**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 343 "A" OF 2004**

**SAMUEL WAMUTU WAIGANJO.....APPELLANT**

**VERSUS**

**MRS ZOHRA BARAKA.....1ST RESPONDENT**

**MOHAMED BARAKA.....2ND RESPONDENT**

**RULING**

This ruling is on two applications dated 28th July 2010 by the respondents and 31st May 2021 by the appellant respectively. The respondent's Notice of Motion is brought pursuant to Order 50 Rule 6, Order 45 Rule 1, order 12 Rule 7 of the Civil Procedure Rules Sections 1A, 1B, 63(e) of the Civil Procedure Act;

**1. Spent**

**2. That this honorable court be pleased to grant orders of stay of execution of the judgement entered and delivered by Hon. Justice Onyancha on 17/2/2014 and all other subsequent orders pending hearing and determination of this application**

**3. That this honorable court be pleased to enlarge time within which the applicant/respondent may file appeal to the court of appeal, file letter requesting for proceedings and judgement of the court.**

**4. That in the alternative this honorable court may be pleased to review the judgement of honorable justice Onyancha delivered on 17/2/2014 relating to interest calculated at bank rates of 20% per annum**

**5. That the proceedings for notice to show cause coming before the honorable Deputy Ms. Mbacho be stayed until this matter is heard & finalized**

**6. The costs of this application be in cause.**

The application was supported by the affidavit of Zohra Mohamed Baraka. The respondents stated that on 17/2/2014 judgement was delivered where they were ordered to pay the principle sum of Kshs. 513,835 plus interest at Bank Rates until payment in full. At the time the respondents/applicants instructed their advocates on record Mukele Moni & Company Advocates to immediately file the appeal but when they asked the file to be transferred to their new advocates N.A Owino & Co. Advocates it was discovered that no appeal was filed. On February 2020 the new advocates were planning to put in an application to appeal and/or review out of time, the country was hit by the Covid 19 pandemic. They indicated that the duration to make this application is regrettable as it was mainly caused by negligence on the part of their former advocates.

The respondents added further that the appellant/respondent has already pulled out a decree and notice to show cause for the sum of Ksh 10,201,415 which he intendeds to execute and that the said amount is punitive unreasonable and illegal as the decretal sum is Ksh 513,000. It was argued that no body or financial institution should be heard to charge a debtor or defaulter more than double the sum claimed. That there is no justification for a 20% interest rate while bank rates are known to fluctuate from time to time and thus if given a chance to appeal to the court of appeal their plea for excessive and punitive interest will receive a favorable response.

The application was opposed by the appellant's grounds of opposition dated 18/10/2020 where they contended that there was no evidence produced by the applicants showing that they issued instructions to their former advocates to appeal the matter herein. Additionally, that the applicants advocate attended the taxation where the deputy registrar taxed the bill on 19/10/2017 at the sum of Kshs 195,011 and later they were issued with a certificate of taxation. On 28/3/2019 the subordinate court issued a certificate of costs under Order 21 Rule 9 and a decree,

in the amount of Kshs. 70,626.90.

The appellants stated that unpaid debt continues to accrue interest at 20% per annum as per the decree and that this is concluded litigation where costs have been taxed. The calculations given to the defendant show that costs and interest had risen to Kshs 10,201,415 as at 5/8/2019. The respondent/applicant made proposals to liquidate the decree costs and interest and paid Kshs 100,000 on 6/3/2018, Kshs 200,000 on 25/4/2019 and Kshs 90,000 on 5/8/2019 leaving a balance of 10,201,415 as of 5/8/2019.

A Notice to Show Cause why execution should not issue was issued by the deputy registrar on 4/10/2019 and was duly served on the respondent's new advocates who on 29/1/2020 asked for time to peruse the court file and get further instructions from the respondent. On 20/7/2020 the respondent advocates called the appellants to collect a cheque for Kshs 319,000 in part payment of the decretal sum, interest and costs

The appellants contended that the respondents have not complied with Order 42 Rule 6 of the Civil Procedure Rules as this application is being brought after a delay of 6 years 5 months after judgement and they have not explained the reason for delay. The application is therefore inordinately late and seeks to deny the appellant the fruits of his judgment and defeat the cause of justice.

The appellants on 31/5/2021 filed a notice of motion brought pursuant to order 22 rule 7(2), Order 51 rule 1 of the Civil Procedure Rules and Sections 1A & 3A of the Civil Procedure Act seeking that appropriate directions be given in regards to Notice to Show Cause why execution should not issue dated 4/10/2019 which was served on the respondent on 11/10/2019 and it seeks orders that the appellant's application for execution dated 20/5/2021 be approved.

The application was supported by the affidavit of Samuel Wamutu Waiganjo. The appellant submitted that the appeal herein was determined on 17/2/2014 whereby judgement was entered in his favour for Kshs 513,845 payable with bank interest. He obtained a decree on 25/9/2015, a certificate of taxation on 9/1/2018 and a certificate of stated costs on 28/3/2019. During this time the respondents' advocate participated in the issuance of the decree and the certificates.

On 4/10/2019 the Deputy registrar issued a notice to show cause why execution should not issue and required the respondent to deposit Kshs. 10,201,406 in court failure to which an attachment and sale of goods would be issued. On 11/10/2019 the respondent was served with the notice and thereafter they attended court in 5/11/2019 where the respondents advocate requested time to peruse the file as they had been recently appointed. On 20/7/2020 the respondents issued a cheque for Kshs 319,000 but thereafter it seems that they decided not to pay the debt because they filed the Notice of Motion dated 22/7/2020.

