



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS CIVIL APPLICATION NO 8 OF 2017**

**KHOKHAR TASNEEM.....1<sup>ST</sup> APPLICANT**

**SOLOMON KAMAU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**MICHAEL KINYUA MWANIKI.....RESPONDENT**

**RULING**

**The Application**

Judgment was delivered against the Applicant on 7<sup>th</sup> February 2017 in Machakos Chief Magistrate's Court Civil Suit No 615 of 2015 for the decretal sum of 3,748,430/= in damages together with costs and interest. On 21<sup>st</sup> March 2017 the Applicants filed a Notice of Motion dated 20<sup>th</sup> March 2017 in this Court seeking orders that they be granted leave to file an appeal against the lower Court's judgment out of time, and an attached Memorandum of Appeal be deemed to be duly filed upon payment of the Court fees. The Applicants also sought an order for a stay of execution of the decree, 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 20<sup>th</sup> March 2017 by Linda Mukami, the Legal Officer of APA Insurance Company Limited, the insurers of the 2<sup>nd</sup> Applicant. The Applicants' Advocates, Wangari Muchemi & Company Advocates, also filed submissions on the application dated 22<sup>nd</sup> April 2017.

The grounds for the application are that the delay in filing the appeal was caused by a misunderstanding of the judgment date as 7<sup>th</sup> March 2017 instead of 7<sup>th</sup> February 2017, and that by the time their Advocates learnt of the entry of the judgment, the time to lodge an appeal had lapsed. Further, that the Applicants have an arguable appeal and are apprehensive that the Respondent might execute the decree against them and may not be in a position to refund the decretal sum if the intended appeal is successful.

The Applicants also stated that they are ready, willing and able to offer security for the decretal sum in Court by issuing a reputable bank guarantee, or performance bond from a reputable insurance company pending the hearing and determination of the appeal. Various judicial authorities were cited and relied upon by the Applicants in this regard in their submissions.

**The Response**

The Respondent opposed the Applicants' application in a replying affidavit he sworn on 31<sup>st</sup> March 2017

by Stephen Wilfred Orenge, his Advocate. The said deponent averred that there has been inordinate delay in filing the application, and no compelling reasons have been given why leave to file the appeal out of time should be granted. Further, that the Applicants were aware that judgment was to be delivered and did not take any appropriate action

The allegations that the Respondent is not a man of means were countered and the deponent annexed statements to show that the Respondent is in a position to refund the decretal sum. 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 of Kshs 1,874,215/= be deposited in joint fixed account pending the hearing and determination of the appeal. These averments were reiterated in submissions dated 2<sup>nd</sup> May 2017 filed by S.W Orenge & Company Advocates, the Respondent's Advocates on record.

### **The Issues and Determination**

The parties sought a ruling on the basis of the pleadings and submissions 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 Applicants and grant leave to appeal out of time, and if so, whether the decree in Machakos Chief Magistrate's Court Civil Suit No 615 of 2015, 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 their 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 7<sup>th</sup> February 2017, and while the time for lodging an appeal lapsed on 6<sup>th</sup> March 2017, the instant application was eventually filed on 21<sup>st</sup> March 2017, which is about fifteen 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 Applicants needs to show what specific loss or prejudice they will suffer if he pays the decretal sum. The Applicants have in this respect stated that the Respondent will not be able to refund the decretal sum of over Kshs 3,748,430/= 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 he has means to refund the decretal sum and attached statements as evidence. I have perused the said statements and note that even though they are evidence that the Respondent is a person of means, they are for December 2013 to June 2014, and the current financial status of the Respondent is therefore uncertain. Lastly, on the third condition, the Appellant did affirm that that he is willing to furnish security for the decretal sum on such terms as the Court may order.

Accordingly, the orders that commend themselves to me arising from the foregoing, is that the Applicant's Notice of Motion dated 20<sup>th</sup> March 2017 is allowed on the following terms:

1. The Applicants be and are hereby granted leave to file and serve their 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 Machakos Chief Magistrate's Court Civil Suit No 615 of 2015, delivered on 7<sup>th</sup> February 2017 pending the hearing and determination of the Applicants' appeal, only on condition that the Applicants shall pay to the Respondent Kshs 1,000,000/=, and deposit the balance of the decretal sum of Kshs 2,748,430/= 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 Applicants shall meet the costs of the Notice of Motion.

Orders accordingly.

**Dated, signed and delivered in open court at Machakos this 12<sup>th</sup> day of June, 2017.**

**P. NYAMWEYA**

**JUDGE**