



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NUMBER 212 OF 2016**

**NICHOLAS NJOROGE WAITHIRA. ....1<sup>ST</sup> INTENDED APPELLANT APPLICANT**

**STEPHEN MWANIKI. .... 2<sup>ND</sup> INTENDED APPELLANT/APPLICANT**

**GITONGA MURAU. ....3<sup>RD</sup> INTENDED APPELLANT/APPLICANT**

**DAWE ASUBA. ....4<sup>TH</sup> INTENDED APPELLANT/APPLICANT**

**VERSUS**

**MARY WAIRIMU MARIGA. ....RESPONDENT**

**R U L I N G**

Before me for determination is the application dated the 16<sup>th</sup> May, 2016 brought under Section 3A, 79G and 95 of the Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules.

The Applicant has sought the following orders: -

1. That this application be certified as urgent and be heard ex parte in the first instance.
2. That this honourable court be pleased to grant leave to the Applicants to appeal out of time against the judgment of the Honourable Senior Magistrate Chesang Maisy, Chief Magistrate's Court Civil Suit No. 3915 of 2013 pending the hearing and determination of the application herein.
3. That this honourable court be pleased to stay execution of the judgment and decree in Naivasha Chief Magistrate's Court Civil Suit No. 3915 of 2013 pending the hearing and determination of the application herein.
4. That the costs of this application abide the outcome of the intended appeal.

It is premised on the grounds set out on the body of the application and it's supported by the annexed affidavit of Joan Oburu. The grounds in support of the application are that judgment herein was delivered on the 11<sup>th</sup> March, 2016 and 30 days within which to file an appeal have lapsed, that the applicants are aggrieved by the said judgment on quantum and are seeking leave to appeal out of time and that the application is timeously made without undue delay, the Applicants stand to suffer substantial and irreparable loss and damage unless the application allowed, the intended appeal shall be rendered nugatory, the applicants have a good and arguable appeal which has high chances of success and that the Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs if

the application is allowed.

In the supporting affidavit it is averred that the advocate who was handing the matter left the firm without proper handover thus leading to delay for which the judgment in the matter was discovered after the stay had lapsed when the Plaintiff forwarded his costs.

That Applicants intend to appeal against the judgment and the intended appeal is merited, arguable and it raises pertinent points of law thus it has overwhelming chances of success and that the Applicants are ready, able and willing to furnish such reasonable security as this honourable court may deem fit. It is further averred that the Applicants had nothing to do with the inadvertent delay in filing the appeal and so they should not be punished for mistakes of their advocates. The Applicants have sought extension of time for filing the intended appeal.

That the application has been made without undue delay and/or the delay occasioned herein is not so inordinate as to be inexcusable. That the Respondent will not suffer any prejudice or any damage that is not capable of being compensated by way of costs. That the Applicants stand to suffer prejudice substantial loss as there is a likelihood that they will not recover the decretal amount if it is paid over to the Respondent.

The Respondent has opposed the application by way of a replying affidavit sworn by Nelson Kaburu Felix and grounds of opposition filed on 2<sup>nd</sup> June, 2016. In the said affidavit it is denied that the Respondent wrote to the applicants advocates on costs. It is also deponed that it is not true that the defendants/Applicants were not aware of the delivery of the judgment since they were represented by counsel who eventually applied for a stay of execution for 30 days and the same was granted. The grounds of opposition are that: -

- a. There has been undue delay.
- b. The depositions in the supporting affidavit are not candid. It is not disclosed.
  1. Which advocate has given the information relied on. The source of the information has not been disclosed.
  2. The advocate who allegedly left the firm is not disclosed.
  3. No letter allegedly forwarded on costs has been disclosed or its date or when it was received.
- c. No justice can be founded on lies.
- d. The application is incurably defective and/or is an abuse of the court process.
- e. Subrogation does not allow insurers to litigate directly as if they are parties.

Parties did file their submissions in support of their respective positions. The Applicants submitted on both the facts and on the applicable law, it was submitted that under Section 3A of the Civil Procedure Act, the court has inherent jurisdiction to make such orders as may be necessary for the ends of justice and nothing in the Act or otherwise can affect this power. The Applicants have relied on the case of **Wachira Karani Vs Bildad Wachira [2016] eKLR** where Mativo J stated as follows:-

***“The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, ex debito justitiae, to have any determination which affects him set aside.....”***

They also relied on the case of **Patel Vs E. A. Cargo Handling Services ltd (1974) E.A. 75**, where the court held that the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.

