



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

MISC. APPLICATION. NO. E004 OF 2020

ERIC MUTUMA.....1ST APPLICANT

NAMESSIO NARUA.....2ND APPLICANT

VERSUS

**MERCY KARIMI MBAE (Suing As Legal Administrator of the Estate of
JANFAIR KATHOMI MBAE (DECEASED)).....RESPONDENT**

RULING

1. Judgment of the trial court was delivered on the 12.3.2020 whereof the Respondent was awarded Kshs.1,210,995/= plus costs and interest in a claim for damages for injuries sustained in a traffic road accident. The judgment was delivered in open court.

The applicant has however not provided this court with a copy of the judgment or a decree extracted therefrom.

2. By an Application dated 18.9.2019 brought under Section 3A, 79G and 95 of the Civil Procedure Act and Order 42 rule 6, Order 22 rule 22 and Order 50 rule 6 of the Civil Procedure Rules (CPR), the Applicants seek orders for leave to file appeal out of time, and for stay of execution of the judgment and decree pending hearing and determination of the application, and the intended appeal.

3. On the 22.9.2020, this court granted interim orders of stay of execution pending hearing and determination of the application.

4. The grounds in support of the application are replicated in the affidavit sworn by Daniel Mwangi, an advocate of the High Court having the conduct of this matter, on behalf of the applicant. It was sworn on the 18.9.2020, that the failure to file the appeal within the statutory period was largely due to the onset and continuity of the Covid-19 Pandemic, which forced closure and downgrading of court operations within the Republic of Kenya, and the limited access to court services.

5. The applicants aver that they are ready and willing to offer and furnish such reasonable security as the court may direct. It is further averred that no prejudice will be occasioned to the respondent if the orders sought are granted.

6. In opposing the application the Respondent filed a replying affidavit on the 13.10.2020 stating that the over five month's delay has not been explained, and that during the Covid - 19 Pandemic, court registries were open for online filing of documents.

It is further averred that the applicants have not demonstrated any loss they may suffer by a denial of the orders. However, it is deposed that should the court allow the application, it ought to direct payment of half of the judgment sum to the respondent and the other half to be deposited in a joint bank account to await outcome of the intended appeal.

7. I have considered the parties affidavits for and in opposition to the application as well as the respective written submissions.

Order 50 Rule 6 CPR empowers the court to enlarge time upon terms as the justice of each case may require upon application.

This is also provided under **Section 95 of the Civil Procedure Act** which donates discretion to the court to extend and enlarge time even though the original time fixed has expired.

8. Section 79 G of the Act provides that an appeal from a subordinate court to the High Court shall be filed within 30 days from the date of the decree or order appealed from, excluding such period of time as may be certified as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

9. There are two limbs to the application:-

(1) Leave to appeal out of time; and

(2) Stay of execution pending hearing and determination of the appeal, if No (1) above is granted.

10. **Leave to file Appeal out of time** For leave to be granted, an applicant is obligated to sufficiently explain to the satisfaction of the cause of the delay – **Order 50 rule 6 CPR & Section 95 of the Act**. The circumstances that led to the delay to filing of the intended appeal within time have been explained in the supporting affidavit – paragraph 4 above.

It is common ground that the Covid - 19 Pandemic visited our country leading to closure and downscaling of court operations four days after the delivery of judgment. It is needless to state that the applicants could not access the court registry within the 30 days provided to obtain the judgement and file the Appeal.

11. Though the court operations were upscaled sometimes in June 2020, the period had already expired. The delay in filing this application, given these circumstances, cannot be said to have been inordinate as submitted by the respondent –

The Court of Appeal in **Halai & Another V Thornton & Turpin (1963) Ltd (1990) KLR 365 cited in Industrial Case No. 1715 of 2011 –Elena Doudoladova Korir - Vs- Kenyatta University (2014) KLR.**

12. The court is enjoined by both the constitution and legislation to dispense justice without undue procedural technicalities, for end of justice to be met, upon its unfettered discretion. **Article 159 (2) (d) of the Constitution and Section 3A of the Civil Procedure Act.**

13. The Court of Appeal in **Vishva Stone Suppliers Company Ltd. V RSV Stone (2006) Ltd (2020) eKLR** held that the:

(a) rules of procedure are handmaidens of justice, and

(b) that a court of law should not allow the prescriptions of procedure and form to trump the primary object of

dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and requirements of a particular case.

(c) that the exercise of jurisdiction under Article 159 of the constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice – Kenya Shell Ltd - vs - Kibiru & Another (1986) eKLR.

14. In light of the above, I find and hold that the delay in filing the intended appeal within the prerequisite period has been sufficiently explained. **Leave to appeal out of time is granted to the applicant**, upon terms that shall be stated at the tail end of this ruling.

15. **Stay Pending Appeal Order 42 Rule 6 (2) CPR** states conditions that an applicant must satisfy the court for an order of stay to be granted being

(1) Substantial loss.

(2) Security for due performance of the decree.

In such an application, there are two competing interests that ought to be considered and balanced; that of the decree holder who holds a decree in his hands, and of the judgment debtor whose rights of appeal too ought to be safeguarded so as not to render the appeal nugatory – **Kenya Commercial Bank Ltd -V- Suncity Properties Ltd & 5 others (2012) eKLR.**

16. Substantial loss is the corner stone in an application for stay. Evidence must be tendered, either in the matter of paying damages awarded would cause difficulty to the applicants themselves, or that they would lose money if the payment is made to the respondent who would otherwise be unable to repay back should the appeal be successful.

17. In the present matter, the award is for Ksh. 1,210,995/= plus costs and interest. The decree is yet to be extracted. No submission was tendered as to the inability of the respondent to repay back if appeal is successful. Granting the order would no doubt cause prejudice to the decree holder as it would deny him the enjoyment of his fruits of judgment – **Kenya Shell Case (Supra), and Kenya Commercial Bank – V Suncity (Supra).**

18. To mitigate the above, the applicants have offered to abide by any condition that the court may impose. On the other hand, the Respondent has proposed that 50% of the decree sum to be paid to the respondent and the balance be deposited in an account to act as security.

19. Upon consideration and exercise of my judicial discretion, the following orders are made:-

1. That the applicants are granted leave to file an appeal out of time. The Memorandum of Appeal shall be filed and served within 15 days of this ruling; with the Record of Appeal being filed within 60 days thereafter.

2. The applicants shall pay 50% of the judgment sum to the Respondent within 45 days. The balance of 50% shall be deposited in an interest earning joint account of both parties Advocates, in a reputable Bank within 60 days of this ruling.

3. In default of No. 1 and/or No. 2 above, these orders shall lapse.

4. No orders as to costs.

Dated, Delivered, and Signed at Kerugoya this 23rd Day of February, 2021.

J.N. MULWA

JUDGE



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