



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MWP SUIT NO.14 OF 2014 (O.S)

JKK.....PLAINTIFF/APPLICANT

VERSUS

MKT.....DEFENDANT/RESPONDENT

RULING

1. By an originating summons dated 15th December 2014, JK (hereinafter the plaintiff / applicant) moved to this court seeking division of matrimonial property against her husband MKT (hereinafter the defendant/respondent). On 10th April 2019, judgment was delivered and orders made to the effect that the developed plots at Zainab Ramadhani Kombo Misufuni and Mzee Masha to be sold and proceeds shared out equally; pending the sale of the said property, the plaintiff and children to continue staying in the said property; the defendant to pay the plaintiff a sum of Kshs 40,000 being 50% of the proceeds of the kiosk sold to Abdalla Feiswal Abdalla.

2. Upon delivery of Judgment, the defendant sought temporary stay of execution which was granted for 14 days pending filing a formal application for stay of execution. Subsequently, the defendant filed an application dated 24th April 2019 seeking stay which was not opposed and therefore granted exparte on 6th May 2019.

3. On 28th April 2021, the plaintiff/ applicant filed a Notice of Motion Application dated 22nd March ,2021 the subject of this ruling seeking the following orders:

- a) **That the honourable court be pleased to strike out the notice of appeal dated 23rd April, 2019 and lodged on the 23rd April, 2019.**
- b) **That the orders of stay of execution and or decree delivered on 10th April,2019 be set aside and or vacated and the court do make a declaration that there is no appeal filed within time allowed or stipulated in the civil procedure code rules .**
- c) **That the plaintiff to proceed to have costs of this suit and subsequent applications taxed by the taxing master.**
- d) **That costs of this application be provided for.**
- e) **That this honourable court grants any further orders as it deems fit.**

4. The application is premised on the grounds set out on the face of it and averments contained in the affidavit sworn by the applicant's counsel one Charles Ohuru Nyamboye on 17th March 2021 stating that: judgement in this suit was delivered on 10th April 2019 and the defendants given 14 days temporary stay of execution; the appellant being dissatisfied with the said judgement delivered on the 10th April,2019 moved this honourable court and filed a notice of appeal on the 23rd April 2019; the defendant was to file and serve the record of appeal within 90 days but which appeal was never filed by the defendant within that time; it is now over 23 months since judgement was delivered but there is no memorandum of appeal filed in court by the defendant /intended appellant; the applicant is being denied enjoyment of the fruits of the judgement given by this honourable court; it is fair ,just and equitable in the circumstances that notice of appeal filed herein be struck out with costs to the defendant and the court does make a finding that the defendant has failed to file any appeal within the time stipulated in the Civil Procedure Act and Rules.

5. The respondent filed a replying affidavit sworn on 12th May, 2021 stating that his advocates on record have severally written to the Deputy Registrar asking to have the proceedings in this matter typed in order to prepare a record of appeal, but they got no response. As proof of his effort in securing typed proceedings, the respondent annexed copies of letters addressed to the deputy registrar marked as "MKT1"

6. The respondent further stated that to date the said proceedings are yet to be typed and that this honourable court can ascertain the same by

confirming with the relevant department. That the delay in the typing pool is in no way his fault and it is the said delay that had his advocates on record fail to file the record of appeal in time. The respondent averred that further to the foregoing, the year 2020 had halted most services even at the judiciary and everyone was trying to cope with the new normal hence the delay herein has been occasioned by circumstances beyond his power and control.

7. The respondent further averred that Section 79 G of the Civil Procedure Act and Order 42 of the Civil Procedure Rules basically refer to appeals from subordinate courts to the high court which is not the case herein. That if the said application is granted, he will greatly be prejudiced as he will be denied of his constitutional right to appeal contrary to Article (50)(2)(q) of the Constitution of Kenya, 2010.

8. He deposed that if the said application is to be granted as prayed, execution will be carried out immediately thus subjecting him to a state of affairs which will not only irreparably affect and/or negate his rights as a successful party in the appeal but also affect their young family which he and the applicant are seeking to protect by reconciling their differences considering the fact that they have never divorced and that they are still together as they pursue an amicable settlement as an alternative mode of dispute resolution mechanism.

