



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**MISC. CIVIL APPLICATION NO. 198 OF 2016**

**JOSHUA MUTHIJA BUNDI**

**MARK MURIUKI KIARA**

**MITUUNGUU NISSAN S. & C. CO-OP. SOCIETY LTD.....APPLICANTS**

**VERSUS**

**JULIUS MUGENDI CHEGE (Suing as the legal representative**

**of the estate of the late ROSALINE NJOKI MUGENDI.....RESPONDENT**

**R U L I N G**

1. This is a ruling on an application dated 31/10/2016 seeking for two prayers. Firstly it seeks for leave to appeal out of time against the judgment and decree in CMCC No.30 of 2016 delivered on 19/09/2016. The second prayer seeks for stay of execution pending hearing and determination of the intended appeal.
2. It is supported by two affidavits of one Njoki Kinyua the legal officer of the applicant's insurer and that of the second defendant Mark Muriuki Kiara.
3. It is deponed that the learned magistrate awarded damages, interests and costs amounting to Kshs. 2,045,816.25 to the respondent which was communicated to the insurer on 22/09/2016. Due to an oversight, the insurer did not act on the file on time an order to instruct the advocate to file an appeal.
4. The insurer was aggrieved by the judgment but had a problem of mix-up of letters in the office and that the communication was only read on the 27/10/2016.
5. The advocate was instructed on the same day to file an appeal. The insurer pleads inadvertence in the delay which it argues should not be visited upon the defendants. The applicants are also apprehensive that the decree-holder may move to attach the assets of the insurer, in the event that the orders for stay are not granted.
6. The application is opposed by the respondent in the replying affidavit of one Julius Mugendi. He states that the delay of about two months is inexcusable and has not been explained. It is further contended that the stay will deny the deceased's family of enjoyment of the fruits of the judgment.
7. It is further argued that since the applicants had consented to settling 75% of the judgment in the consent for liability, it is appropriate that they be ordered to pay the equivalent amount of Kshs.1,534,362/=.

8. The parties agreed to have the court prepare its ruling on their pleadings. However, the respondent went ahead and filed written submissions. There is no evidence of services of the submissions on the applicants. The court will therefore disregard the submissions and go by the consent of the parties of using their respective affidavits in determining the application.

9. The judgment in CMCC No. 39 of 2016 was delivered on 19/09/2016 and the insurer was notified on time. The applicants had 30 days to file an appeal but did not do so until 31<sup>st</sup> October 2016. The reason given was that the insurer mixed up its correspondences thus losing sight of the letter notifying them of the judgment.

10. The delay of 42 days is not a short period considering that the law allows 30 days for filing an appeal. The question is whether this delay may be regarded as reasonable in the circumstances. This will depend on whether the applicants have shown sufficient cause for the delay.

11. I am of the opinion that the alleged mix-up of correspondence is a likely occurrence in offices that may not be properly organized. The applicants maybe excused for this but not without a prize. This application is based on the fact that the applicants were aggrieved of the judgment on grounds that the quantum was excessive.

12. This court has a duty to ensure that neither party suffers considering the overriding objective in Section 1A and 1B of the Civil Procedure Act. It was held by the Court of Appeal in the case of **MS. PORT REITZ MATERNITY VS JAMES KARANJA KABA, CA 63/97** that:-

*The right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for the depriving of the plaintiff of that right.*

13. As well as the applicants praying for orders of stay of execution, they argue that the respondents are of unknown means and that if the decretal amount is paid to them through attachment or otherwise, the applicants may not be able to recover its money in the event that the appeal is successful. The applicants did not annex any evidence that the respondents are men of straw. For this reason the court will not rely on an assumption.

14. The applicant has not given any offer for security of judgment which is a requirement in an application of this nature. The laid down principles in granting stay mostly depend on the court balancing between the interests and rights of both parties. The conditions set out in Order 42 rule 6(2) must not fully be established considering the provision of Sections 1A and 1B of the Civil Procedure Act. It is noted that the parties recorded consent on liability at 75% in favour of the plaintiff/respondent.

15. It is argued that the award is excessive though the approximated excessive amount has not been disclosed. I am of the considered opinion that the excess complained of may not go beyond half of the decretal amount.

16. The applicant has not shown that he is likely to suffer any prejudice in the orders being granted save for delay in payment of the decretal amount pending the filing and determination of the appeal.

17. I have carefully considered the arguments of both parties in this application. Liability was never contested and a consent was entered admitting 75% liability. The respondent was successful in the suit and is entitled to security of his judgment. For these reasons, I allow the application in the following terms:-

*(a) That leave to appeal out of time is hereby granted.*

*(b) That the memorandum of appeal be filed within 7 days.*

*(c) That stay execution pending filing and determination of the appeal is allowed on the condition*

*that the applicants deposit half the decretal amount within 21 days in an interest earning account in the names of the advocates for the parties and in default, the orders to be vacated forthwith.*

*(d) That the applicants to meet the costs of this application.*

**DATED, DELIVERED AND SIGNED THIS 24TH DAY OF JANUARY, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Muriuki for Mugendi for respondent**