



**Radha Motors Limited v Kerandi & another (Suing as the Legal Representative
of the Estate of the Late Dennis Kereore Kerandi - Deceased) (Civil
Appeal 18 of 2018) [2020] KEHC 10489 (KLR) (6 August 2020) (Ruling)**

Neutral citation: [2020] KEHC 10489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL 18 OF 2018
AN ONGERI, J
AUGUST 6, 2020**

BETWEEN

RADHA MOTORS LIMITED APPELLANT

AND

NELSON KERORE KERANDI 1ST RESPONDENT

AGNES MORAA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
DENNIS KEREORE KERANDI - DECEASED**

*(Being an appeal against the judgment and Decree of the Hon. M. Nyigei, SRM delivered
on the 7th February 2018 in Bomet Magistrate's Court Civil Case No. 55 of 2016)*

RULING

1. The Appellant/Applicant under Certificate of Urgency filed an Application by Notice of Motion dated 7th August, 2018 brought under Article 159 of *the Constitution* of Kenya, 2010, Section 1A, 1B, 3A, 3B, 63(e) and 95 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 50 Rule 6, Order 22 rule 22, order 42 Rule 6 and Order 51 Rule 1 Civil Procedure Rules, 2010 and all enabling provisions of law together with the Supporting Affidavit of Rameez Muhammad sworn on the same day seeking orders that:
 - a) That this matter be certified urgent and service thereof be dispensed with in the first instance (spent).
 - b) That time for lodging an Appeal against the Ex parte judgment delivered on 7/02/2018 in Bomet Principle Magistrate's Court Civil Case No. 55 of 2016; Nelson Kerore Kerandi



& Agnes Moraa (Suing as the legal representative of the Estate of Dennis Kerandi Kerore (deceased) Vs. Radha Motors Limited, be enlarged.

- c) That the annexed Memorandum of Appeal be deemed to have been filed within time and therefore properly on record upon payment of the requisite fee;
- d) That consequently, leave be granted to the Applicant to lodge Record of Appeal within sixty (60) days of payment of the fee subject of prayer 3 hereinabove.
- e) That consequently, pending the inter parties hearing of this application: -
 - i) There be stay of execution of the ex parte judgment delivered herein on 7/02/2018 as well as the resultant Decree and all/any consequential orders/process subject thereof;
 - ii) An order of injunction do issue restraining the Respondents, whether by themselves, their agents, servants, employees, assigns or anyone howsoever claiming through them from interfering with the Appellant's peaceful, quiet and derivative use of all her moveable properties subject of the annexed proclamation of attachment/repossession/distrain of moveable property dated 7/08/2018, and/or otherwise dealing with said items in any manner adverse to the Appellant's interest therein.
- f) That the OCS, Central Police Station, Mombasa, do supervise the execution of this order, provide security, and ensure no public disturbance ensues, whilst maintaining law and order throughout and after the execution of this order.
- g) That the interim orders subject of prayers/orders nos. 5 and 6 hereinabove do persist until the hearing and determination of the Appeal subject thereof.
- h) The costs of this application be provided for.

Appellant's Case

2. In the Supporting Affidavit of Rameez Muhammad; the Director of the Appellant's company, it is alleged that vide Complaint dated 21/04/2015, the Respondents sued the Appellant seeking inter alia, special and general damages on behalf of the Estate of the Deceased, on account of fatal injuries sustained through a road traffic accident that allegedly occurred on 25/08/2014 along Bomet - Sotik road involving Motor Vehicle Registration Number KBY 798D, apparently registered in the name of the Appellant.
3. He avers that the matter proceeded Ex-parte in the absence of the Appellant on or about 14/06/2017, whereupon, vide Notice of Motion Application dated 27/06/2017, the Appellant sought and was granted, inter alia, leave to defend against the Respondents' claim, with the order of remitting to the Respondents Kshs. 15,000/= within 7(seven) days with effect from 4/10/2017, the said amount being in respect of throw-away costs. Neither the Appellant's Directors nor her employees were notified of the outcome of the said Ruling, and were oblivious of the import thereof, through no fault on their part.
4. On 29/03/2018, the Appellant's Director was served with a Proclamation Notice of even date indicating that a substantial portion of her movable property was, by a copy thereof, rendered the subject of attachment on account of a Decretal amount of Kshs. 6,096,400.50/=, apparently emanating from those proceedings.
5. Consequently, the Appellant's Director inquired from the Respondent/s previous Advocates on record M/S Christine Kipsang & Co. Advocates, Mombasa, about the subject proclamation Notice,



