



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

**MISC APPLICATION NO. 359 OF 2016 CONSOLIDATED WITH MISC APPLICATION NO.
361 OF 2016**

VEGPRO KENYA LIMITEDAPPLICANT

VERSUS

GLADYS MOMANYI1ST RESPONDENT

CAROLINE MUYALE OKUTOYI2ND RESPONDENT

RULING

These applications are consolidated.

The applicant was the defendant while the two respondents were plaintiffs in two separate suits in the lower court whose judgments were delivered on 27th May, 2016. The cause of action was the same in both cases which involved personal injuries sustained by the respondents and in which the respondents were awarded damages by the lower court.

Any party aggrieved by a judgment of a subordinate court is required to file an appeal within 30 days from the date of the decree or order appealed against. The applicant herein did not comply with that requirement as a result of which, there is now a Notice of Motion under Order 42 Rule 6, Order 51 Rule 1, Order 50 Rule 6 of the Civil Procedure Rules and Sections 1 A, 1B, 3A,65,79G and 95 of the Civil Procedure Act seeking the following orders, that the court be pleased to enlarge time within which to file a Memorandum of Appeal; that the Memorandum of Appeal annexed to the application be deemed filed and served within time; that there be a stay of execution of the judgment and decree herein and any consequential orders arising therefrom, pending the hearing and determination of the appeal.

An interim stay of execution was given pending the determination of the applications. The applications are supported by affidavits sworn by the Eva Okallo, the applicant's Human Resource Manager alongside the grounds set out on the face of the applications.

The respondents filed replying affidavits opposing the applications. Both learned counsel have filed written submissions and cited some authorities which I have read. Notwithstanding the limit imposed by law within which the appeal may be filed, an appeal may be admitted out of time if the appellant satisfies the court that there are good and sufficient reasons for not filing the appeal in time – see Section 79 G of the Civil Procedure Act. In addition, Order 50 Rule 6 confers upon the court the power to enlarge such time upon terms as the justice of the case may require, even where the application to enlarge the limited time so fixed is not made until after the expiration of the time appointed or allowed.

The applications before the court were made within the 30 days set for filing the appeal. The affidavits in

support thereof have made a candid admission of the delay and it is clear the delay was not deliberate.

On the subject of stay of execution Order 42 Rule 6 of the Civil Procedure Rules is instructive.

No order for stay of execution shall be made unless,

- a. The court is satisfied that substantial loss may be suffered by the applicant unless the order is made and that the application has been made without unreasonable delay.
- b. That such security as the court orders for the due performance of such decree or order as may be binding on a party has been given by the applicant.

The discretion conferred upon the court shall be exercised judiciously taking into consideration the material presented by the parties and ensuring that justice is done to both parties. I note that the applicant has committed itself to abiding by any terms as to security as shall be ordered by the court.

On the other hand, it is submitted that the respondents have no known sources or means of income. It should be noted however that, the respondents have judgments in their favour arising from a contested litigation and the fact that they have no known sources or means of income should not be weighed against them.

I have noted from the draft Memorandum of Appeal that the appeal is against the award of damages only and therefore liability is not an issue. That being the case, I believe the court is possessed of sufficient material to make an informed decision that shall meet the justice required by both parties.

Weighing one thing against the other and doing the best in the circumstances of this case, I allow the applications by making the following orders,

- a) The time to file the Memorandum of Appeal is hereby enlarged by 15 days from the date of this ruling.
- b) The Memorandum of Appeal shall be filed within the said period of 15 days.
- c) There shall be a stay of execution on condition that in Miscellaneous Application No. 361 of 2016 the applicant shall pay to the respondent a sum of Kshs. 200,000/= and the balance of Kshs. 155,000/= be deposited in an interest earning account in the names of both advocates within 30 days from today.
- d) There shall be stay of execution on condition that in Miscellaneous Application No. 359 of 2016 the applicant shall pay to the respondent a sum of Kshs. 100,000/= and the balance of Kshs. 105,000 shall be deposited in an interest earning account in the names of both advocates within 30 days from today.
- e) The costs shall abide by the outcome of the appeal.

Orders accordingly.

Dated, signed and delivered at Nairobi this 4th day of October, 2016.

A. MBOGHOLI MSAGHA

JUDGE