REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. CIVIL APPLICATION NO. 10 OF 2020

MOI UNIVERSITY.....APPLICANT

VERSUS

KAIRA NABASENGE.....1ST RESPONDENT

EDWARD TOO.....2ND RESPONDENT

JOHN TAMAR.....3RD RESPONDENT

RULING

1. By a notice of motion dated 24.01.2020, supported by an affidavit of **RECCE MUKHABANI MWANI, MOI UNIVERISTY** (the applicant) prays;

(a) to be allowed to file appeal out of time from the judgment delivered on 13th September 2019 in Eld. CMCC No. 681 of 2006 (consolidated with Eld CMCC No.446 of 2008),

(b) that there be stay of execution of the decree, pending hearing and determination of the appeal,

(c) that the memorandum of appeal annexed be deemed as properly filed and served, upon payment of requisite court fees,

(d) that the attachment by M/S Lister Auctioneers be declared illegal and set aside ex-debito justiciare.

2. The application is premised on grounds that;

a) The judgment was delivered without prior notice to the appellant,

b) Upon delivery of judgment, the firm of Nyairo Advocate who represented the applicants was never served with notice of Entry of judgment to enable them advise their client and seek instructions on whether to appeal or not,

c) The firm of advocates was served with an extracted decree on 2nd December 2019, and when a representative visited the court registry on 3rd December 2019 with a view of obtaining a copy of the judgment, the court file could not be traced. They were eventually only able to peruse the court file on 24.01.2020 after the applicant's property had been proclaimed, pursuant to warrants of attachment issued on 20th January 2020.

3. That is when the applicant's counsel realized that the warrants of attachment and proclamation issued, were not in line with the judgment as provided under Order 21 Rule 7 and 8 of Civil Procedure rules – which is why the applicant asks the court to find that the attachment by Lister Auctioneers is illegal and must be set aside.

The applicant is aggrieved by the judgment and wishes to appeal against that decision.

4. In opposing the application through a replying affidavit sworn by **KAIRA NABASENGE** (1st Respondent) the court is urged to find that the application is brought in bad faith and after inordinate delay, the intention being to delay the respondents enjoyment of the fruits of their judgment. He points out that the matter took 13 years to determine and most of the issues raised are either res judicata or subject for review by the trial court and not the High Court eg. Application for stay. That in any event **REECE MUKHABANE MWANI** who has sworn the

affidavit in support of the application is the applicant's advocate, and has no authority to depone on behalf of his clients, matters relating to evidence.

5. It is contended that it was not necessary to issue a notice of entry of judgment, which he maintains only applies when there is an exparte judgment and not in instances of inter partes hearing.

6. Further, that one of the reasons why the matter took 13 years to be finalized is because the court file kept disappearing, and at some point a skeleton file had to be constructed, and subsequently kept in the strong room, so there is no way that the file could not be traced if requested for. That in any event the applicants have not presented any letter written to the Chief Magistrate requesting for the court file or about none availability of the same. The respondents point out that judgment was delivered in the absence of both parties, after the scheduled date aborted, but the steps of realizing the judgment by applying for the decree and sending same to the applicant's counsel with a request to pay.

7. That if the applicant is dissatisfied with the figures appearing on the decree then it ought to seek review from the trial court, not pursue an appeal.

8. It is the respondent's contention that the intended appeal will be inadmissible pursuant to provisions of Section 79B of CPA since the issues are res judicata, and the matter has been deliberated by the High Court in two separate matters ie. **Eld HC JR MISC. APPL. 31 of 2005 and HCCC No. 118 of 2006.**

Further, that the draft memorandum of appeal does not raise any arguable issues and allowing the appeal to be filed out of time will be waste of time.

In any event, if the appeal succeeds, the respondent are persons of means who could easily refund the sums awarded.

Delivery of judgment exparte: Order 21 Rule 1 places a duty on the trial court to notify parties of delivery of judgment.

Section 79G of the Civil Procedure Act provides that:

> **Every appeal from a subordinate court to the High Court shall be delivered within thirty days from the date of the decree or order appealed against, excluding fro, the lower court certify as having been requisite for preparation and delivery the appellant 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.**

9. At the hearing of the application, Miss Odwa submitted that because the judgment was delivered in absence of both parties so the appellant could not have immediately taken steps to address its dissatisfaction in the decision. This is not contested, actually the judgment was delivered in the absence of both parties after several aborted sittings by the trial court. Certainty the court had a duty to notify parties of judgment and failed. So if the last time the matter came up in court was on 30th October 2019 when both parties were present in court, and thereafter nothing happened, then the logical question to ask is, what steps did the parties take to demonstrate diligence and keen interest in the matter and mitigating lapses.