The appellant submitted that the late appeal by the respondents is a device that is being used to further delay the payment of the decretal sum, interests and costs and is a miscarriage of justice.

The application was opposed by the replying affidavit of Norah A. Owino dated 13/7/2021 where it was contended that the respondents believed that an appeal had been filed by their former advocate and once they realized the mistake they appointed the firm of N.A Owino & Company to pursue an appeal out of time. Despite the new firms attempts to having the appeal filed file they were delayed by the Covid 19 pandemic which grounded judicial operations and the situation remained the same till later in the year 2020 when the restriction were eased.

The respondents asserted that they have an arguable appeal with a chance of success as they have been extremely prejudiced by the 20% interest per annum imposed by the judgement and that this application for execution is premature since there is already an application for stay pending appeal and leave to appeal out of time.

On perusal of the record what is undisputed is that the appellant on 11/12/2002 filed a suit in the lower court seeking payment of Kshs 513,845 as payment for woodblocks he had sold to the respondents. The trial court dismissed the matter and on appeal this court in its judgement dated 17/2/2014 found the appeal to be merited and ordered that the respondents pay Kshs 513,835 to the appellant with interest at bank rate as prayed from the date of filing the suit until full payment. A decree was issued and costs were later taxed.

The respondents have now approached this court in their application dated 28/7/2020, seeking extension of time to appeal out of time and a stay of execution pending the intending appeal. They indicated that they were not aware that their former advocates had not filed an appeal and that together with the Covid 19 pandemic is the reason for their delay in filing their appeal.

The principles that guide a court in considering an application for leave to file an appeal out of time were laid down by the Court of Appeal in the Case of **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015)eKLR** thus:-

> **"The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.**
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> **The parameters for the exercise of such discretion are clear. See MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486 and FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332 OF 2004 (unreported) where this court rendered itself thus:**
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> **"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the structure of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of**

**delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors."**

The Court of Appeal in **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR** as follows:

**"For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable.**

The Judgment in respect of which the Respondent seeks leave to file an appeal was delivered on 17/2/2014. The Application herein was filed on 28/7/2020 about 6 years 6 months later. This by all standards is inordinate delay.

The respondent has laid blame on their former advocates as they had believed that they had already filed an appeal. The appellants however indicated that the respondents cannot plead ignorance as their former advocates participated in the taxation process. The respondents also added that the Covid 19 pandemic was also to blame for the delay as there were restrictions put into place that delayed the filing of this application.

It is clear from the record that all along the applicants have been indolent. The appeal was initially heard by Justice H.M. Okwengu who delivered her judgment on 30th September 2009 in favour of the appellant. The appellant was awarded the claimed sum of Kshs.513,845 plus cost and interest at court rates. About ten (10) months later, the applicants filed an application seeking to set aside the judgment and have the appeal heard afresh. On 5th July, 2011 Justice M.A. Ang'awa allowed the application and the appeal was heard afresh. The complaint in that application was that the appeal was heard in the absence of their advocate.

The appeal was heard afresh and judgment delivered by Justice D.A. Onyancha on 17th February, 2014. The judgment was delivered in the presence of the applicants' counsel Mr. Kimathi who pleaded for a thirty (30) days stay of execution. That request was declined and the court directed that a formal application was to be filed. The respondent maintains that the applicants' counsel subsequently participated in the taxation of costs. The applicants went silent until 31st May, 2021 when they emerged through a different advocate after the notices to show cause were served on them. Once again Zohra Mohamed Baraka, the 1st applicant, in her supporting affidavit complained that she had instructed her former advocate to file an appeal but the same was not filed and prays that the ineptitude and negligence of her former counsel should not be visited on them. The applicants raised the same complaint against their advocate when they applied for the appeal to be heard afresh. If the applicants instructed their former advocates to file an appeal, how comes they went into slumber for over six (6) years without finding out whether the appeal was filed or not. This is nothing but an abuse of the court process. The same should be discouraged as the applicants have themselves to blame.

I do note that the debt has ballooned from Kshs.513,845 to Kshs.10,201,415. This was not a bank loan where the court could invoke the Duplum Rule. Section 44A (4) of the banking Act (Amendment No. 9 of 2006) states as follows:-

**"This section shall not apply to limit any interest under a court order accruing after the order is made."**

From the provisions of the above section, the applicants are duty bound to pay the decretal sum plus interest as ordered by the court. It is the applicants who failed to pursue the matter with their advocates and they have to settle the claim as awarded by the court. The court awarded interest of 20%p.a. as prayed. Section 26(1) of the Civil Procedure Act vests the courts with the discretion to award interest on pecuniary judgments. The application seeks to review the interest rate but is brought after inordinate delay.

This court finds that the respondents have not given a plausible explanation for the delay because even before the pandemic they were indolent in prosecuting their intended appeal as five years passed without them finding out anything about their matter. Their application for extension of time therefore fails. Having found as above the respondents' application for stay of execution also fails as I have already found that unreasonable time has passed before the application was filed.

On the second application the appellants are seeking directions in regards to Notice to Show Cause why execution should not issue on examination of the record this court notes that Notice to Show Cause was set down for hearing several times but the parties were never heard. The appellant is at liberty to execute.

The upshot is that the application dated 28th July 2020 lacks merit and is hereby dismissed with no orders as to costs.

**DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2021.**

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**S. CHITEMBWE**

**JUDGE**