



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC. CIVIL APPLICATION NO. 24 OF 2013

1. JOSEPH WAMBURU TUMBO

2. SIMON WAMBURU TUMBO APPLICANTS

VERSUS

JOSEPH MUTISO KIMAURESPONDENT

R U L I N G

1. The Application dated 22/1/2013 seeks the following orders:-
 1. **“Spent.**
 2. **Spent.**
 3. **That the Applicant be granted leave to appeal out of time and the annexed Memorandum of Appeal be deemed as filed upon the payment of the Court requisite fees.**
 4. **That the Applicant be allowed to provide sufficient security in the form of a security bond to ensure that if the appeal does not succeed, the Respondent shall be able to get the fruit of the judgment without delay.**
 5. **That the costs of this application be bound by the outcome of the intended appeal.”**
2. According to the affidavit in support, judgment was given on 21/11/2013 and the appeal ought to have been filed on 7/1/13 since time had stopped running from 22/12/2012. That due to the Christmas holidays coupled with the misplacing of the file in the insurance company’s office, the instructions to appeal were given on 8/1/2013. It is contended that the delay is not inordinate or unreasonable and that the appeal has high chances of success. The Applicant is ready to provide sufficient security in the form of an insurance bond. The Appellants have also expressed the fear that they shall suffer substantial loss if stay is not allowed as the Respondent may not be able to refund the money in the event that the appeal is successful.
3. The application is opposed. According to the replying affidavit, the delay in filing the appeal is unreasonable and has not been explained. That the substantial loss to be suffered has not been proved. That liability was settled by consent and the sum of Kshs.100,000/= should be released to the Respondent and the balance deposited in an interest earning account pending the finalization of the appeal.

4. The judgment of the lower court was delivered on 21/11/2012. The appeal herein was filed on 22/1/2013. Taking into account the Christmas holidays when time stops running, the delay is not inordinate and has been sufficiently explained.
5. Under **Order 42 rule 6 (2)** are as follows:

“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.”**
6. The Respondent has not shown that he is capable of refunding the decretal sum. 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.”

7. Liability was settled by consent and the appeal is no quantum. There is no possibility of the appeal succeeding on 100% basis. The Respondent should therefore be able to enjoy at least 50% of the fruits of his judgment. 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.”

8. Consequently, I allow the application on the condition:-
 - a. **The Applicant do release 50% of the decretal sum to the Respondent within 30 days from date hereof.**
 - b. **The balance to be deposited in court or in a joint interest earning account of the Advocates to the parties herein within 30 days.**
 - c. **In default execution to issue.**
 - d. **Costs in cause.**

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 15th day of May 2014.

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B. THURANIRA JADEN

JUDGE