



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. CIVIL APP NO. 19, 18, 12 OF 2018

SIMON GITONGA WACHIRA.....PLAINTIFF

V E R S U S

AUGUSTINE NZIOKA KIVUVO.....DEFENDANTS

RULING

1. The applicant vide application dated 18/3/2019 seeks an order that he be granted leave to file a reference and/or appeal against the ruling delivered on 21/2/2019 out of time.
 2. The applicant was also seeking a stay of execution of the certificate of costs dated 11/3/19 pending hearing and determination of the intended reference/appeal.
 3. The application is based on the ground that he learnt of the ruling which was delivered on 21/2/2019, through a letter from the Firm of M/s S. G. Wachira dated 22/2/2019. The applicant had no notice of the delivery of the ruling and was not in court when the ruling was delivered. The applicant is apprehensive that the execution may proceed and he is likely to suffer irreparably. He is ready to provide security.
 4. The application is supported by the affidavit of the applicant sworn on 18/3/2019.
- Prayer -3- for stay was granted ex-parte in the interim.
5. The respondent opposed the application and filed a Replying affidavit sworn on 25/4/2019. His contention is that the application is frivolous, vexatious (sic), unmerited (sic) and an abuse of court process. That the applicant was served with the notice that the ruling of the bill of costs shall be delivered on 21/2/19. The notice is annexed marked SGW-1. That the respondent was aware as the secretary of G. O Ombachi & Co. Advocates was present in court and later disappeared around 2.00 Pm. The applicant has admitted that he learnt about the ruling on 22/2/19, and he ought to have enquired about the ruling at the registry and proceed to file the appeal. The applicant wrote a letter to the Deputy Registrar requesting the reasons for assessing the Bill of Costs and a reply was given on 12/3/2019. The respondent prays that the application be dismissed.
 6. The parties agreed to canvass the application by way of written submissions. For the applicant it is submitted that the applicant be given leave in the interest of justice as there was no mistake on his part.
 7. For the respondent it is submitted that the applicant was aware of the ruling a day after it was delivered and has not given any reason for the delay in filing the appeal. The applicant and his Advocate were not diligent. The respondent is willing to refund the amount in the certificate if the appeal succeeds. It is further submitted that the appeal is premised on falsehoods and lacks cogent explanation.
 8. I have considered the application. The applicant seeks the exercise of discretion by this court in his favour. It is trite that courts discretion must be exercised judicially.
 9. From the record, the ruling of the Deputy Registrar was delivered on 21/2/2019. There is a copy of a notice dated 18/2/19 annexure SGW-1- showing that a notice of delivery was sent to the parties. The applicant therefore had notice of delivery of the ruling. There is no explanation why the applicant and his Advocate did not attend court. The allegation that the secretary of Mr. Ombachi was in court has not been denied. The applicant has also admitted that he was notified of the ruling the day after it was delivered. The issue which arises for determination is extension of time to file reference from the taxing officer's decision. Clause 11 of the Advocates (Remuneration) Order states that the court has discretion to extend time for lodging a reference notwithstanding the expiry of 14 days period prescribed for the reference from the taxing master's decision on costs. It provides:-

11(1) "should any party object to the decision of the Taxing Officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

4. The High Court shall have power in its discretion by power to enlarge the time fixed by sub-paragraph.

5. The High Court shall have power in its discretion by order to enlarge the time fixed by sub-paragraph(1) or (2) for the taking of any step application for such an order maybe made by chamber summons upon giving to every other interested party not less than three clear days notice in writing or as the court may direct and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

The Order gives the High Court jurisdiction to extend time for filing a reference in the High Court.

10. When considering whether to exercise discretion in favour of the applicant, the court has to consider whether the applicant is likely to suffer substantial loss, whether the application has been filed without unreasonable delay and security. This is as provided under **Order 42 Civil Procedure Rules**.

11. Substantial Loss:-

This can be determined by considering the amount of costs and whether the respondent would be able to reimburse.

The taxed costs amounts to Kshs 10,342.00/-. The respondent has submitted that he would be able to reimburse the costs if the appeal succeeds. In Misc. 18/2018 the taxed costs are Kshs 60,228.00/-. In Misc 12/2018 the taxed costs are Kshs10,874/-. The total is Kshs 81,444/-. The amount is not substantial. The applicant is not likely to suffer substantial loss.

12. Delay

The application was filed on 18/3/19. The applicant was served with notice that the ruling was delivered on 22/2/19. He waited for nearly one month without taking action. The delay was inordinate.

13. Security

The applicant has stated that he is ready to provide security.

The applicant has not demonstrated that he deserves the exercise of discretion by this court. The applicant is guilty of delays which has not been explained. The applicant has not demonstrated good faith as the Secretary of his Advocate was in court when the ruling was to be delivered an indication that they received notice of delivery of ruling. Despite that they took no action until nearly a month later when they filed this application. I find that the applicant does not deserve the exercise of the discretion by this court. I order as follows:-

1. The application lacks merits and dismissed.

2. Costs to the respondent.

3. The ruling to apply in Misc. Application No. 12/2018 and 18/2018.

Dated at Kerugoya this 12th day of March 2020.

L. W. GITARI

JUDGE