



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MAKUENI
HIGH COURT MISC APPEAL NO. 1 OF 2017
MUGECHA ELIUD A.K.A ELIED NJENGA MUGES.....APPELLANT
- VERSUS -
NDAVI NZIU A.K.A JEREMIAH NDAVI NZIU.....RESPONDENT

R U L I N G

1. By a motion dated 6/3/2017, the Applicant seeks the following reliefs:-

1. **THAT** this application be certified urgent and be heard ex-parte and service of the application be dispensed with the first instance.
2. **THAT** there be interim stay of execution of the decree in **KILUNGU C.M.C.C. NO. 9 of 2016** pending the hearing and determination of this application in the first instance.
3. **THAT** the Honourable Court be pleased to grant the Applicant leave to file appeal against the Lower Court judgment out of time.
4. **THAT** the attached Memorandum of Appeal be deemed as duly filed upon payment of court fees.
5. **THAT** there be stay of execution of the decree herein pending the hearing and determination of the intended appeal against the judgment and order of the Honourable Magistrate.
6. **THAT** costs of this application be provided for.

2. The same is anchored on the Provisions of Order 42 R 6, Order 22R 22, Order 50 R 5 Civil Procedure Rule Section 1A, 3A Civil Procedure Act and all enabling provisions of the law.

3. The motion is based on the grounds that there is good and sufficient cause for not filing the appeal in time. The stay in lower court has expired and execution may be levied anytime. Thus Applicant will suffer substantial loss, injustice and be highly prejudiced and above all the intended appeal will be rendered nugatory.

4. The delay in filing appeal is not inordinate and thus excusable.

5. The applicant is ready to make an undertaking on security and abide by conditions which court may set pending hearing and determination of the appeal.

6. The Respondent if paid the decretal amount may not be able to refund the same thus render appeal nugatory. Application is supported by the affidavit of **Linda Mukami** sworn on **06/03/2017**. The same reiterates the contents of the grounds set out in the motion.
7. The application is opposed and the Respondent has filed a replying affidavit sworn by **Ndavi Nziu** on **09/03/2017**.
8. The Respondent avers that the application is bad in law and incompetent. That it is an abuse of the court process, an afterthought and brought inordinate delay. It is also stated to be an attempt to deny Respondent from enjoying the fruits of a successful litigation.
9. It is averred that the applicant was aware of the judgment date vide notice dated **12/02/2016** and served upon Applicant advocate on **19/01/2017**. After delivery of judgment on **31/01/2017** the Applicant went into slumber up to **03/03/2017**.
10. It is averred that there should be no stay of execution as the decretal amount can be repaid.
11. Further there is no appeal filed and also the conditions of grant of stay are not met.
12. The Application and the intended appeal are intended to delay the realization of Respondent's fruit of his judgment.
13. The award is reasonable taking to account that the Respondent sustained comminuted fracture.
14. The parties were to file and exchange submissions. At the time of fixing the ruling date no party had filed the submissions.
15. After Respondent advocate left court the Applicant advocate appeared and agreed with date taken and he left a copy of the submissions and promised to supply a copy of respondent's submissions as he had a copy.
16. The court finds that only Applicant submissions are on record.
17. The court will thus rely substantially on the facts deponed to be fair to all parties.
18. On extension of time to file appeal out of time, the court relies on the case of **MWANGI -VS- IBRAHIM MSA MISC CIVIL APP. NO. 40/2013** where the court held that, the threshold of granting leave to appeal out of time is met by considering;
 - **The length of the delay; it should not be inordinate.**
 - **The reason for delay should be excusable.**
 - **The intended appeal should show some elements of high chances of success if application is granted.**
19. On the length of delay, the judgment was delivered on **31/01/2017**.
20. The instant application was filed on **08/03/2017**. The 30 days from **31/01/2017** lapsed on **2nd March 2017**, or thereabout thus a delay of 6 days or thereabout.
21. The court views the same delay not to fall within the description of being inordinate and but reasonable delay. The Applicant states that they were not aware of the date of the judgment.
22. However there is a notice in the Applicant's advocate on **19/01/2017** stating that the judgment was to be delivered on **31/01/2017**. Thus the adduced reason for delay may appear inexcusable.

23. On the issue of the grounds whether the intended appeal has high chances of success, the court has no benefit of seeing the proceedings, pleadings and the judgment to measure the possibility of the intended appeal success.

24. However a draft memo attached to the affidavit in support of the application raises 7 grounds. The grave man being the quantum of the damages which is alleged to be exorbitant.

25. On account of the delay not being inordinate, I am persuaded to grant a conditional extension of time to file appeal which will go hand in hand with the result of the conditions of stay of execution.

26. Order 42 (2) Civil Procedure Rules stipulates that:-

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.

27. On issue of speed in filing the application, the court notes that the lower court had given stay which lapsed on **30/02/2017**. This application was lodged on **08/03/2017**. The same by any standard was filed without delay.

28. On the issue of applicant suffering substantial loss if order sought is not granted, the amount demanded by the Respondent is **Kshs.1,554,855/=**. The Applicant avers that if the intended appeal succeeds and the amount is not recovered from the Respondent, the Appellant will suffer substantial loss.

29. The Respondent just avers that the amount can be repaid. He does not aver that he would be able to refund same if appeal succeeds yet he has not demonstrated his ability to refund same.

30. The court is of the view that the Applicant would suffer a substantial loss of the amount claimed if it succeeds in appeal and fails to recover the same.

31. However we must also take to account that the Respondent is the victor and thus he should not be deprived the fruits of his judgment. The court has to therefore strike a balance for the interest of justice.

32. The Applicant challenges the award not the liability. Thus the mission by the Applicant will be to have award reduced.

33. The Applicant has offered to tender security for performance of the award. The court therefore is inclined to grant a conditional stay.

34. The court therefore makes the following orders –

1) The intended appeal shall be filed within 14 days on condition that Kshs.10,000/- is paid to the Respondent as costs for the application within same 14 days.

2) There will be stay of execution on condition that the applicant pays the Respondent Kshs.700,000/- within 14 days. The balance to await result of the appeal.

3) If any of the above conditions in 1 and 2 above are not fulfilled, the application will stand dismissed and execution to proceed forthwith.

SIGNED, DATED AND DELIVERED THIS 3RD DAY OF MAY, 2017.

C. KARIUKI

JUDGE

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