



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION 196 OF 2020**

**GEOFFREY JOSEPH ONYANGO MEWE.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**MOHAMED NASSIR ABDI.....INTENDED APPELLANT**

**MWANATUMU KHAMISI HUSSEIN.....INTENDED APPELLANT**

**RULING**

1. The subject matter of this ruling is a notice of motion application dated 18/9/2020 and filed on the even date by the Intended Appellants (hereinafter the Applicants) and seeks for the following orders: -

**a) Spent;**

**b) That this Honourable court be pleased to extend time and grant leave to the Applicants to lodge a Memorandum of appeal out of time against the Judgment and decree entered against the Applicants by Principal Magistrate Hon. J.M Omido in CMCC Number 383 of 2017 at Kwale on the 4<sup>th</sup> March, 2020;**

**c) Spent;**

**d) That this Honourable court be pleased to stay execution of the judgment and decree in Kwale Principal Magistrate Court Civil Suit No. 383 of 2017 pending the hearing and determination of the intended appeal;**

**e) Spent;**

**f) That this Honourable court be pleased to issue any other orders that it may deem fit, just and expedient in the interest of justice;**

**g) That the costs of this Application be in the cause.**

2. The application is brought under the provisions of Section 3A, 79G and 95 of the Civil Procedure Act, Cap 21, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 all of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

3. From the face of the application, the main ground is that upon delivery of the Judgment in Kwale C.M.C.C. No. 383 of 2017 on the 4<sup>th</sup> March, 2020, the Applicants instructed their advocate to file an appeal but he failed to file the same on time. As such the delay was occasioned by an advocate and not by deliberate inaction of the Applicants.

4. In support of the prayer for stay of execution, it is averred that the Plaintiff/Respondent is likely to proceed with execution and render the intended appeal nugatory. Further, that the Plaintiff is of unknown resources and unable to repay the decretal sum if the same is paid to him.

5. The application is supported by the Affidavit of Isabella Nyambura, the Intended Applicants' insurer's legal officer, evenly sworn on 18/9/2020. In the said affidavit, she explicated the grounds on face of the application and added that the Applicants were ready to provide security as directed by the court.

6. In response, the Plaintiff/Respondent filed a replying affidavit dated the 9/11/2020. He deposited that the judgment was delivered in the

presence of advocates for both parties and his (the Plaintiff's) advocate wrote a follow up letter dated 9<sup>th</sup> March, 2020 notifying the Applicant's advocate of the judgment. It is argued that it was incumbent upon the applicants to seek further advice from their advocates with regard to timelines for filing an appeal. Accordingly, the Plaintiff submits that no plausible explanation for the delay of 6 months in filing the appeal has been tendered and the application is merely a delay tactic meant to deprive him the fruit of his judgment.

7. The Plaintiff further proposes that in the event that this court is willing to allow the application, then the Defendants should be directed to pay to him half the decretal sum being Kshs. 498,375/= and reasonable costs of Kshs. 146,380/=.

8. Directions were taken that the application be canvassed by way of written submissions and both parties have complied with the same. The Applicant's submissions were filed on 3/11/2020 while those of the Plaintiff/Respondent were filed on 10/11/2020.

9. I have had the benefit of reading the written as well as the oral submissions offered and the decided cases cited by the parties. They replicate much on the grounds in support and opposition of the application as captured above and I need not to duplicate the same herein.

### **Analysis and Determination**

10. After perusing all the pleadings filed in this case and the submissions made by the parties herein as well as the authorities relied on, only two (2) main issues come for determination and they are as follows;

**a) Whether the delay in filing the Appeal has been explained, and**

**b) Whether the Applicants have meant a case to warrant stay of execution of the trial court's Judgment**

11. As regards the issue for leave to file an appeal out of time.

Section 79G of the *Civil Procedure Act* provides that:

***“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***

***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”***

12. It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. However, whether or not to extend time for filing an appeal is an exercise of this court's discretion which should be based on reasons and not on whims or caprice.

13. From the reading of **Section 79G of the Civil Procedure Act**, the matters which a court should take into account in deciding whether or not to grant an extension of time are; *the length of the delay; the reason for the delay; the chances of the Appeal succeeding if the application is granted; and the degree of prejudice to the Respondent if the application is granted.*

14. In this particular case, Judgment by the trial court and subject of the intended appeal was delivered on the 4/3/2020. The application herein was filed on 18/8/2020. The application has therefore been filed more than five (5) months after the delivery of the Judgment.

