



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL MISC. APPLICATION NO. 177 OF 2014

MOHAMMED AZIM
MANJI.....DEFENDANT/APPLICANT

VERSUS

PERPETUAL KATUMBI NZIOKI (*suing as the Mother and personal representative of the estate of*

RYAN MAINA MIGOSI
(*Deceased*).....PLAINTIFF/RESPONDENT

RULING

1. The application dated 11th August, 2014 seeks orders that there be a stay of execution of the decree in PMCC Kithimani No. 26 of 2013. Secondly, the application seeks orders that leave be granted to appeal out of time.
2. The delay in filing the appeal is blamed on the bureaucracy in the office of the Applicants insurer.
3. It is deponed that the delay in filing the application is not inordinate. That the appeal has high chances of success and if the decree is executed the appeal will be rendered nugatory. That the Respondent may execute the decree and if the Respondent is paid the decretal sum, she may not be capable of refunding the same. That the Appellant stands to suffer financial loss. The Applicant has offered to deposit security for the due performance of the decree.
4. The application is opposed. It is deponed by the Respondent that no good reason has been given why the appeal was not filed in time. That the application is an afterthought as the applicant had promised to settle the decretal sum. It is further stated that the application lacks merits and the appeal has limited chances of success.
5. The application was argued by way of written submissions which I have duly considered.
6. The principles of the law to be considered on whether or not to allow an application to extend the time within which to appeal are settled. See for example **Barclays Bank of Kenya Ltd vs Martha Karwirwa Antony (2010) eKLR** where the Court of Appeal cited with approval the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. 225 of**

1997 where it was stated as follows:

“the decision whether or not to extend the 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, 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.”

7. The judgment the subject of this appeal was delivered on 26th June, 2014. The application herein was filed on 13th August, 2014. The delay is not inordinate and has been explained. I have looked at the grounds of appeal. The same raises serious issues which need to be ventilated. There is no prejudice that can be suffered by the Respondent which cannot be compensated by way of damages.

8. Under **Order 42 rule 6(2)** -

(2) No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) 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 by the applicant.

9. In an application of this nature, the court needs to balance the interests of both parties. As stated by the Court of Appeal in **Kenya Shell Ltd. Vs Kibiri & Another (1986) KLR:-**

“In applications for stay the court should balance the parallel prepositions, first that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.”

10. The Applicant stand to suffer substantial loss if his property is attached and auctioned. The Applicant is also apprehensive that the Respondent is not capable of refunding the decretal sum. The Respondent on the other hand has not given any evidence to allay those fears. As stated by Court of Appeal in **National Industrial Credit Bank Ltd –vs- Aquinas Francis Wasike & Another Civil Application Nai 238 of 2005 (UR. 144/2005):-**

“This 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, Chapter 80 Laws of Kenya.”

11. The Applicant is ready to deposit security for the due performance of the decree herein. I allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning account of both counsels for the parties or in court within 30 days from the date hereof. In default execution to issue.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 5th day of June, **2015**

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B. THURANIRA JADEN

JUDGE