



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NUMBER 595 OF 2015

EVANSON CHEGE. 1ST APPLICANT

MACHUA MICHAEL. 2ND APPLICANT

VERSUS

ELISHA OYANGO OKEYO – (*Suing as Administrator of the Estate*)

and on behalf of the Dependants of

MALCOM GRIFFINTHS OKEYO. RESPONDENTS

R U L I N G

By a Notice of Motion dated 17th December, 2015, the Appellants Evanson Chege and Machua Michael seeks from this court the following orders: -

1. Spent
2. That the Respondent and/or his Agent one Jovan H. Kariuki trading as Moran Auctioneers be restrained from proclaiming, attaching, and selling the Applicant’s property or goods pending the hearing and determination of this application inter partes.
3. That stay of execution of the Judgment and decree in Chief Magistrate’s Milimani Commercial Courts Suit No. 4080 of 2013 and all consequential orders therefrom be granted pending the hearing and determination of this application.
4. That the time to lodge an appeal be enlarged and the Applicant be granted leave to file the Appeal out of time.
5. That a stay of execution of judgment and decree in Milimani CMCC No. 4080 of 2013 and all consequential orders therefrom pending hearing and final determination of the intended Appeal.

The application is brought under Order 50 Rule 6, Order 42 Rule 6 Order 51 Rules 1 and 3, Order 22 Rule 22 of the Civil Procedure Rules and Sections 1A, 3A, 63(e), 79G and 95 of the Civil Procedure Act and all the enabling provisions of the law.

It is premised on the grounds set out on the body of the same and on the annexed affidavits of Eric K’

Okul, Sophie Cheronno and James Karanja all sworn on 17th December, 2015.

In his supporting affidavit, Erick Okul deposes that he is a legal officer of Africa Merchant Assurance Company Limited who are the insurers of motor vehicle registration Number KXM 578 at whose instance the claim is being defended. As insurers they are entitled to defend the suits that adversely affect the interests of their insured as per the contract of insurance executed between themselves and the Appellants herein.

In his said capacity and on the 17th December, 2015, he received a call from the advocate for the Appellants Mrs. Cheronno of Cheronno & Co. Advocates informing him about the judgment and the fact that warrants of attachment have already been issued in Milimani CMCC No. 4080 of 2013 and it was the first time that he was getting to know about the judgment.

He deposed that the said judgment was for a total sum of Kshs.1,172,075/- and being aware that the Respondent is a minor the award was excessive and especially the award of Ksh.450,000/- for loss of expectation of life and a sum of Ksh.80,000 for pain and suffering considering that the death occurred on the third day. That the Respondent did not provide proof for the entire claim of special damages so as to warrant the award of Ksh.142,075/- under that head.

He further deposes that he instructed their advocate to appeal against the said judgment and in his honest belief, the intended appeal has high chances of success. That, as insurers of the Applicants herein they are ready to deposit Ksh.550,000/- in an interest earning account in the joint names of the respective advocates. He is apprehensive that the Respondent may not be in a position to refund the decretal sum if the Appeal succeeds and this will render the appeal nugatory. During the proceedings the occupation of the Respondent was never disclosed and hence his apprehension.

In her affidavit, Sophie Cheronno, the Advocate on record of the Appellants deposes that Milimani CMCC No. 4080 of 2013 came up for submissions on the 4th September, 2015 when the learned magistrate gave a judgment date of 29th September, 2015. On the said date, it was not delivered and was deferred further to 5th November, 2015.

That on 5th November, 2015, she sent her court clerk one James Karanja to court to get a counsel to hold her brief for purposes of taking the judgment and the said clerk reported that judgment was not ready and had been deferred to the 13th November, 2015. The same clerk went back on 13th November, 2015 and he informed her that he did not find the matter among the ones listed for judgments on that day. From that time, the court file went missing and it was not until the 14th December, 2015 when she received a letter from the Respondent's advocate informing her about the judgment. An advocate from her office perused the court file and confirmed that indeed judgment was delivered on 5th November, 2015 and not deferred as alleged by the court clerk.

Not having been aware of the judgment, she was not able to file the appeal on time and hence the application herein. That failure to apply for a stay of execution or file the appeal in time was due to the misleading information that she received from her court clerk but having interviewed him, she formed the opinion that the mistake was genuine.