- it being clear beyond peradventure that the said firm of Advocates had represented the Appellant throughout the said proceedings.
6. It is averred that upon receiving no concrete information as to the reasons for issuance of the said Proclamation Notice, the Appellant's Director then approached the Appellant's current firm of Advocates for appropriate assistance and redress, and, upon perusal of the Court record, it emerged that:-
 - i. The suit proceeded ex parte on 13/12/2017, the Appellant's previous Advocates on record having received the relevant hearing notice "under protest" as they were never invited to fix said hearing date, and the same was grossly inconvenient as they had other matters on said date fixed earlier;
 - ii. There is on record a third party notice dated 31/05/2017 as well a notice of motion application dated 18/07/2017, seeking, inter alia, leave to serve the said third party notice upon the named third party, ELIJAH GATHOGO MWANGI, by way of substituted service (registered post) through his last-known postal address, P.O. Box 57-00232, Ruiru-Kenya;
 - iii. The said application was pending for hearing and determination as at the date that this matter proceeded ex parte, 13/12/2017;
 - iv. The case ought not to have proceeded on 13/12/2017 in light of the foregoing.
 7. Further, a clear perusal of the statement of defence filed on behalf of the Appellant reveals that the subject motor vehicle was sold to the said ELIJAH GATHOGO MWANGI, the named Third Party, on 5/04/2013, long before the date of the alleged accident, 25/08/2014. Also it came to the Appellant's attention that: -
 - i. Vide agreement dated 12/05/2014, ELIJAH GATHOGO MWANGI, agreed to enjoin in the Registrar of Motor Vehicles' Records, one JANE WAMBAI NENE of C/O P.O. Box 732, Githunguri-Kenya, as an equal co-owner of said motor vehicle by virtue of her equal contribution to purchase of said motor vehicle.
 - ii. Vide letter dated 19/01/2015, addressed to ELIJAH GATHOGO MWANGI, the motor vehicle's insurers at the time of its sale to third party, M/S APA Insurance Limited, vitiated/avoided the insurance policy on account of the said third party's violation of express terms and conditions therein.
 8. By dint of the foregoing, it is clear beyond peradventure that the Appellant was wrongly enjoined in the said proceedings, and, notwithstanding said anomaly, had a credible defence against the Respondent's claims, by virtue of being neither the insured nor beneficial owner of the issue vehicle as at the date of the alleged accident.
 9. Further, there being a pending application for determination in the court record, and the emergence of a second third party eligible for joinder, the matter was proceeded ex parte.
 10. It is stated that quite importantly, any deficiency in the prosecution of the Defence case arose, if any, through no fault on the part of the innocent appellant, it being trite law that apparent mistake of counsel ought never be visited upon an innocent litigant.
 11. That vide Notice of Motion Application dated 3/03/2018, the Appellant sought, and was granted at the first instance, inter alia, stay of execution of the ex-parte judgment delivery on 7/02/2018 as well as the resulted decree and all orders/process consequential thereto. The said application was disposed



of inter parties by way of written submission whereupon the Honorable Court reserved its ruling for delivery on 11/06/2018, which ruling was subsequently deferred to 2/07/2018.

12. The Applicant indicates that on 2/07/2018, the Honorable Court delivered its ruling to the effect that:

“...if I am to delve into that matter (setting aside ex parte judgment), I will appear to be sitting on Appeal on a decision of a fellow Magistrate, which will be improper.

