



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCA NO.E031 OF 2019.**

**EMI TRAVEL LIMITED.....RESPONDENT**

**VERSUS**

**KENYA RUGBY UNION(Sued through it's under named lawful officers being**

**1. THE CHAIRMAN.....1<sup>ST</sup> APPELLANT/APPLICANT**

**2. THE SECRETARY.....2<sup>ND</sup> APPELLANT/APPLICANT**

**3. THE TREASURER.....3<sup>RD</sup> APPELLANT/APPLICANT**

**RULING**

1. Through the application dated 8<sup>th</sup> January 2020, the Applicants/Appellants herein seek the following orders:

**a) Spent.**

**b) That this honourable court be pleased to vacate and/or set aside the orders of the honourable magistrate G. A. Mmasi (Mrs) (SPM) sitting at Milimani Chief Magistrate's Commercial Courts issued on the 8<sup>th</sup> day of November, 2019.**

**c) That this honourable court be pleased to direct that the Appellants'/Applicants do not deposit the balance of the decretal sum being Kshs 6,183,671.20 on/before 29<sup>th</sup> January 2020 in the judiciary account pending the hearing and determination of this application.**

**d) That this honourable court be pleased to direct that the Appellants'/Applicants do not deposit the balance of the decretal sum being Kshs 6,183,671.20 on/before 29<sup>th</sup> January 2020 in the judiciary account pending the hearing and determination of the appeal.**

**e) That pending the hearing and determination of this application, the respondent's agent Timothy Awuor t/a Nairobi Connections Auctioneers be compelled to release the Appellants'/Applicants' goods and motor vehicle registration number KBF 946H Toyota Hilux pick up double cabin on running attachment.**

**f) That the agent Timothy Awuor t/a Nairobi Connections Auctioneers be compelled to release the Appellants'/Applicants' goods and motor vehicle registration number KBF 946H Toyota Hilux pick up double cabin on running attachment pending the hearing and determination of the Appellants'/Applicants' instant application.**

**g) That the agent Timothy Awuor t/a Nairobi Connections Auctioneers be compelled to release the Appellants'/Applicants' goods and motor vehicle registration number KBF 946H Toyota Hilux pick up double cabin on running attachment pending the hearing and determination of the Appellants'/Applicants' appeal.**

2. The application is supported by the affidavit of the applicants counsel, Mr. **Jared Nchore Orare** and is brought in the grounds that:

**a) That the Appellants'/Applicants' are unable to comply with the court order of 8<sup>th</sup> November 2019 on/before 29<sup>th</sup> January**

2020 as they are financially crippled due to lack of sponsorship and are currently pursuing the sports fund for disbursement of monies to the rugby fraternity through the Ministry of Sports.

*b) That the Appellants'/Applicants' have tried explaining their financial position to the respondent but all their efforts have been frustrated this leaving them with no other option but to seek this courts intervention.*

*c) That the stay of execution order was conditioned upon the Appellants'/Applicants' depositing the sum of Kshs 12,367,342.36 in court within 60 days of the said order which period lapses on 29<sup>th</sup> January 2020.*

*d) That upon depositing the said decretal sum: half the amount would be released to the decree-holder/respondent and the balance would be held in court pending hearing and determination of the appeal.*

*e) That the Appellants'/Applicants' herein have since gone ahead and paid the sum of Kshs 6,183,671.20 to the respondent herein (which is double the principal sum owed) in compliance with the stay of execution order granted by the Honourable Magistrate G. A. Mmasi(Mrs) (SPM) on the 8<sup>th</sup> day of November, 2019.*

*f) That the respondent extracted warrants of attachment through the firm of Timothy Awuor t/a Nairobi Connections Auctioneers who proclaimed the Appellants'/Applicants' goods and motor vehicle registration number KBF 946H Toyota Hilux Pick Up double cabin.*

*g) That the Kenya Rugby Union (Appellants'/Applicants') use the attached motor vehicle to run its daily operations and the continued attachment and seizure of the same has paralysed its work and if execution was to issue in default of payment of the balance of the decretal sum; the Kenya Rugby Union (Appellants'/Applicants') will not only suffer irreparable loss and damage but this instant application and MILIMANI HIGH COURT CIVIL APPEAL NO. E031 OF 2019 will be rendered nugatory in the event of success.*