15. The Applicants have blamed their advocate for the delay in filing the Appeal and in my view, what they seem to be saying is that they should not be condemned as a result of inaction by their former advocates. As a matter of evidence, and in circumstances of those allegations, no evidence has been laid before the court to buttress the same. Much as the Applicants have attempted to shift the blame to their former advocates, nothing has been exhibited to confirm that indeed the advocate failed to act as instructed. My view is that whereas litigants instruct Advocates to act for them, the cases belong to litigants and they have a duty to monitor the progress of their cases.

16. **Section 79G of the Civil Procedure Act** requires that before the Court enlarges the time within which to appeal, the Applicant must satisfy the court that he had good and sufficient cause for not filing the Appeal in time. In the case of **Alibhai Musajee...Vs...Shariff Mohammed Al-Bet Civil Appeal No.283 of 1998**, the Court of Appeal held that whereas the **Civil Procedure Act** allows for extension of time for filing an Appeal, if good and sufficient cause is shown, failure to act does not constitute a good or sufficient cause.

17. Further in the case of **Berber Alibhai Mawji...Vs...Sultan Hasham Lalji & 2 Others [1990-1994] EA 337**, the court held that inaction on the part of an advocate as opposed to error of Judgment or a slip is not excusable. I am therefore not satisfied that the delay or default on the part of the Applicant has been satisfactorily explained.

18. However, I have considered the draft memorandum of appeal as annexed to the application. The Applicants intends to appeal against the finding on quantum of the trial court since parties had recorded consent on liability on 13/11/2019. The Plaintiff is amenable to the court allowing the application but on condition that half of the decretal sum is paid to him.

19. I am therefore inclined to allow the application as such since I see no prejudice that will be occasioned to the Plaintiff/Respondent. Likewise, both competing interests of the Applicants to the appeal and that of the Plaintiff of enjoying fruits of a judgment made in his favour will have been addressed. This court has time and again considered that under **Sections 1A, 1B, & 3 of the Civil Procedure Act** as well as **Article 159 of the Constitution** it is mandated to expeditiously do justice to parties before it. In my view Justice would be done if the

Applicants are allowed to proceed with the appeal and at the same time ensure that the Plaintiff enjoys fruits of his judgment by ordering payment of half the decretal sum to him.

20. In my view the above finding has addressed the second issue for consideration on whether stay of execution should be granted. Be that as it may, **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010** stipulates the conditions in which the stay may be granted. It provides that an Applicant in an application for stay must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application has been filed without unreasonable delay. The applicant must also show that he is willing to offer such security as may be ordered by the court.

21. On the issue of substantial loss, the Applicants argued that the Plaintiff/Respondent is of unknown means and if the decretal sum is paid then the Applicants may be unable recover the same in the event that the appeal is successful. To that fear, the difficulty to recover the decretal sum should the appeal succeed, the Plaintiff/Respondent has not given an answer or rebuttal. In the decision in the case of **Kenya Shell Ltd vs Kibiru [1956] KLR 410** the Court of Appeal pointed out that if an applicant alleges difficulties in recovery of decretal sum it rests on the respondent to show that he would be able to effect a refund. Having not done so, I am satisfied that Applicants are likely to suffer substantial loss.

22. Noting that the Applicants have offered to deposit security for due performance of the decree, I reiterate that the grant for stay of execution pending appeal is discretionary and should be exercised in a manner that balances the interest of the Applicants with those of the Respondent. Consequently, the prayer for stay of execution is hereby allowed but on condition that it pays to the Respondent one half ( $\frac{1}{2}$ ) of the decretal sum awarded by the trial court while the other half ( $\frac{1}{2}$ ) of the decretal sum shall be deposited in an escrow interest earning account to be opened and held by the advocates for both parties hereto pending the hearing and determination of the appeal.

23. The upshot of my finding therefore is that:

**(a) The time to file appeal is extended and the appeal to be**

**filed within 30 days from today's date;**

**(b) The Applicants to pay half the decretal sum to the Plaintiff**

**and deposit the other half as directed at paragraph 22 above within 30 days from the date hereof;**

**(c) In default, the stay orders granted shall lapse unless they**

**are otherwise enlarged by the court.**

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 28<sup>th</sup> day of January, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

**JUSTICE D.O CHEPKWONY**