



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

MISCELLANOUS CIVIL APPLICATION NO 302 OF 2016

ISAAC WANAINA.....APPLICANT

VERSUS

ALEXANDER MUTUA KISULI (Suing as the

Personal Representative of the Estate of

RUTH KANINI MUTUA (Deceased).....RESPONDENT

RULING

The Application

Judgment was delivered against the Applicant on 5th October 2016 in Kithimani Principal Magistrate's Court Civil Suit No 195 of 2013, whereby the Applicant was found 100% liable for an accident involving the Respondent, who was awarded Kshs 887,600/= in damages together with costs and interest. On 16th November 2016 the Applicant filed a Notice of Motion in this Court seeking the following substantive orders:

1. That the Applicant be granted leave to file his Memorandum of Appeal out of time, and to appeal out of time against the whole judgment/decreed issued in Kithimani Civil Suit No 195 of 2013, delivered by the Resident Magistrate on 5th October 2016.
2. That this Court be pleased to grant a stay of execution of the judgment of the trial Court in Kithimani Civil Suit No 195 of 2013 delivered by the Resident Magistrate on 5th October 2016, pending hearing and determination of the intended appeal.

The application is premised on the grounds in the face of the Notice of Motion, and in the supporting affidavit sworn on 16th November 2016 by Ann Odongo, the Assistant Claims Manager of Directline Assurance Company Limited, the insurers of the subject motor vehicle involved in the said accident. The grounds are that the Applicant is aggrieved by the findings of the trial Court as to liability, and intends to lodge an appeal. However, that by the time he received a copy of the judgment and were then able to issue instructions to the his counsel to institute an appeal, the time to lodge an appeal had lapsed.

Further, that the Applicant has an arguable appeal, as shown in his annexed draft Memorandum of Appeal, and that he is apprehensive that the Respondent might not be in a position to refund the decretal sum if the intended appeal is successful. The Applicant also stated that he is ready, willing and able to

deposit the full decretal sum in Court pending the hearing and determination of the appeal, and to furnish such reasonable security as this Court may deem fit.

The Response

The Respondent opposed the Applicant's application in a replying affidavit he swore on 14th December 2016, wherein he averred that it is not true that the Applicant called for a copy of the judgment as he had not annexed a certified copy of the same, and has not demonstrated any justifiable cause to warrant the exercise of the Court's discretion to extend time. Further, that there was inordinate delay on the part of the Applicant in filing this application which has not been explained.

According to the Respondent, the instant application does not meet the threshold to warrant stay of execution, or the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, as no substantial loss has been demonstrated by the Applicant that will be caused if the decretal sum is paid to the Respondent. Further, that the allegations that the Respondent is a man of straw are not supported by any material evidence, and it is a cardinal principal of evidence law that he who alleges must prove. Lastly, it was averred that if the Court is minded to allow the application, the Respondent be paid half of the decretal sum and the balance be deposited in Court, or a in joint interest earning account of the firms of advocates representing both parties, pending the hearing and determination of the appeal.

The Issues and Determination

The parties sought a ruling on the basis of the pleadings filed, which I have read and carefully considered. The two issues to be determined are whether the Court should exercise its discretion in favour of the Applicant and grant leave to appeal out of time, and if so, whether the judgment delivered in Kithimani Principal Magistrate's Court Civil Suit No 195 of 2013, delivered by the Resident Magistrate on 5th October 2016 should be stayed pending the hearing of the appeal.

The law as regards the filing of appeals in the High Court is found in section 79G of the Civil Procedure Act which provides as follows:

“ Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

The grant of leave to file an appeal out of time is a matter of judicial discretion, which principle was espoused in the case of **Machira & Company Advocates vs Mwangi & Another, (2002) e KLR** and expounded in **Kenya Shell Ltd vs Kobil Petroleum Ltd, (2006) 2 EA 132**. The Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat – vs – IEBC & 7 Others, (2014) eKLR** laid down the principles for extension of time for filing an appeal as follows:

- 1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- 3) Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis;
- 4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

- 5) Whether there will be any prejudice suffered by the respondent if the extension is granted
- 6) Whether the application has been brought without undue delay; and
- 7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

The Applicants' main reason for the delay in filing his appeal is that by the time they received the judgment of the lower court and gave instructions to the filing of an appeal, the time for lodging an appeal had lapsed. I note that judgment was delivered on 5th October 2016, and while the time for lodging an appeal lapsed on 4th November 2016, the instant application was eventually filed on 16th November 2016, which is about ten days later. This Court therefore finds this reason for the delay to be credible, given that the delay in filing the application was not inordinate. I will therefore allow the Applicant's prayer for leave to appeal out of time for the foregoing reason.

On the second issue, stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, which provides as follows:

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

- (a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;
- (b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and
- (c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

In the present application, this Court has found the delay in filling the application not to have been inordinate in the foregoing. On the fulfillment of the second condition, the Applicant needs to show what specific loss or prejudice he will suffer if he pays the decretal sum. The Applicant has in this respect stated that the Respondent will not be able to refund him the decretal sum of over Kshs 887,600/= in the event that his appeal succeeds. This averment in my view is sufficient and specific enough as to the

substantial loss that the Applicant will suffer if the application is not granted.

The Respondent urged in this regard that the Applicant ought to have provided cogent evidence that the Respondent is not a person of means. I am of the view that this is not a burden that can be placed on the Applicant, as he is not seized of such evidence. I am in this regard guided by the position as stated by the Court of Appeal in **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike**, Nrb CA Civil Application No 238 of 2005 where it was held as follows:

“The court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge see for example Section 112 of the Evidence Act Cap 80 Laws of Kenya.”

Lastly, on the third condition, the Appellant did affirm that that he is willing to furnish security by depositing the entire decretal sum in Court.

Accordingly, the orders that commend themselves to me arising from the foregoing, is that the Applicant’s Notice of Motion dated 16th November 2016 is allowed on the following terms:

1. The Applicant be and is hereby granted leave to file and serve his Memorandum of Appeal out of time within 14 days from the date of this ruling.
2. There shall be a stay of execution of the judgment and decree in Kithimani Principal Magistrate’s Court Civil Suit No 195 of 2013, delivered by the Resident Magistrate on 5th October 2016, and all consequential orders arising therefrom, pending the hearing and determination of the Applicant’s appeal, only on condition that the Applicant shall deposit the entire decretal sum in an interest earning account in the joint names of the Applicants’ and Respondent’s Advocates on record within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.
3. The Applicant shall meet the costs of the Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 11th day of January, 2017.

P. NYAMWEYA

JUDGE