*h) That the reasons advanced herein above constitute sufficient grounds to warrant the grant of the orders sought.*

*i) That it is therefore only fair and just that the said court order issued on 8<sup>th</sup> day of November, 2019 be vacated/set aside to enable the (Appellants'/Applicants') continue managing the sport of Rugby in the Country without a noose hanging over its head of imminent sale of its goods and motor vehicle KBF 946h Toyota Hilux pick up double cabin.*

*j) That no prejudice shall be occasioned to the applicant if this application were to be allowed.*

3. The respondent opposed the application through the grounds of opposition dated 15<sup>th</sup> January 2020 wherein it states that the applicant is guilty of laches and that the application is not brought in good faith and is an abuse of the court process. The respondent also opposed the application through the replying affidavit of its Director, **Esther Wambui Karua** sworn on 15<sup>th</sup> January 2020 wherein she avers that even though the judgment the subject of the appeal was delivered on 22<sup>nd</sup> July 2019, the applicant did not take steps to challenge the said judgment until October 2019 when they were served with the warrants of attachment.

4. She avers that the applicants thereafter sought and obtained leave to appeal out of time and stay of execution before the lower court. She contends that the magistrate's court lacks the jurisdiction to extend time to file an appeal and that the instant appeal is therefore incompetent.

5. She states that the order for stay of execution granted to the applicants was conditional on the judgment debtor depositing the entire decretal sum in court by 8<sup>th</sup> December 2019 and that the attachment of the applicants goods is legal and in accordance with the court's decree.

6. The application was canvassed by way of written submission which the parties' respective advocates highlighted at the hearing thereof.

7. I have considered the pleadings filed herein and the submissions by counsel together with the authorities that they cited.

8. The main issues for determination are:

*a) Whether the applicants have made out a case for the granting of the orders sought in the application.*

*b) Whether the Chief Magistrate's court had jurisdiction to extend time to file the appeal.*

#### **Jurisdiction**

9. While advancing the argument that the Magistrates' court lacks the jurisdiction to extend time within which to file the appeal, counsel for the respondent cited Section 79G of the Civil Procedure Act which stipulates as follows:-

#### ***Time for filing appeals from subordinate courts***

***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.***

10. Under section 2 of the Civil Procedure Act, court is defined as ***the High Court or the Subordinate Court acting in exercise of its civil jurisdiction.***

11. Having regard to the above cited sections of the Civil Procedure Act I find that Section 79G does not specifically provide that only the High Court can extend time within which to file an appeal from the subordinate court. A further reading Section 79G shows that even where time for filing an appeal has lapsed, the court may still extend such time where sufficient grounds have been provided.

12. My above finding notwithstanding, and assuming that I am wrong in the finding that the lower court may grant leave to file an appeal out of time, I find that this is not the forum where the challenge on the extension of time granted by the lower court may be made. My take is that if the lower court erred in granting leave to appeal out of time, then such an order may only be challenged in a proper appeal against the said decision.

13. Turning to the prayers to set aside and/or vacate the orders of the lower court of 8<sup>th</sup> November 2019, I find that such prayers can only be made before the court that granted the impugned orders and not this court.

14. I note that the applicants concede that they have complied, albeit partly, with the impugned orders of 8<sup>th</sup> November 2019 by depositing part of the decretal sum in the judiciary account and that it is their failure to deposit the full decretal sum in court that rightly precipitated the issuance of warrants of attachment of the applicant's property. In other words, the applicants concede that they did not comply with the impugned orders fully.

15. The applicants now seek the intervention of this court to vary or set aside the lower court's orders. I find that such variation or setting aside can only be made by the court that issued the orders and not this court. I agree with the respondent's argument that the instant application is an abuse of the process of court and that the applicants are guilty of laches as they waited until the expiry of the time, granted by the Lower Court, to deposit the decretal sum before filing the instant application.

16. In conclusion, I find that the application is not merited and I therefore dismiss it with costs to the respondent.

**Dated, signed and delivered in open court at Nairobi this 27<sup>th</sup> day of February, 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mrs Omumia for the applicant

M/S Karua for the respondent

Court Assistant: Sylvia