



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**MISCELLANEOUS CIVIL APPLICATION NO. 41 OF 2014**

**ALI ZULEKHA ..... 1ST APPLICANT**

**ALI ABSY NASSIR ..... 2ND APPLICANT**

**VERSUS**

**PATIENCE JUMWA RUWA** legal representative of

the Estate of **JONATHAN CHARO KAZUNGU.....RESPONDENT**

**RULING**

The application dated 2nd December, 2014 seeks two main prayers namely leave to appeal out of time and stay of execution of the decree in Malindi CMCC No. 93 of 2010. The application is supported by the affidavit of Erastus Mwaniki. The Respondent filed a replying affidavit sworn on 8th December, 2014. Parties agreed to determine the application by way of written submissions.

The Applicant's position is that the current application has been filed without any undue delay, the applicants will suffer irreparable loss if the decretal sum is released to the Respondent as the Respondent has not demonstrated any capacity to refund the amount in the decree should the appeal succeed. It is further contended that without an order of stay of execution the appeal will be rendered nugatory and that the appeal is arguable. Finally, the Applicant's maintains that they are willing to provide any security.

On her part, the Respondent contends that there was unreasonable delay in filing the application, no appeal has been filed yet the Applicants had handwritten proceedings. The application lacks merit and does not meet the required threshold. According to the Respondent, the application is an abuse of the court process. The Applicants ought to have filed a holding appeal and that counsel for the Appellant was in court when the judgment was delivered.

The background information from the pleadings show that the Respondent filed civil suit number CMCC 93 of 2010 seeking damages in her capacity as the legal representative of the estate of Jonathan Charo Kazungu. There were four Defendants in the suit. The Applicants were the 1st and 2nd Defendants while David Murigi Wamai and Anthony Kosgei were 3rd and 4th Defendants respectively. By the consent of parties, liability was apportioned at 70% against the 1st and 2nd Defendants while 30% liability was apportioned against the 3rd and 4th Defendants.

The current application was filed by the 1st and 2nd Defendants whole are supposed to shoulder the greatest liability of 70%. The trial magistrate awarded damages totaling Kshs. 1,747,050 before costs. The judgement was delivered on 17th September, 2014. The Applicants were granted 30 days stay of execution which lapsed on 17th October, 2014. The main dispute is the amount of damages awarded by the trial court. The application herein was filed on 2nd December, 2014. This was about two and a half months from the date of the judgement. I do find that the delay in filing the application as well as the appeal is not in ordinate. At times its not prudent to file holding appeal only to amend the memorandum soon thereafter as suggested by the Respondent. The Applicant maintains that the typed proceedings were not ready and could not have filed their appeal.

It is clear that the Applicants are simply disputing the assessed damages. They contend that the awarded damages are excessive. It is the Applicant right to pursue and appeal. The appeal will determine whether the amount awarded was excessive or not. This is an arguable issue and the appeal is therefore no frivolous or one intended to frustrate the Respondent from enjoying the fruits of her judgement.

The Applicants have expressed their willingness to abide by any conditions in form of security that would be imposed by the court. The suit before the trial magistrate was filed in 2010. Although there is a remote possibility of the 3rd and 4th Defendants settling their share of the damages awarded, it is clear that the Respondent has incurred expenses up to this level. It would be unfair not to impose conditions upon the Applicants as they pursue their appeal. The dispute is on the total amount to be awarded as the Applicants do not dispute the fact that in any event damages would be awarded to the Respondent. This being the case, I do order that the Applicants pay the Respondent a sum of Kshs. 300,000 within forty five (45) days hereof. The Respondent to thereafter deposit a sum of Kshs. 600,000 in a joint account of counsels for both advocates within forty five (45) days after the payment of the sum of Kshs. 300,000.

In the end, the application dated 2nd December, 2014 is granted as prayed subject to fulfillment of the above terms. The intended appeal to be filed within fourteen (14) days hereof. Should the Applicants fail to fulfill the above conditions, the orders of stay shall stand vacated.

**Delivered and dated at Malindi this 4th day of March, 2015**

**Said J. Chitembwe**

**JUDGE**