



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MISC.CIVIL APPLICATION NUMBER 520 OF 2016**

**DHL SUPPLY CHAIN EXPRESS LIMITED.....1<sup>ST</sup> APPLICANT**

**FRANCIS MWILU**  
**MWINZILI.....2<sup>ND</sup> APPLICANT**

**GEORGE K. MWAURA.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**SIMON KIMANI NDUNG’U.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 4<sup>th</sup> day of October 2016, the Applicants moved the Honourable Court for orders that;

- a) The application herein be certified urgent and heard ex parte in the first instance.
- b) There be a stay of execution of the judgment entered on the 5<sup>th</sup> day of August 2016 and decree issued on the 16<sup>th</sup> September 2016 in **Milimani Civil Suit No.5694 of 2013**, pending the hearing and determination of this application inter parties.
- c) There be a stay of execution of the judgment entered on the 5<sup>th</sup> day of August 2016 and decree issued on the 16<sup>th</sup> September in Milimani Civil Suit No.5694 of 2013, pending the hearing and determination of Applicants intended Appeal.
- d) The court be pleased to grant the orders sought subject to any conditions as the court may deem fit.
- e) That the auctioneer’s costs be borne by the Respondent.
- f) That the costs of this application be provided for.

2. On 17<sup>th</sup> October 2016 at the hearing of the application, counsel for the applicants sought leave to amend the application to include a prayer No. 7 that:

***“the 1<sup>st</sup> and 2<sup>nd</sup> applicants be granted leave to file appeal out of time”***. The counsel for the

respondent did not oppose the said application.

3. The application is premised on the grounds set out on the body of the same and the annexed affidavit of Paul Kibet dated 4<sup>th</sup> October 2016.

4. The Applicants aver that judgement was delivered on 5<sup>th</sup> August 2016 in milimani Civil Suit No. 5694 of 2013 in the respondent's favour wherein the respondent was awarded Ksh. 1,872,555/= together with the costs of the suit and interest and being dissatisfied with the same, they intend to appeal out of time. They aver that the application was brought without undue delay, that they did not file an appeal as they were not aware of the judgement delivered on the 5<sup>th</sup> August 2016. The applicants contend that on the date the matter came up for submissions on 15<sup>th</sup> July 2016, Hon. Ngetich had issued an order that they be served with a notice of the judgement date of 5<sup>th</sup> August 2016. It is their contention that the respondent failed to serve them with the notice and had failed to communicate in any way that judgement had been delivered.

5. The applicants claim that they got to know of the judgement and decree obtained on the 30<sup>th</sup> September 2016 when they were served with a proclamation notice and warrants of attachment. Further, they stated that the respondents, in their replying affidavit, did not deny that there was an order for them to serve the applicants with a notice for the date of the judgement.

6. They contend that they are not aware of the defendant's means and if stay is not granted, the respondent may not be able to pay back the same. It is further averred that the appeal is arguable and has a high likelihood of success and no prejudice will be occasioned to the respondent if the orders sought are granted.

7. The applicants states that they are ready and willing to comply with any conditions set by the court and offer sufficient security to satisfy the judgement, should their appeal be unsuccessful.

8. The respondent has opposed the application by way of a replying affidavit sworn by Simon Kimani Ndung'u and dated 17<sup>th</sup> October 2016. He avers that this court has no jurisdiction to hear the matter and the same should be struck out. Further, he argues that the application is frivolous and lacks merit. The respondent also opposes the application on the grounds that the applicants have not shown what loss they would suffer or incur if the application is not granted.

9. On the issue of whether the application was brought without undue delay, the respondent relies on paragraph 3 of the replying affidavit dated 17<sup>th</sup> October 2016 setting out the track record of the applicants and the many times they failed to attend court before the lower court.

10. The respondent argues that in the memorandum of appeal, it is intimated that the applicants intend to file an appeal against the whole judgement while it is on record that the applicant did not challenge liability at 100% against the respondent. That in the applicants' submissions before the magistrate's court, they admitted that judgement ought to be entered on 100% basis against them. That on quantum of damages, they submitted that an award of Ksh. 250,000 is adequate and therefore the application lacks merits and it should be dismissed.