10. The applicants simply chose to sit and wait, until they were jolted from slumber by a prelude to the execution process. So they cannot wave the no notice of entry of judgment card to seek indulgence – after all neither of them was notified that judgment had been entered.

11. Of course there is nothing wrong in seeking leave to file appeal out of time but what good cause was there for failing to file the appeal out of time? The applicants say that upon hearing that the judgment had been delivered and decree issued, attempts to trace the court file failed. The respondents say it is common knowledge to the parties that given the history of disappearance of the court file, the file had been kept in the strong room. This is not denied. But even if the applicant was to be given the benefit of doubt and it be assumed that it was not aware of the strong room arrangements, then what steps were taken to show that the file had been requested for and was not available. Not a single correspondence has been presented to this court neither a letter to the Chief Magistrate of Executive Officer asking for the file or complaining about is on availability. I am afraid that lament about the missing file is simply hot air intended to cause the court go on a guilt trip. It has no leg on which to stand.

12. The applicants also state that there exists an arguable appeal. Mrs Odwa did not address the court on this limb, and Mr Nabasenge's contention is that the appeal will fail abinitio as the matters raised have already been dealt with by the High Court in two other similar matters. That in any event, the issue regarding the figures in the decree not agreeing with the suit awarded in the judgment is not a matter of appeal, but can easily be addressed in a review. Without going into the details of the intended appeal, the memorandum of appeal raises issues of fact as well as issues of law. They are not limited to only administrative issues or calculation of figures which could be remedied through review and perhaps this is the only issue which give a lifetime to the applicant **[See FIRST AMERICAN BANK V SHAH [2002]/EA 05]** consequently the applicant be and is hereby allowed to file and serve appeal out of time. The memorandum of appeal filed herein shall be deemed to be properly filed upon payment of requisite court fees.

13. Stay of Execution: Mrs Odwa submits that the amount awarded in the decree judgment is colossal, yet in the judgment, all that the court said was that the respondents were entitled to a refund without specifying the amount to be refunded. That based on that ambiguity the Respondents drafted an inflated decree which includes interest totaling to Kshs.9,926,543.

14. The applicant is apprehensive that if the amount is paid out and the appeal succeeds then the applicant may never recover the money as

no affidavit of means was recorded.

15. A rejoinder to this is that most of the respondents are persons of substance, being advocates in private practice, judicial officers and employees of various institutions, who can each easily refund the Kshs.50,000/- each applicant is entitled to. I take judicial notice that indeed some of the respondents are advocates practicing in this town as well as judicial officers in various part of the County. Of course that alone does not proved that they are financially liquid. Nonetheless, I take cognisance of the sentiments expressed in the case of ***Paul Nderitu Mwani & Anor' V Jacinta Mbete Mutisya and Anor' [2018] eKLR*** to the effect that when confronted with an application for stay pending appeal, a court must consider the twin overriding principles of proportionally and equality which is aimed at placing parties on equal footing and see where the scales of justice lie, considering the fact that transitional motions should not render the ultimate end of justice nugatory.

16. In this case the scales to balance is whether in declining to grant stay, the appeal would be rendered nugatory, or the applicant may lose a large sum of money to persons who may not repay, or whether in granting stay the respondents will be denied a chance to enjoy the fruits of litigation which has been in the corridors of justice for 13 years.

Therefore the overriding rights of the applicants must NOT derogate the respondent's rights to reaping from their litigation. Let me paraphrase the words of the court in ***Macharia t/a Macharia & Co. Advs v East African Standard*** that the court's should be slow in getting obsessed with the protection of an intending appellant in total disregard of the successful respondent, flirting with the sob story of losing a colossal sum if stay is not granted. Where the allegation is that the respondent will not be able to refund the decretal sum, the burden is upon the applicant to prove that. The applicant has not demonstrated that the respondents are persons of such depleted means, to the extend that if the sums awarded are paid out then they would fail to refund.

17. The only challenge here is that the judgment did not specify the sums payable, simply saying the parties were entitled to a refund. I think the rule of common sense dictates that the decree be drawn in the line with what was prayed for in the pleadings which was kshs.50,000/- per student – that doesn't take Calculus to work out. That is something that the respondents ought to correct in the decree before carrying out execution. The judgment awarded a refund and costs and if interests was intended then the same can be addressed by **REVIEW** - that would not be a reason to order stay of execution.

Simply lamenting that the sum is colossal does not demonstrate the ***"substantial loss"*** element referred to under Order 42 rule 6 (2).

In any event the applicants have not even offered any security for due performance and I find no basis upon which to grant stay.

Each party shall bear tis own costs.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 27th day of **February 2020**

H. A. OMONDI

JUDGE