



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**MISC. CIVIL APPLICATION NO. 69 OF 2020**

**BETWEEN**

**1. NJIHIA CHARLES *alias* CHARLES NDEREBU NJIHIA**

**2. GITAU ANTHONY.....APPELLANTS/ APPLICANTS**

**VS**

**MUASYA ILUNGA.....RESPONDENT**

**RULING**

1. Judgment was entered on 18<sup>th</sup> February, 2020 before the Chief Magistrate's Court, Thika, in Civil Case No. 291 of 2015 for **MUASYA ILUNGA**, the respondent herein for Kshs.1,903,340.00. The defendants in that case, who are now the applicants before me are **NJIHIA CHARLES and GITAU ANTHONY**.

2. The applicants have filed several applications in this matter, all seeking similar prayers. It is not clear to me whether the intent of filing those several application was to confuse the court and the respondent. Whatever is the reason this Court takes a very dim view of that state of affairs.

3. The first in time, of those applications is dated 17<sup>th</sup> March, 2020. The applicants by that application seek orders that leave be granted for them to file an appeal out of time and that there be stay of execution of the subordinate court judgment, "pending the hearing and determination of the application."

4. When that application was placed before the judge on 20<sup>th</sup> May, 2020 the learned judge made an ex parte order in the following terms:-

***"The court having considered the motion filed on 19/5/2020 directs the registry to assign it a hearing date in the next term. Meanwhile, the status quo with regard to the decree is to be maintained conditional upon the applicant depositing a sum of Shs.800,000 ... into court within 21 days of today's date."***

5. The applicants filed another notice of motion application dated 21<sup>st</sup> September, 2020. By that application the applicants yet again sought stay of execution of the subordinate court's judgment and also prayed for extension of 21 days from 20<sup>th</sup> May, 2020 within which to deposit Kshs.800,000. This application was not brought to the attention of the court and therefore no orders were made on it.

6. The third application filed by the applicants is dated 7<sup>th</sup> December, 2020. The applicants yet again sought stay of execution of the subordinate court's judgment, and also sought a declaration be made that execution undertaken by Crater View Auctioneers, on 3<sup>rd</sup> December, 2020 was illegal. The applicant sought the lifting of the warrants of attachment of moveable goods issued to that auctioneer.

7. That application was placed before me on 9<sup>th</sup> December, 2020 and on noting that the applicants deposited the amount ordered that is Kshs.800,000/= on 2<sup>nd</sup> November, 2020 a temporary stay of execution of the trial court's judgment was granted by me.

8. What the applications and the respondent's two replying affidavits reveal is that the applicant have failed to be candid when approaching this Court the applicants filed an application before the Thika Chief Magistrate's court, dated 24<sup>th</sup> February, 2020. In that application the applicants sought stay of execution of the judgment of that court on the ground that they wished to have time to negotiate the costs awarded to the respondent. There was no mention at that stage that the applicants wished to appeal the judgment. It does seem that the applicants were content with the trial court's judgment.

9. The applicants in approaching this Court failed to explain why they did not file their appeal within the thirty days required under **Section 79G** of the Civil Procedure Act. The only explanation is that the courts having scaled down their services due to COVID-19 pandemic the appeal could not be filed within time required. The National Council on the Administration of Justice issued a press release on 15<sup>th</sup> March, 2020 announcing the scale down of services due to the pandemic. The applicants should have filed their appeal by 19<sup>th</sup> March, 2020. What prevented them filing their appeal by 15<sup>th</sup> March, 2020? There is no explanation.

10. The applicants should have borne in mind the decision of the Court of Appeal in the case **VISHVA STONE SUPPLIES COMPANY LIMITED VS. RSR STONE (2006) LIMITED (2020) EKLK** when it was stated:-

*“The above principles were restated by the Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ) in NICHOLAS KIPTOO ARAP KORIR SALAT VERSUS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS (supra) as follows:-*

*‘(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.*

*(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.*

*(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.*

*(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.*

*(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.*

*(6) Whether the application has been brought without undue delay; and*

*(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”*

11. Having that in mind the applicants ought to have explained the delay to this Court. Perhaps they could not explain because it would seem that from 18<sup>th</sup> February, 2020, when the trial court delivered its judgment, up to the time of approaching this Court, the applicants had no intention of filing an appeal. That to some extent gives credence to the depositions of the respondent that the applicants were only interested in seeking stay of execution and not to appeal the judgment. That would explain the applicant’s bombardment of filing several applications before this Court and before the trial court.

12. In my view there is no merit in the prayer for leave to file an appeal out of time. That prayer fails and having failed there is no basis of granting or extending stay of execution of the trial court’s judgment.

#### **DISPOSITION**

13. The court grants the following orders:-

(a) The notice of motion applications dated 17<sup>th</sup> March, 21<sup>st</sup> September and 7<sup>th</sup> December, 2020 are without merit and are dismissed with costs.

(b) The stay of execution of the Thika Chief Magistrate’s Court Civil Case No. 291 of 2015 is lifted and vacated.

(c) The costs of Crater View Auctioneers shall be paid by *Njihia Charles alias Charles Nderebu Njihia and Gitau Anthony* within 30 days of today’s date.

**RULING DATED AND DELIVERED AT KIAMBU THIS 23RD DAY OF SEPTEMBER, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Ndege

For the Applicant: Ms. Nguleya

For the Respondent : Ms. Nzili holding brief for musia

**COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**