



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU
MISC CIVIL APPLICATION NO. 57 of 2016
GILBERT MUTINDA DIPPLOY PLAZTIC ALIAS
DPL FESTIVE LTD.....APPLICANTS
VERSUS
THOMAS KABUTU MUCHORI.....RESPONDENT

RULING

1. The Applicants seek orders for enlargement of time to file Memorandum of Appeal out of time and for stay of execution pending the hearing and determination of the Intended Appeal. The intended appeal is from a judgment delivered in Limuru PMCC No. 26 of 2012 on 25/04/2016. The Application is supported by a Supporting Affidavit by Nzuki Maithya, the Commercial Manager of the Company that insured the motor vehicle which was involved the accident that was the subject matter of the litigation in the lower court.

2. The Respondent has filed a Replying Affidavit. Both in this Replying Affidavit and in the Written Submissions filed on his behalf, it would appear that the Respondent is not opposed to an order for extension of time. His main concern is the request for stay of execution.

3. The facts appear largely undisputed. A notice had been served that the judgment in the lower court would be given on 29/04/2016. For some reason, the judgment was delivered, unbeknownst to the Applicants or their lawyer, on 25/04/2016. Despite the Applicants' lawyers' best efforts, he was only able to learn about the judgment on or around 10/11/2016. The Advocates immediately wrote to their counterparts as they sought instructions from the Insurance Company. All these facts are not denied by the Respondent so they are not in dispute.

4. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section 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.

5. Our case law has now provided guidelines on what will be considered "good cause" for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The

most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour

6. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR*. They include the following:

- i. The period of delay;
- ii. The reason for the delay;
- iii. The arguability of the appeal;
- iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- v. The importance of compliance with time limits to the particular litigation or issue; and
- vi. The effect if any on the administration of justice or public interest if any is involved.

7. Looking at all these factors and considering that the request for extension of time is not opposed, I find that the Applicants have easily met the threshold for grant of an order for extension of time.

8. I must next determine if the Applicants are entitled to a Stay of execution. This prayer is opposed by the Respondent.

9. The reasoning by the Respondent is as follows. The parties consented to judgment on liability. So the only issue on appeal would be damages. Regarding damages, the Respondent argues that it is illogical for the Applicant to ask for a stay of execution over the whole decretal sum for the following reasons:

- a. Of the total decretal sum, the amount of Kshs. 380,000 is for future medical expenses. The magistrate awarded this amount after the Respondent had suggested a figure of Kshs. 500,000 while the Applicants suggested a figure of Kshs. 350,000. In other words, at the minimum, the only amount at issue is Kshs. 30,000.
- b. The parties had also stipulated to the proofs on special damage amounting to Kshs. 212,661/=. The receipts were produced by consent – and so this cannot be a valid point on appeal.
- c. On general damages, the Applicants had suggested that the Respondent be awarded Kshs. 200,000/= in the Court below. The Learned Magistrate awarded Kshs. 700,000/=. So, at the maximum, what is at issue on appeal is a maximum of Kshs. 500,000/=

10. I find the logic by the Respondent compelling. Even accepting that the Applicants have met the threshold for a grant of stay of execution, there are damages in the sum of Kshs. 762,661/= that is not at all an issue on the appeal. In other words, even if the Applicants succeeded on all aspects of their appeal, the minimum amount they will need to pay is Kshs. 762,661/=. There is absolutely no reason whatsoever to grant a stay of execution over this sum.

11. Even though the Respondent's lawyer urged me to also order the Applicants to pay half of the disputed award of general damages at this point, I will stop at ordering the Applicants to pay the sum of Kshs. 762,661/= within thirty days of today and in default, execution to issue.

12. I will also order the Applicants to deposit the remaining decretal sum in Court within thirty days.

13. Consequently, I make the following orders

- i. The Applicants to pay a sum of Kshs. 762,661/= to the Respondent within thirty days. In default, execution to issue.**
- ii. The entire remaining decretal amount to be deposited in Court within thirty days. In default, execution to issue.**
- iii. The Applicants to file their Appeal within fourteen (14) days of today. In default, the grant of extension of time to automatically expire**
- iv. The Applicants to file and serve the Record of Appeal within sixty days of filing their Memorandum of Appeal.**
- v. The substantive appeal to be mentioned on 11/09/2017 for directions on hearing.**

14. Orders accordingly.

Dated and delivered at Kiambu this 15th day of June, 2017.

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JOEL NGUGI

JUDGE