She further deposes that the appeal has high chances of success as the award was excessive and unjustified.

The affidavit of James Karanja who works as a legal clerk in the firm of Cheronno & Co. Advocates is in tandem with that of Sophie Cheronno regarding the dates when the CMCC No. 4080 of 2013 came up for judgment and what transpired on each occasion. He avers that he mistook case number 4080 of 2013 for case No. 4080 of a different year which mistake was genuine.

The Respondent opposed the application by the Appellant vide a replying affidavit sworn on the 5th

January, 2016 by his advocate Charles Oyoo Kanyangi, in addition to the grounds of opposition dated 5th January, 2016 and filed on 6th January, 2016. In his grounds of opposition he contends that: -

- a) The application is misconceived and unsustainable.
- b) That the Applicant has misrepresented the real facts to the court.
- c) That the application is frivolous and an abuse of Court Process.
- d) That the application is a clever ploy on the part of the Application to further delay the execution process.

In the replying affidavit counsel for the Respondent contends that after conclusion of the hearing before the trial court the same was listed for judgment on 29th September, 2015 and on that date though both parties were represented, the same was not ready and it was deferred to 5th October, 2015. He confirms that when the judgment was finally delivered on the 5th November, 2015 the counsel for the Appellants was not present in court though the date and the time were given by the court in the presence of a M/s Karren Meli Advocate who represented her.

He depones that after delivery of the judgment, he called M/s Karren Meli Advocate on the 6th November, 2015 and informed her of the judgment and sought to know if her clients were prepared to settle the award or they would prefer that he proceeds with execution. She promised to respond after perusing the court file but she never did.

That on 14th December, 2015, Mrs. Cheron called him asking him about the judgment and when it was delivered and he gave her all that information. She promised to give him a feedback after perusing the court file only to be served with the current application thereafter. He averred that on the day the judgment was delivered there was a list on the door of the court indicating some judgments which were not ready among them CMCC No 4080 of 2014 while CMCC No. 4080/2013 was indicated to be coming up for judgment on the same day at 2.30 p.m.. According to him, it is not therefore, true that judgment was delivered on 5th November instead of 13th November, 2015 as alleged by the Appellants.

In his view, the court gave a balanced judgment and the intended appeal has no merits and does not stand any chance of success. That the warrants of attachment and sale have been taken out against the Appellants and the Respondent is entitled to realize the fruits of his judgment. That the Appellants have not stated any serious grounds to convince the court to grant a stay of execution pending the hearing and determination of an intended appeal that has not even been filed. He urges the court to dismiss the application.

The submissions by both parties reiterates the depositions in the rival affidavits with the Applicants relying on the following past decisions **Richard Ngetich & Another Vs Francis Vozena Kidiga (2012) eKLR, Kenindia Assurance Co. Ltd Vs Patrick Muturi (C.A. No. 1107/1983) M. M. Butt Vs Rent Restriction Tribunal (1982) eKLR and Kemfro Africa Ltd Vs Lubia & another, C.A No. 21 of 1984** which I have had a chance to read and consider.

The counsel for the Appellants has relied on Section 79G of the Civil Procedure Act; that this court may extend time for filing an Appeal if sufficient reasons have been given for the delay. She quoted the case of **Richard Ngetich & another Vs Francis Vozena** (HCCA 75 of 2012) to drive her point home.

She further submitted that the Applicants have an arguable appeal with high chances of success and referred the court to the draft memorandum of appeal and argued that the general damages awarded are excessive and that the honourable magistrate laid no basis for the award.

On the issue of substantial loss, it is her submission that the Respondent has not only failed to give assurances but has not bothered to respond to the Applicants assertion about her source of income. She

has relied on the case of **Gathenge Engineers and Electrical Ltd Vs Postal Corporation of Kenya** where the court held inter alia that: -

“The court must be satisfied through some evidence on record like an affidavit, that the decretal sum will be safe if the Applicants appeal was successful.”

