



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC APPLICATION NO. E266 OF 2021

ELIUD NJUGUNA MUNGAI.....1ST APPLICANT

JOSEPH KIHU MBURU.....2ND APPLICANT

VERSUS

MIRIAM AKOTH OOKO.....RESPONDENT

RULING

The applicants filed a notice of motion dated 24th May 2021 which is brought pursuant to Section 1A, 1B, 3A, 3B, 79G, and 95 of the Civil Procedure Act Order 22 Rule 22 order 42 Rule 4, 6 and 7, Order 50 Rule 6 and Order 51 Rule 1 and 3 of the Civil Procedure Rules 2010 for orders;

- 1. Spent**
- 2. That this Honourable Court be pleased to grants applicants leave to file a memorandum of appeal out of time**
- 3. That this Honourable Court be pleased to order stay of execution of the judgment issued by the trial court on 2nd November 2020 pending the hearing and determination of this application.**
- 4. That this Honourable Court be pleased to order a stay of execution of the judgement issued by the trial court on 2nd November 2020 pending the hearing and determination of the intended appeal**
- 5. That this Honourable Court be pleased to order stay of proceedings in the declaratory suit pending the hearing and determination of this application and the intended appeal.**
- 6. That the costs of this application abide by the outcome of the appeal.**

The application was supported by the affidavit of Joyce Chichi Advocate. It is indicated that the hearing in the subordinate court proceeded *ex parte* on 29th September 2020 because it was wrongly diarized by their administrator. When the matter came up for hearing they could not find it in the cause list. After the matter proceeded *ex parte*, the advocates for the respondent never served them with the judgement notice as *ex parte* judgement was delivered on 2nd November 2020. The said advocates have now proceeded with execution by filing a declaratory suit against the applicants' insurer.

The applicants seek to appeal against the aforementioned judgement and the time within which an appeal can be lodged has since lapsed. Also the 30 day stay of execution granted by the trial court has since lapsed.

The applicants submitted that the delay was not inordinate since they were not aware that the judgement had been delivered and when they found out that the respondent had filed a declaratory suit, they immediately filed the application herein. That this application will not cause any prejudice to the respondents and they are willing and able to give reasonable security in the form of a bank security.

It was also the applicants' submission that the intended appeal raises pertinent issues and has a high chance of success unless granted leave to appeal out of time, the applicants stand to suffer irreparable loss and damage. The respondent is likely to execute which would render the appeal nugatory and greatly prejudice them.

The application was opposed by the replying affidavit of Miriam Akoth Ooko dated 14th October 2021. She averred that she instituted the suit against the applicants seeking compensation for injuries sustained on 17th June 2019. Judgement was delivered on 2nd December 2020 and the present application was filed on 24th May 2021. The applicant has not given the reason for delay and nothing has been attached in the application to show follow up was made in the registry.

Counsel for the respondent submitted that the applicants have not met the threshold for granting them stay of execution. The applicants have not shown sufficient cause nor have they indicated how they would suffer substantial loss if the decretal sum is paid to the defendant.

It was also submitted that the application is sworn by an advocate and breaches the provisions of the civil procedure act which requires that affidavits be confined to such facts as the deponent is capable of his own knowledge to prove.

The respondents argued that the applicants have to demonstrate any peculiar circumstances that necessitate withholding of the decretal sum. The applicants have not even stated how they would suffer substantial loss. In support counsel cited the case of **Equity Bank Ltd v Taiga Adams Co. Ltd [2006] eKLR**

"In the application before me, the applicant has not shown or established the substantial loss that would ensue if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that is execution is carried out – in the event the appeal succeeds, the Respondent would not be in a position to pay- reimburse – as he/it is a person of no means. Here, no such allegation is made, much less established, by the appellant/applicant."

Analysis and Determination.

The three issues for determination are:-

- a. Whether to grant leave to appeal out of time"
- b. Whether to grant a stay of execution pending the hearing and determination of appeal"
- c. Whether to grant a stay of proceedings in the declaratory suit"

Under Section 79G of the Civil Procedure Act, a party may be granted leave to file an appeal out of time if he satisfies the court that he has good reason for not filing the appeal within the time provided by law. In the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR**, the Court of Appeal reiterated the conditions to be considered in deciding whether or not to grant extension of time to file an appeal. These are the length of the delay, the reason for the delay, possibly, the chances of success of the appeal if the application is granted, and finally, the degree of prejudice to the respondent if the application is granted.

In this case it is the applicants' case that they were not aware that judgement had been delivered as they were not served with any notice and the matter proceeded *ex parte*. They only received information when the respondent filed a declaratory suit.

Judgement was delivered on 2nd November 2020 and the application herein was filed on 24th May 2021 about 6 months after. Bearing in mind that the decision sought to be appealed from was delivered in the absence of the applicants. It is in the interest of justice that the applicants be granted leave to appeal out of time. No notice of entry of judgment was served on the applicants.

A Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) ...

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

The applicants herein have indicated that they have an arguable appeal with high chances of success and that if orders of stay of execution are not granted it would render the appeal nugatory. They also indicated that they are willing to provide security in the form of a bank security.

The dispute involves a claim for damages arising from a road traffic accident. The plaint in Civil Suit number E225 of 2021 shows that the accident involved two vehicles. The original suit proceeded *ex parte*. The applicants intend to pursue an appeal. On the other hand, the respondent is seeking to enjoy the fruits of her judgment. She was awarded Kshs.258,968 plus costs of Kshs.91,625. The total claim is for Kshs.350,593.

Given the circumstances of the case, I am satisfied that the application herein is merited and is hereby granted on the following terms:-

1. The appeal shall be filed and served within 14 days hereof.

2. The applicants provide a bank guarantee for the decretal sum of Kshs.350,593 within 45 days hereof.
3. In default of prayer 1 and 2 above the stay orders granted shall lapse unless they are otherwise enlarged by the court.
4. There be stay of proceedings in the declaratory suit pending the hearing and determination of the intended appeal.
5. Costs shall be in the cause.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2021.

.....

S. CHITEMBWE

JUDGE



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