REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 418 OF 2016

ANDESON NJARAMBA MUGI..1ST APPLICANT

JOYCE WAMBUI NYOIKE...2ND APPLICANT

(Suing as administrators of the estate of John Itotia Njaramba)

VERSUS

JOHN MAGU WANYOIKE ....1ST RESPONDENT

ANGWENYI DAMARIS..2ND RESPONDENT

RULING

1. The application dated 17th August, 2016 principally seeks orders **that this Honourable Court be pleased to extend time and grant the Applicants leave to lodge Memorandum of Appeal out of time against the judgment and decree entered against the Applicants by the Honourable R. Ngetich (Mrs) Chief Magistrate on the 8th July, 2016.**

2. Secondly, **that a stay of execution on the Judgment/decree in CMCC No. 5847 of 2013 – Milimani Commercial courts entered against the Defendant/Applicant by the Honourable Trial Court on 8th July, 2016 pending the hearing and determination of the intended appeal.**

3. The application is premised on the grounds stated in the body of the application and is supported by the affidavit of the Applicants' insurers claims manager. The delay in filing the appeal is attributed to inadvertence on the part of the counsel in obtaining sufficient instructions from the client. It is further stated that if there is no stay of execution, the Applicants stand the risk of not being able to recover the decretal sum if the appeal is successful, thereby rendering the appeal nugatory. It is further stated that the Applicants have a strong and arguable appeal with high chances of success on both the issue of liability and quantum. The Applicants are ready to comply with such reasonable conditions as the court may set.

4. In opposition to the application, the Respondent filed a replying affidavit. It is stated that the application herein is merely meant to delay the Respondent from enjoying the fruits of the judgment. It is further averred that the Applicants rushed to court to forestall execution. That the Applicants are not deserving of the orders sought as the appeal is a sham with no triable issues.

5. The application was argued by way of written submissions which I have considered.

6. Section 79G of the Civil Procedure Act provides that:

> **"Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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."**
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> (See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

7. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

> **"No order for stay of execution shall be made under sub-rule (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."**

8. Order 22 Rule 22 (1) of the Civil Procedure Rules provides as follows:

> **"22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.**

9. Sufficient cause is established if the conditions set out in Order 42 rule 6(2) are met. (See for example the following persuasive authorities: **Tabro Transporters Ltd v Absalum Dova [2012] eKLR, Wachira Karani v Bildad Wachira [2016] eKLR**).

10. Turing to the case at hand, the judgment of the lower court was delivered on 8th July, 2016. The appeal herein therefore ought to have been filed on or before 7th August, 2016 but was filed on 18th August, 2016. This it a delay of about eleven (11) days. The delay is not inordinate. It's been explained that the delay was due to the inadvertence of the counsel in obtaining sufficient instructions from the client.

11. Faced with a similar scenario, the Court Appeal in the case of **Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR** 103 at 1040 where Apalo, J.A. (as he then was), posited as follows:

> **"Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."**

12. On the question of substantial loss, the Applicants have expressed their fear that they may not recover the decretal sum in the event that the appeal is successful. This is substantial loss. As stated by the Court

of Appeal in the case of **Kenya Shell Limited vs. Kibiru (1986) KLR:**

> **"Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented."**

13. The Respondent has not said anything about his ability to refund the decretal sum. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another**:

> **"This 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, Chapter 80 Laws of Kenya."**

14. On the question of security for costs for the due performance of the decree, it is noted that the Applicants have positively averred that they are ready, able and willing to comply with any reasonable conditions that the court may give.

15. On whether the appeal raises any triable issues, under Order 42 Rule 6(2) of the Civil Procedure Rules, the applicants are seeking orders of stay pending appeal from the subordinate court to the High Court. The applicants are not required to prove that they have an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98 – Maritha Njeri Wanyoike & 3 others vs Peter Machewa Mwangi & 5 others; Bake 'N' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR**).

16.To balance the interests of both parties herein, I allow the application on condition that the Applicant deposits the decretal sum in a joint interest earning account of the counsels for both parties herein or in court within 30 days from the date hereof. Costs of this application to the Respondent.

Date, signed and delivered at Nairobi this 16th day of Feb., 2017

B. THURANIRA JADEN

JUDGE