It was her further submission that the question of whether an appeal shall be rendered nugatory was also addressed in the case of Nairobi, **Delux Services Limited Vs Eric Onyango Ndenge (suing through his uncle as next friend Daniel Evans Otieng)** cited in the case of **Kenindia Assurance Limited Vs Patrick Muturi** where the court held: -

“As to whether the appeal, if successful, will be rendered nugatory, that will undoubtedly be the consequence because once the money is paid over to the decree holders it will be beyond the reach of and the control of the applicant.....”

On the issue of delay she submitted that the application was filed only three days from the date it was brought to the attention of the Appellants counsel that judgment had been entered and in that regard, there was no undue delay. Lastly on the issue of security it was submitted that the Appellants are ready to deposit a sum of Ksh.550,000/- in a joint account in the names of both Advocates for the parties.

The brief submissions by the counsel for the Respondent reproduces the contents of the replying affidavit and the grounds of opposition.

I will start by considering prayer 4 of the application for enlargement of time to file the appeal out of time and in so doing, the question is whether the applicants have shown good and sufficient cause why they failed to file the appeal in time. The Applicants contends that they were not present when the judgment was delivered while the Respondent’s counsel contends that he informed the counsel for the applicants of the delivery of the judgment. I have noted that the applicants have not denied by way of an affidavit or otherwise that the counsel for the Respondent notified them of the delivery of the judgment. However, looking at the draft memorandum of appeal, I am satisfied that the same is arguable. Even without going into the merits of the appeal, I note that one of the grounds listed therein is that the learned magistrate erred in law and in fact by awarding special damages when the same had not been specifically proved, this to me is a triable issue between the parties.

The counsel for the Appellants attributes the delay in filing the appeal to a mistake by her court clerk. In the case of **Philip Chemowolo & another Vs Augustine Kubede (1982 – 1988)KAR 103 at 1040, Apolo J.A** as he then was poised: -

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made 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 over reach, 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.”

I now turn to the prayer on stay of execution. The Court of Appeal when dealing with an application for stay pending appeal under Order 42 rule 6 (2) in the case of **Halan & another Vs Thornton & Turpin (1963) Ltd (1990) KLR** had this to say: -

“The High Court’s discretion to order a stay of execution of a decree is fettered by the three conditions. Firstly, the Applicant must establish sufficient cause, secondly the court must be satisfied that substantial loss would emerge from a refusal to grant stay and thirdly, the applicant must furnish security. The application must of course be made without undue delay.”

Under the Revised Edition 2010 of the Civil Procedure Act, an Applicant seeking a stay of execution pending appeal only needs to show that he will suffer substantial loss, that the application has been made

without undue delay and such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

On the issue of substantial loss, the Respondent has not addressed himself to the same notwithstanding that the Appellants have cast doubt on his ability to refund the money should the appeal succeed. The burden of proof lay on him. This was the holding in the case of Nairobi Civil Application No. 238 of 2005 **National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (UR)** where the Court of Appeal stated: -

“The 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 Cap 80 Laws of Kenya.”

The Respondent did not discharge that burden, in fact he did not even address that issue.

On the issue of the delay, I have noted elsewhere in this ruling that the applicants did not deny the assertion by the counsel for the Respondent that they were notified of the delivery of the judgment but for the reasons given supra, I will excuse the mistake and consequently the delay in filing the application.

Lastly, on the issue of security, an offer has been made by the Appellants to deposit a sum of Ksh.550,000/- in a joint account by both Advocates. The figure is based on the fact that in their estimation, the court ought to have awarded a similar sum. This argument does not hold any water and it's neither here nor there. The Respondent has not stated that he will suffer any prejudice if the application herein is granted.

For the above reasons, I exercise my discretion and order that there shall be a stay of execution of the decree in Milimani CMCC No. 4080 of 2013 pending the hearing and determination of the intended appeal on condition that the Applicants will deposit the whole decretal sum in a joint account by both advocates within 30 days from the date hereof and in default, the stay order shall lapse.

The Applicant is hereby granted leave to file appeal out of time and the intended appeal to be filed and served within 14 days from the date hereof.

Costs of the application shall be in the cause.

Dated, signed and delivered at Nairobi this 2nd day of June, 2016.

.....

L. NJUGUNA

JUDGE

In the presence

..... ***For the Applicants***

..... *for the Respondent*