



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 41 OF 2019**

**MARGARET ANINDO T/A IGARE AUCTIONEERS.....RESPONDENT**

**VERSUS**

**DAVID TARUS.....RESPONDENT**

**RULING**

[1] This Ruling is in respect of the application dated **25 March 2019**. It was filed by the Appellant under **Sections 3A and 79G of the Civil Procedure Act, Chapter 21** of the **Laws of Kenya and Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. The prayers sought thereby are:

[a] Spent

[b] Spent

[c] That the Court be pleased to extend the time for the filing of appeal in respect of the ruling and order made on **10 December, 2018** in **Kapsabet SPMCC No. 130 of 2017: David Tarus vs. Margaret Anindo T/A Igare Auctioneers;**

[d] That the appeal filed herein be validated upon the grant of leave per prayer [c] above;

[e] That there be a stay of execution of the judgment in **Kapsabet SPMCC No. 130 of 2017: David Tarus vs. Margaret Anindo T/A Igare Auctioneers** pending the hearing and determination of the appeal herein;

[f] That the costs of the application be provided for.

[2] The main ground raised in support of the application is that the impugned decision was delivered without notice; and that the time for appeal had already lapsed by the time the Appellant got to know of it. In her Supporting Affidavit, the Applicant averred that her proposed appeal raises fundamental issues and therefore that it would be in the interests of justice to give it a chance. In support of her application, the Appellant annexed, *inter alia*, a copy of the Notice to Show Cause issued by the lower court to demonstrate that unless the orders sought are granted, her appeal will be rendered nugatory.

[3] The Respondent opposed the application and, to that end, filed a Replying Affidavit sworn by him on **24 June 2019**. He averred therein that the Appellant was all along aware of the ruling of the Court; and had failed to account for the delay in filing this application, pointing out that she had the habit of failing to attend court for no good reason. The Respondent also urged the Court to note that, before the lower court, the Appellant failed to file a defence or to attend court for hearing; and, therefore, that she has not given a good reason why she should be given a chance for appeal.

[4] The application was canvassed by way of written submission, pursuant to the directions issued herein on **25 June 2019**. Thus, the Applicant's written submissions, dated **16 September 2019**, are to the effect that good and sufficient cause has been shown for extension of time pursuant to **Section 79G** of the **Civil Procedure Act**; and for stay of execution pending appeal. On the other hand, the submissions of the Respondent were that notice of the date of ruling was duly given by the lower court; and that the Applicant has no one to blame but herself for her failure to attend court. Counsel relied on **Davis & Shirliff Ltd vs. Attorney General** [1978] eKLR for the submission that the process server, as an officer of the court cannot be blamed for the Applicant's failure to defend the lower court suit.

[5] I have given due consideration to the application and the submissions made herein by counsel for the parties. The background facts are largely undisputed. The parties are the disputants in the lower court suit, namely, **Kapsabet SPMCC No. 130 of 2017;** and, as far as can be

ascertained a default judgment was obtained therein, after the Applicant failed to file a defence. The Applicant then unsuccessfully moved the lower court for the setting aside of the default judgment; and it is that ruling that provoked the instant application.

[6] **Section 79G of the Civil Procedure Act**, which is one of the enabling provisions cited by the Applicant, provides that:

**"Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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 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."**

[7] At paragraphs 7 to 14 of her Supporting Affidavit, the Applicant set out the chronology of events with a view of demonstrating that no notice of judgment was given by the lower court. She explained that the ruling was initially set to be delivered on **29 October 2018**, but that it was not delivered as scheduled. The ruling was thereafter postponed to **5 November 2018**; and then **12 November 2018** but again, it was not delivered. The Applicant stated that ultimately, they were advised that the ruling would be given on notice. According to her, no such notice was served on her Advocate, and was surprised when the Notice to Show Cause was served for **11 March 2019** (marked **Annexure J**). The Applicant annexed documents to buttress her averments in this regard, marked **Annexures D-G**; and to show that by the time she got to learn of the ruling, the appeal window provided for in **Section 79G of the Civil Procedure Act** had lapsed.

[8] Other than an averment that the Applicant was aware of the date of ruling, the Respondent did not refute the Applicant's assertion that the ruling was to be given on notice and that no notice was served. In the premises, I am of the view that sufficient cause has been shown by the Applicant to warrant extension of time. Having so found, I would be of the considered view, which I hereby take, that the Applicant is entitled to stay pending the hearing and determination of her appeal. She has demonstrated that a Notice to Show Cause has already been issued for purposes of execution; and that she stands to suffer substantial loss unless execution is stayed, as required by **Order 42 Rule 6, Civil Procedure Rules**.

[9] On the question of prejudice, having weighed the competing interests and rights of the parties, I take the view that the party that would suffer the most prejudice would be the Applicant, should she be denied a chance to pursue her appeal. As matters stand, the Respondent already has a Decree in his favour; and the delay in its enjoyment, if any, will invariably be compensated for by costs as well as interest on the principal sum, should the appeal turn out to be frivolous. In the premises, I would adopt the position taken in **Banco Arabe vs. Bank of Uganda [1999] 1 EA 22**, which I hereby do, that:

**"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."**

[10] In the result, the orders that commend themselves to me, and which I hereby issue are as hereunder:

[a] That the Applicant be and is hereby granted leave to appeal out of time from the ruling and orders made on **10 December 2018** in respect of the Applicant's application dated **8 June 2018** in **Kapsabet SPMCC No. 130 of 2017: David Tarus vs. Margaret Anindo T/A Igare Auctioneers**; and that her Memorandum of Appeal dated **25 March 2019** be and is hereby admitted out of time;

[b] That execution of the judgment in **Kapsabet SPMCC No. 130 of 2017: David Tarus vs. Margaret Anindo T/A Igare Auctioneers** be and is hereby stayed pending the hearing and determination of the appeal;

[c] That the costs of the subject application shall abide the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2020

OLGA SEWE

JUDGE