13. Considering the circumstances of this case, and the fact that the Trial Magistrate is not sitting, it is only proper that the Applicant pursues an Appeal to the High Court. I am not therefore able to determine the Application dated 3rd April, 2018 for the reason given. I will make no order as to the costs of the Application.”
14. The Applicant avers that the said ruling to be rather ambiguous, and vide letter dated 6/07/2018 addressed to the Executive Officer Bomet Law Courts, the Appellant through her advocate on record sought that the subject court file be placed before the honorable trial court at the earliest for purposes of taking directions on the said application.
15. It was stated that owing to the initial trial court’s absence from court station, the court file was again placed before the instant subordinate court on 30/07/2018 for the envisaged purpose, and, again, the honorable court declined to issue any substantive orders.
16. Applicant avers that as it stands now, the Respondents have made application for, and been issued with, warrants of attachment and sale in respect of the appellant’s property pursuant to the impugned decree, and through M/S Worn-No-Words Auctioneers, have proceeded to proclaim said property in envisage satisfaction of the same impugned decree, whilst the appellant, through her advocates on record, has taken tangible, reasonable steps to set aside the impugned ex parte judgment to no avail. His only recourse now is to lodge Appeal against the impugned ex-parte judgment, albeit out of time.
17. Therefore, it is stated that it is only in the interest of justice, fairness, equity, constitutionalism, principles of the Rules of Law and Natural justice and Protection of Fundamental Rights and Freedom enshrined in *the Constitution* of Kenya, 2010 that this Application ought to be allowed as prayed.
18. Applicant prays that this honorable court grants the orders as sought herein with the urgency they merit, the execution of the impugned decree shall, in all likelihood, proceed to its logical conclusion, to the Defendant’s utter detriment on account of her utility of said property in her commercial enterprise, the net resultant loss whereof would be too onerous to be redeemed in any way, matter of form.
19. On 15th October, 2018 the Applicant filed Supplementary Affidavit sworn by the same Rameez Muhammad. It is further argued that Respondent has approached the application for enlargement of time to appeal and stay of execution pending such appeal as thought the same were appeal proper.
20. He also replied that the Respondent admits both directly and indirectly that the situation the Appellant finds herself is not of her own making, having been previously represented by the firm of M/S Christine Kipsang & Co. Advocates.
21. It is also believed that by virtue of all the incontrovertible averments in both the affidavits filed by the Applicant, as well as deposit of half of the decretal amount subject hereof as directed by the court, the Applicant has duly fulfilled the threshold requirements thereby making out a prima facie case to warrant grant of all the orders sought in the instant Application.



22. Attached with the Supplementary affidavit is affidavit sworn by Christine Kipsang previously on record for the Defendant/Applicant. In her affidavit she retaliates the content of the Supporting Affidavit by Rameez Muhammad. She further averred that Ms. Koech who apparently held brief for her and indicated that the court could proceed and serve a judgment date is not known to her as she had never interacted with such an individual, neither could her firm representative or herself give any such instructions as insinuated by such individual.