9. The respondent further averred that the plaintiff will not suffer any prejudice as she has always been in possession of all the properties in the matter hence it is not correct to claim that she is being denied fruits of the judgement. That the said application is solely brought by the plaintiff's advocate as a means to tax his bill of costs.

10. I have considered the application and the response thereof. The only issue which arise for determination is whether the notice of appeal on record should be struck out and the order of stay lifted.

11. The applicant has urged this court to strike out the notice of appeal on the grounds that the respondent has not filed the record of appeal 23 months down the line thus denying her the enjoyment of the fruits of the judgement given by this honourable court on 10th April, 2019.

12. The respondent on the other hand in his affidavit at paragraphs 4, 5, 6 and 7 averred that his advocates have severally written to the deputy registrar asking for proceedings in this matter typed in order to prepare a record of appeal to no avail. That to date the said proceedings are yet to be typed and that the delay at the typing pool is in no way his fault and that it is the said delay that has made his advocates on record to fail to file the record of appeal in time. Further, that the year 2020 had halted most services even at the judiciary due to corona and everyone was trying to cope with the new normal thus the delay herein has been occasioned by circumstances beyond his control.

13. It is trite that filing a notice of appeal is an expression of the intention to appeal and a party who files such notice is deemed to have lodged an appeal upon which a court can base its discretion to grant an order for stay. However, notice of appeal should not be used as a shield not to move the court of appeal by filing a substantive appeal and where such steps are not taken within reasonable time, then, the court shall have no option but to vacate such stay orders.

14. In this case, the delay in filing a substantive appeal has been associated with failure by the court to supply certified typed proceedings. Faced with a similar situation on the effect of failure to supply proceedings in time, the court in the case of County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR had this to say;

“The issue of delay of typed proceedings is well known in our legal system and on this basis; this Court has previously extended time and held that such a delay is not on part of the party but the court and that this issue consists of facts beyond a party’s reach. In *Hassan Nyanje Charo v Khatib Mwashetani and 3 others, eKLR [2014]* this Court stated:

“Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail...

Would it be in the interests of justice then to turn away an applicant who has, *prima facie*, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court’s administrative machinery? We think not.”

However, we hasten to add that a ground of delay of getting typed proceedings is not a *prima facie* panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the Court.”

15. In the case of Attorney General v Lucy Nduta Nganga [2017] eKLR the court quoted the case of Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others [2011] eKLR, where the court stated that , a notice of appeal was served on the respondent out of time and without leave of the court. Upon being asked to strike it out, the Court of Appeal (Omolo, Bosire and Nyamu JJ.A) observed that:-

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without

undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion." (Emphasis added).

16. I note from the court record that there is a copy of draft typed proceedings. However, it is not clear when they were typed, whether they were proof read and certified and parties supplied with copies of the same. I have also noted the letters being referred to by the respondent and the draft Memorandum of Appeal all marked as annexures "MKT-1", "MKT-2". On a benefit of doubt, I am persuaded to believe that the delay in filing a substantive appeal cannot solely be apportioned on the respondent and or his advocate but also the court must bear a share of responsibility.

17. Whereas delay in typing and supply of proceedings is a perennial problem in our courts, parties must always make a follow up beyond mere letter writing. As to the ground of corona affecting court operations, the same is a mere excuse as courts were only affected between March and May 2020. Thereafter, with virtual proceedings and electronic case management, things normalized.

18. Although the delay is quite prolonged, I will indulge the respondent in the interest of substantive justice an opportunity to pursue his appeal. Indeed, the applicant will not suffer any prejudice considering that she is in occupation of the subject property.

19. Having held that the respondent had reasonable excuse in not filing the appeal in time, it will not be fair in the interest of justice to strike out the notice of appeal. Accordingly, the application is disallowed and the following orders shall abide;

(a)The application dated 22nd March, 2021 is hereby dismissed.

(b)The respondent to file his appeal within 21 days from the date of delivery of this ruling in default stay of execution order in place to stand vacated automatically.

(c)The respondent to follow up with the relevant department for purposes of obtaining typed and certified court proceedings.

(d) This being a family matter, each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 24TH DAY OF SEPTEMBER, 2021

J.N.ONYIEGO

JUDGE