11. This court has duly considered the application, and the submissions made by parties' advocates when the application came up for hearing on the 15<sup>th</sup> March, 2017. The applicant has sought two main orders in the application. One is for stay of execution pending the outcome of the intended appeal and the other is for leave to file the appeal out of time.

12. The court will first deal with that of stay of execution. This is provided for under **Order 42 Rule 6** of the **Civil Procedure Rules**. Under that order an applicant has to satisfy the court that: -

***1) It will suffer substantial loss if the stay is not granted and that such an application has been brought without undue delay.***

**2) 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.**

13. The financial position of the Applicant and that of the Respondent becomes an issue when considering substantial loss and where execution is sought to be stayed. The court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. See **Kenya Shell Ltd Vs Kibiru & Another (1986) KLR 410**.

14. The applicants have expressed doubts over the respondent's ability to refund the decretal sum in the event the appeal succeeds. Ideally, the burden is upon the Applicant to prove that the Respondent will not be able to refund any sums paid, should the Appeal succeed. However, as the Applicants have intimated, it may not be possible for them to know the Respondent's financial means. The law in this case is that the Applicant is expected to swear upon reasonable grounds that the Respondent will not be in a position to refund the money. In that case the legal burden remains with the Applicant while the evidential burden shifts to the Respondent to show that he is in a position to refund the money. The respondent in this case has not tendered any evidence as a rebuttal to the assertion that they may not have the means to refund the decretal sum. See ***ILRAD V KINYUA, (1990) KLR 403 at Page 406*** where it was held as follows:

***“We have considered what Mr. Sehimi has said. However, we must “observe that the onus was upon the respondent to rebut by evidence that the claim that the intended appeal if successful would be rendered nugatory on account of his(respondent’s) alleged impecunity”.***

15. The Applicants' explanation for the delay is that the respondent failed to notify them of the judgement date contrary to the court order to do so. It is noted that the Respondent has not denied that he was ordered to notify the Applicant of the date for judgement.

16. The court finds this explanation to be sufficient as the Applicants filed this application on October 4<sup>th</sup> 2016, 4 days after becoming aware of the judgment delivered on 5<sup>th</sup> august 2016. The delay has therefore been explained.

17. On security, the Applicants herein have indicated their willingness to deposit security. In view of the foregoing, the applicants have satisfied the requirements of **Order 42 Rule 6** in that regard.

18. The other issue is whether leave to file appeal out of time should be granted. On this issue the court is guided by the principles laid down in ***THUITA MWANGI V KENYA AIRWAYS LTD, (2003) eKLR*** thus:

***“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of the delay; secondly, the reason for the delay; and thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”***

19. An applicant ought to give sufficient explanation for the delay, and the court ought to consider if, whether even with such delay justice can still be done. The Applicants explained that the delay was occasioned by the respondent's failure to obey courts directions to give them notice of the judgement date. The court finds that the delay is excusable since the respondent can be compensated by way of costs and justice can still be done. The prayer for extension of time is therefore allowed.

20. In the result, the following orders are made: -

**a) Leave is hereby granted to the Applicants to file an appeal out of time. The Appeal to be filed within 14 days from the date of this ruling**

***b) A stay of execution of the decree in Milimani Civil Suit No.5694 of 2013 is hereby granted pending the hearing and determination of the intended appeal on condition that the whole decretal sum is deposited in court within 30 days from the date of the ruling, failing which, the stay order shall automatically lapse.***

**c) The Auctioneers costs to be borne by the Applicants.**

**d) Each party shall bear its own costs of the application.**

**Dated, signed and delivered at Nairobi this 14th day of July, 2017.**

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**L NJUGUNA**

**JUDGE**

***In the presence of***

.....***for the 1<sup>st</sup> Applicant***

.....***for the 2<sup>nd</sup> Applicant***

.....***for the 3<sup>rd</sup> Applicant***

..... ***for the Respondent***