Respondent's Case

23. On 27th August 2018 the Respondent filed his Replying Affidavit sworn on 22nd August, 2018.
24. In his response, the Respondent expresses that the averment by the Appellant that the proceedings in the Lower Court on the 13th December, 2017 were ex-parte is erroneous and misadvised. He avers that both parties were represented where M/sKusa Advocate held brief for MoseNyambega Advocate for the Plaintiff/Respondent while, M/sKoech Advocate held brief for Kipsang Advocate for the Defendant/Applicant.
25. Further it is averred that M/sKoech indicated to the court that they were ready to take a hearing date and the court went to schedule judgement for 7th February, 2018.
26. The Respondent argues that on 31/5/2017 an application by the Applicant to enjoin a third party was heard and orders granted allowing the Applicant to enjoin a third party to the proceeding thereafter, a hearing date was given for 14/6/2017 by consent.
27. It is said that on the hearing date there was no representation by the Applicant. Respondent filed submissions with notice to the Applicant. Subsequently, the advocate for the Applicant filed an application to set aside the proceedings of 14/06/2017 which application was heard on the 28/6/2017 and the court ordered that the same should be served upon the Respondent and the third party for inter parties hearing on 19/7/2017, which was not done.
28. The Respondent indicates that inter parties hearing was adjourned to 23/8/2017 whereby the court allowed the Applicant to file supplementary affidavit if need be and directed the parties to canvas the application dated 27/6/2017 by way of written submissions. By consent the matter was scheduled for mention on 13/9/2017.
29. On 13/9/2017 there was no representation by the Applicant or their advocate and no explanation was given. The Respondent confirmed filing of submission and a ruling date scheduled for 4/10/2017 which ruling notice was served upon the Applicant's advocates.
30. On 4/10/2017 the court allowed the Applicant's application seeking the set aside of ex-parte proceedings of 14/6/2017 with conditions attached that; throw cost of Kshs. 15,000/= be paid to the Respondent within 7(seven) days from the date of the ruling which the Applicant had not complied with.
31. After the collapse of 7(seven) days as given, Respondent requested for a mention date for purposes of taking a judgment date and the same was issued for 13/12/2017 and a mention notice served upon the Applicant's advocates who received it under protest.
32. Respondent avers that the court perused affidavit of service dated 11/12/2017 filed on 17/12/2017 and proceeded to issue a judgement date for 7/2/2018. That on 19th March, 2018 judgment was served upon M/s Christine Kipsang & Co. Advocates vide Notice of Entry of Judgment dated 16th March, 2018.



33. Respondent argues that the Notice of Motion dated 7th August, 2018 craves for dismissal as the prayers thereof 1-5 inclusive are devoid of merit as the applicant is in effect seeking to reengineer its case after fully participating in the Lower Court and or committing omission and commission which are inexcusable and not attributed to the court or the respondent.
34. The Respondent replied that it is not the duty of the court to supervise communication between the advocates on record and their clients and that the advocates as officers of the court have/had an obligation to ensure full adherence to the orders and direction of the court as contemplated under Section 1A (1), (2), (3) of the Civil Procedure Act.
35. It is also argued that the period of appeal contemplated in the Civil Procedure Act lapsed a long time ago and that the Applicant has not tendered plausible grounds for enlargement of time to accommodate an appeal out of time and that the intended appeal is a mere agitation on the part of the Applicant and that this application is intended and calculated to suffocate limited judicial time and that the same should be dismissed with costs.
36. The Respondent in response to Article 159 (2) of the Constitution of Kenya, 2010 as relied by the Applicant, the Respondent states that this Article does not contemplate exercise of judicial authority to overturn a judgment based on substantive justice and that the said Article has been invoked in abstract considering the aptness of the proceedings culminating in the judgment under execution.
37. Finally, it was replied that the court extended adequate indulgence and accommodated the Defendant/Applicant and that the right to be heard and the procedural and substantive rights impended therein were adequate availed to the Applicant. the court therefore performed its duty and mandate within the ambit of the Constitution and legal contemplations thus, the judgment should not be disturbed.
38. It is therefore Respondent's reply that this application is an afterthought intended to deny the Respondent the fruits of the judgment and the decree of the court.
39. On 29th October, 2018 the Respondent filed their Further Replying Affidavit and it is averred that the said affidavit filed by the applicant confirms that the Defendant/Applicant through his counsel previously on record fully participated in the case and that the said advocate was accorded ample opportunity by the court to ventilate the client's case.
40. It is also averred that this application is convoluted with prayers that are premature and incapable of grant as the merit of the judgment cannot be questioned at the stage of seeking enlargement of time.
41. The Application was later canvassed by written submission where the matter was scheduled for hearing to highlight the submissions on 29/10/2018.