On whether the appeal is arguable or not, the applicants have referred to the annexed memorandum of appeal the main ground being that the award was excessive and was not proportionate to the injuries suffered by the Respondent. It was also submitted that the lower court failed to consider the evidence adduced before the lower court to ascertain the cause of injuries. In general, the Applicants submitted that the appeal is arguable and in support of that contention have referred to the case of **Bake & Bite (Nrb) Limited Vs Daniel Mutisya Mwalonzi [2015] eKLR** and that of **Kenya Revenue Authority Vs Sidney Keitany Changole & 3 Others [2015] eKLR** where the court held: -

***“This court has further held that the Applicant need only prove or establish one arguable point noting that an arguable appeal is not necessarily one that will succeed, but one that is not frivolous.”***

The counsel for the Applicants also submitted that Section 79G contains a provision which allows the court to admit appeal out of time if a good and sufficient reason is advanced for not having filed the appeal on time. They also relied on Section 95 of the Civil Procedure Act which allows extension of time even though the period originally fixed or granted may have expired. Order 50 Rule 6 of the Civil Procedure Rules was also relied on. According to the Applicants they have shown a sufficient cause to the court to allow it to exercise its discretion in their favour. They have relied on the Wachira Karani case supra where Mativo J explained what sufficient cause is.

On the stay of execution, it was submitted that the application was filed without undue delay and that the Applicants have already paid half of the decretal sum to the Respondents to the tune of Ksh.1,298,764/-.

On the part of the Respondent it was submitted that the Applicants failed to file the appeal in time because unnamed advocate left the firm. That no such letters as are alleged by the Applicants were ever written to their advocate as none has been produced. According to the Respondent, the Applicants wish to obtain an order through lies and misleading affidavits and therefore the court should not exercise its discretion in favour of such Applicants.

It was further submitted that the Oxygen rules should not be used to defeat an old and settled principles which have aided the court to do justice. That the Applicants did not show sufficient cause why the court should exercise discretion in its favour and that the application is an abuse of the court process. On the issue of sufficient cause, the Respondent has relied on the case of **Madison Insurance Co. Ltd Vs Peter Mutunga Masila & Another (2005) eKLR**. It has further been submitted that the court cannot extend time to file appeal when no appeal has been filed and to do so would be an abuse of the court. To support this contention the Respondent has relied on the cases of **Asma Ali Mohammed Vs Fatima Mwinyi Juma, Civil Appeal No. 75 of 2014 eKLR** and **Gerald M’Limbirie Vs Joseph Kangangi (2009) eKLR**.

Order 42 Rule 6(1) is clear on the conditions that an applicant who seeks an order for stay of execution is required to satisfy. The Applicants filed the application a month after the stay that had been granted by the lower court lapsed. Though the Respondent submits that the delay is inordinate, the same has been explained which explanation is plausible in the circumstances of this case.

The Applicants have also offered to furnish such security as this Honourable Court may deem fit. On substantial loss, the Applicants have expressed doubts as to whether the Respondent will be in a position to refund the decretal sum if paid to him in the event that the intended appeal succeeds. The effect of this was to shift the evidential burden to the Respondent to show that he shall be able to do so. It is noted that the Respondent has not addressed his mind to the same and, therefore, he failed to discharge the burden.

On whether the court should grant leave to file appeal out of time the applicants have shown sufficient cause why the appeal was not filed on time. As to whether the Applicant has an arguable appeal, this

court is not in position to make a finding on the same as the proceedings of the lower court have not been annexed and the court is not aware of the evidence that was adduced in the lower court.

Counsel for the Respondent submitted that the court cannot extend time to appeal when no appeal has been filed. He has relied on Section 79G and the case law.

This court has perused the two authorities relied on both of which are High Court decisions. This court is not persuaded by the said authorities.

In the premises aforesaid, it is the finding by this Honourable court that the Notice of Motion dated 16<sup>th</sup> May, 2016 has merits and it is hereby allowed in the following terms.

***a. The Applicants are granted leave to file 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 Naivasha Chief Magistrate's Court, Civil Suit No. 3915 of 2013 is hereby granted pending the hearing and determination of the intended appeal on condition that: -***

***i. The balance of the decretal sum be deposited in a joint account in the names of the Advocates for the Applicants and Respondent within 21 days from the date of the ruling failing which the stay order shall automatically lapse.***

***c. Costs of the application be borne by the Applicants.***

Dated, signed and delivered at Nairobi this 10<sup>th</sup> day of November, 2016.

.....

**L NJUGUNA**

**JUDGE**

**In the presence**

..... ***for the Applicants***

..... ***For the Respondents.***