Applicant's Submissions

42. Chemutai Counsel for the Applicant adopted submissions dated 12th October, 2018 and filed on 15th October, 2018.
43. It is submitted that the issues for determination is whether or not the Applicant has fulfilled the threshold requirements for grant of orders of enlargement of time to lodge appeal and; stay of execution pending appeal.
44. It is indicated that the previous advocate for the Appellant Christine Kipsang failed to inform the Applicant of the proceedings in the lower court when their application seeking leave to defend the claim against them was allowed and that throw-away cost of Kshs. 15,000/- as ordered was not paid.



The Applicant came to be aware that judgment was delivered when they were served with notice of proclamation for the decretal sum of Kshs. 6Million.

45. It is submitted that upon inquiry they did not get any forthcoming answer and upon perusal of court's record they released that on 13.12.2017 the matter had proceeded ex parte. That the advocate was served with notice which was received under protest. Additionally, there is an application that was yet to be heard however, exparte judgment was effected in favor of the Plaintiff.
46. Counsel submits that in their supplementary affidavit which has been attached affidavit by Christine Kipsang who has made an explanation that she has never interacted with any Koech.
47. Relying on Section 79G of the *Civil Procedure Act*, Order 50(6), 42(6) of the Civil Procedure Rules, 2010 and the case of Mutiso Vs. Mwangi (1999)2 EA 231 (CAK) and Reliance Bank Ltd Vs. NorlakeInvestment Ltd (2002) 1 EA 227 (CAK) the applicant submits that it is well established that the decision whether or not to extend time to file an appeal is essentially discretionary. And what the court should determine first the length of the delay; secondly, reason for delay thirdly, the chances of the appeal succeeding if the application is granted; and lastly, the degree of prejudice to the Respondent if the application is granted.
48. In conclusion the Appellant seeks for appeal to be allowed out of time as mistake was by their Advocate. It is submitted that the Applicant has sufficiently made out a prima facie case to warrant grant of the orders sought in the application.

Respondent's Submissions

49. Mose Counsel for the Respondent adopted submissions dated 18th September, 2018 and filed on 19th September, 2018.
50. The Counsel reiterated the contents in their replying affidavit and further affidavit filed in reply to the instant application. It is submitted that the Applicant is seeking to set aside the judgment of the lower court. The case was filed on 21.4.2015 and Defence on 26.6.2015 it took 2(two) years from the date of filing Defence to apply for Third Party Notice whereby time limits is 14days from the date of filing Defence.
51. The 3rd Party is not properly in court's file however, the court extended indulgence. It was indicated that by the conduct of the Defendant/Applicant he was not keen to pursue the third party enjoinder to the suit. the Advocates for the Applicant fully participated effectively and substantively for and on behalf of the Applicant throughout up to judgment.
52. It is submitted that this application is an effort to overstretch the discretion of court and to take it and the parties to square one and to deny the Respondent the fruits of the judgment.
53. Counsel submitted that this application is blatant abuse of court's process. further, the Applicant received several indulgences from court but failed to use the same within the meaning as contemplated *Civil Procedure Act*. Additionally, it is submitted that the Applicant fully participated and was aware of the happenings and fully briefed. It is also submitted that when court allocated 14th June, 2017 as the hearing date for the suit, both the Applicant and their advocate were in court but no one attended court on that day.
54. However, the court on application by the Applicant set aside the proceedings on that day with conditions attached in which it was until 17th November, 2017 when the Respondent requested for a mention date for direction; 43days of unexplained indolence on the part of the counsel for the Applicant.



55. It was submitted that the affidavit by Christine Kipsang is evasive and that it has no evidential value. Further, it was submitted that this matter is for setting aside of judgment therefore, it should be left to court's discretion.
56. In finality it was submitted that if the court finds that the application lacks merit, the Respondent be allowed to proceed with execution and request that the entire decretal sum and cost be deposited. However, if it proceeded on merit, the Respondent will take serious the directions of the court. Therefore, the Respondent prays that this application be dismissed.

Issues for Determination

57. After perusing the Application Notice of Motion, Replying Affidavit, Supplementary Affidavit and Further Affidavit filed, parties' submissions together with legal authorities relied upon, what is deemed for determination is:
- (i) Whether there can be orders of stay of execution? and;
 - (ii) Whether the court can grant orders for extension of time to file appeal out of time?

The Law

58. Section 79G provides for time for filing appeals from subordinate courts and it provides that; every appeal from a subordinate court to the high court shall be fixed within a period of thirty days from the date of the decree or order appealed against
59. Section 95 provides for enlargement of time and expressly states that;
- “where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

Civil Procedure Rules, 2010

60. Order 22 rule 22 provides when court may stay execution and it provides as follows;
- “the court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellant jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.
61. Order 42 rule 6 provides for stay in case of appeal and it states as follows;
- “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made



by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

62. Order 50 rule 6 provides for power to enlarge time and stipulates as follows;

“where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the cost of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

63. Order 51 rule 1 provides for ways in which application shall be brought before court and it is by way of notice of motion which shall be heard in open court unless, the court directs that the matter be heard in chambers or unless the rules expressly provides.

Analysis

64. On issue I it was argued by the Applicant that judgment was entered ex parte and that they were not aware of the same until and when they were issued with Notice of Proclamation and upon perusal of the court’s record. Appellant also argued their previous advocate on record was served with hearing notice however, it was received under protest.

65. In her Affidavit M/s Christine Kipsang Advocate confirmed that she was the previous advocate for the Applicant and she also confirmed that she was served with the hearing notice which was received under protest indicating that she had prior engagements.

66. In reply, the Respondent stated that the Applicant had an active advocate M/s Christine Kipsang on record who was aware of the proceedings of the case. He argued that the advocate was served with relevant notices and that on 17/11/2017 the day the matter had been fixed for hearing M/s Koech advocate held her brief and sought for a judgment date. It was also submitted that the Court had on many occasion indulged the Applicant’s advocate who was not keen in defending the matter against the Applicant. Additionally, the Advocate was aware of the Judgment date since they were served with notice.

67. Additionally, the Applicant was also accorded ample time to enjoin a third party to the proceedings. The application was granted but the Applicant failed to have the third party enjoined in the suit. Therefore, it is misleading to the court that this matter had not been tackled.

68. Order 12 rule 2(a) provides that if on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the Plaintiff attends, if the court is satisfied that notice of hearing was duly served, it may proceed ex parte. On 14th June, 2017 the matter had proceeded ex parte however, the Applicant’s advocate was able to have the proceedings set aside in which she was granted with conditions which was not met prompting the Respondent to seek for entry of judgment which was successful. Also in this event, nothing was pursued by the Applicant nor the advocate on record.

69. In the current case, the Applicant’s application seeking to set aside proceedings of 14/6/17 was allowed with conditions attached which conditions were not met. The matter later on proceeded for judgment and nothing was done. Judgment was delivered on 7th February, 2018 and this application for stay



brought in August, 2018 seven (7) months down the line and was only spurred by the impending execution of decree.

70. Again, the Applicant was granted time to enjoin a third party to the proceedings which he failed therefore, he should not be heard to say that a third party was not included in the proceedings.
71. However, the advocates were to blame for their clients' misfortune and I find that the court is aware it has under order 22 rule 22 Civil Procedure Rules, 2010 unfettered discretion in an application such as this one, the court however, in order to exercise that discretion has to be satisfied that the Applicant deserves to be accorded an order for stay of execution.
72. On issue 2 section 79G provides for time for filing appeals from subordinate courts. The Court in exercising their discretion whether to extend time to file an appeal out of time, some of the factors to consider were suggested by court of appeal in *Mwangi Vs. Kenya Airways Ltd (2003)* and include the following:
 - i. The period of delay;
 - ii. The reason of the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
 - v. The importance of compliance with the time limits to the particular litigation or issues; and
 - vi. The effect in any on the administration of justice or public interest if any is involved.
73. The Applicant argued that they were not aware of the judgment entered against them up and until 29/03/2018 when the Appellant's Director was served with a proclamation Notice. He further stated that upon inquiry from their previous advocates on record M/S Christine Kipsang & Company Advocates no answer was given hence contracting the current advocates; Ngonze & Ngonze Advocates for representation.
74. The Applicant states that via Notice of Motion dated 3/04/2018 they sought to have the ex parte judgment set aside but no avail as the instant court ruled that since the trial court was not sitting then it would be proper for the Applicant to pursue an appeal to the High Court. That again on 30/7/2018 court file was placed before the instant subordinate court but was declined any substantive orders.
75. The Respondent on the other hand argued that the Applicant was fully represented by the then advocate on record who was fully aware of all the proceedings of the case. He further argued that all the relevant notices in addition to notice of judgment date was served upon the advocate. Therefore, it cannot be said that the Applicant was not informed.
76. I find that it is not in dispute that the Appellant is seeking extension of time to file an appeal in a case that proceeded ex parte. The Appellant was not granted a chance to apply to set aside the ex parte judgment but was told to file an appeal. I find that the Appellant has explained that he was not aware that the case had proceeded ex parte until he was served with notice of proclamation for the decretal sum of KShs. 6 Million.
77. The issue before me is whether the Applicant should be granted enlargement of time and stay of execution. In exercising the discretionary power to grant or refuse to grant enlargement of time, the court has to be guided by some factors including.



- i. Whether there has been indolence on the part of the applicant or default which has not been explained;
 - ii. Whether the applicant is guilty of abuse of court process.
 - iii. Whether the enlargement will prejudice the defendant.
 - iv. Whether the denial of further period to comply will occasion prejudice to the applicant given the circumstances of the case.
 - v. Whether the enlargement is necessary for the effectual complete adjudication of the issues in controversy;
 - vi. Whether it is just to enlarge time in the circumstances of the case.
78. Once the court is persuaded that it is in the interest of justice to enlarge time, it will exercise its unfettered discretion in favour of the applicant and impose terms and conditions on which it will allow enlargement of time, which requirement, besides an award of costs to the respondent as espoused in the proviso to Order 50 Rule 6, serves the legitimate expectation on the part of the respondent that he is not being unfairly prejudiced by such enlargement.
79. In the current case I find that it is not in the interest of justice to drive away a party from the seat of justice for mistakes not of their own making. It is not in dispute that the Applicant was not aware of the hearing notice served upon his former Advocate. In the case of *Ramanya V Zaver*(2002) 2 EA 329 the Court held that :
- “ The mistakes, faults or dilatory conduct of counsel should not be visited on the litigant.”
80. It is for the above reasons that I exercise my discretion and allow the application for enlargement and I extend the time for filing the appeal by 45 days from this date.
81. I also grant orders of stay of execution of the decree in the lower court pending hearing and determination of the impending appeal.
82. The proclamation of attachment/repossession/distrain of the Applicant’s moveable property dated 7/08/2018 be and is hereby lifted and the Applicant to pay Auctioneer’s charges, if any.
83. In addition to the above orders, and pursuant to the proviso to order 50 Rule 6, and as the delay in complying with the order of the court within the stipulated period was not occasioned or contributed to by the respondent in any way, I order that the respondent be compensated by an award of thrown away costs of this application assessed at kshs 50,000/- to be settled within the next 30 days from the date hereof in default, the respondent shall be at liberty to execute for recovery of the said thrown away costs notwithstanding the pendency of the intended appeal.
84. I also order that the memorandum of appeal filed herein be deemed to have been filed within time upon payment of the filing fee.

DELIVERED, SIGNED AND DATED AT BOMET THIS 6TH DAY OF AUGUST 2020.

A. N. ONGERI
JUDGE

