



REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 48 OF 2019

ICEA LION GENERAL INSURANCE COMPANY.....APPELLANT

VERSUS

CHRIS NDOLO MUTUKU

T/A CRYSTAL CHARLOTTE BEACH RESORT.....RESPONDENT

(Being an Appeal arising from Judgment and Decree in Civil

*Case No. 80 of 2018 in the **Principal Magistrate's court at Bondo***

delivered on 9th October 2019 by Hon. E.N. Wasike, Senior Resident Magistrate)

RULING

1. There are two Applications subject of this Ruling. Both applications were filed under certificate of urgency and were certified as urgent for consideration expeditiously and set for mention on 21/10/2020 for directions interpartes. On 21/10/2020, both counsel for the respective parties appeared and indicated their readiness to argue their respective applications. The court then granted their wishes to have the two applications heard simultaneously by way of oral submissions hence this twin Ruling.

APPLICATION DATED 7/10/2020

2. In the application dated 7/10/2020, the Respondent/Applicant **CHRIS NDOLO MUTUKU T/A CRYSTAL CHARLOTTE BEACH RESORT** seeks, materially, that the draft cross appeal annexed to the application be admitted for hearing out of time and be deemed as duly filed and served. The respondent also prayed for further or other orders as are appropriate for the effective and fair administration of justice. He prayed that costs be in the cause.

3. The grounds upon which the application is predicated are ten in number. The respondent also swore an affidavit in support of the application, reiterating the grounds in support thereof. In the grounds and deposition, the Respondent **MR CHRIS MUTUKU** who is also an Advocate of the High Court asserts that the Appellant's Memorandum of Appeal was served on him on 21/11/2019 simultaneous with an application for stay of execution in the lower court and that the Respondent was by law expected to file his cross appeal within 30 days after the said service, thus, by 22/12/2019. He asserts and deposes that under Order 50 Rule 4 of the Civil Procedure Rules, time does not run between 21st December and 13th January hence the proper last day for filing of the cross appeal was 14th January 2020.

4. Counsel further deposed and asserted that due to the fact that there was an application pending ruling before the court in Bondo Court and owing to the distance between Nairobi and Bondo, the Respondent was unable to obtain a copy of the court's judgment for purposes of perusing it and deciding on its merits or otherwise.

5. It is further deposed that immediately after hearing the appellant's application for stay of execution in the lower court interpartes, Hon. E.N. Wasike the Presiding magistrate was transferred from the station and that he carried with him all pending files to his new station for writing of rulings and judgment which Ruling was subsequently delivered on 6/2/2020 by Hon. Nandi the succeeding magistrate, without notice to the Respondent and that he only came to learn of it in March 2020.

6. Further, that immediately thereafter, and before he could apply for and obtain a copy of the judgment, covid-19 restrictions were imposed upon the country.

7. Counsel asserted that failure to file the cross appeal was neither deliberate nor due to indolence or recklessness but that it was occasioned by factors beyond the control of the Respondent.

8. He asserted further that it will be a gross miscarriage of justice if he is denied the opportunity to ventilate his grievance before the court and that no prejudice shall be occasioned to the appellant if the orders sought are granted.

9. No replying Affidavit or grounds of opposition were filed. However, the appellant's counsel opposed the application by the Respondent through oral submissions when the matter came up for oral hearing on 21/10/2020 contending that the Respondent was aware of the appeal filed in November 2019 but never saw it fit to file a cross appeal as prescribed in the Act. In his view, no reasons had been advanced for the nearly one year inordinate delay yet the court has already given directions on the disposal of the main appeal. Mr. Otieno Njoga counsel for the appellant urged this court to dismiss the application by the Respondent.

APPLICATION DATED 15/10/2020

10. The application dated 15/10/2020 filed by the appellant seeks for review of the orders of this court made on 7/10/2020 with respect to the conditional stay orders granted by the trial court on 6/2/2020 and that the ruling of 7/10/2020 be substituted with an order that the court deems fit. The appellant also sought for stay of execution of decree in Bondo PM CC 80/2018 pending hearing and determination of the application. He also prayed for costs of the application.

11. The grounds upon which the application is predicated are on the face of the application dated 15/10/2020 and supported by an affidavit sworn by Mr. Dancan Otieno Njoga advocate and annexures thereto and the said grounds are echoed in the deposition by counsel for the appellant.

12. According to the appellant, this appeal which is said to be of high chances of success was filed challenging judgment on quantum and liability in Bondo PM CC 80/2018 and that the decree holder's financial status is unknown as per his evidence in the trial court hence if the decretal sum is paid to him and the appeal succeeds, the appeal shall be rendered nugatory as it will be impossible to recover the decretal amount from him.

13. The appellant concedes that the stay granted by the trial court on 6/2/2020 was conditional. That the respondent had written to this court on 25/9/2020 asking for release of the primary trial court file to Bondo Law courts for initiating execution process against the appellant. That failure to comply with conditional stay orders granted on 6/2/2020 was as a result of the Respondent's failure to avail a copy of his National Identity card (a crucial document/requiring for opening of a joint account which fact the Respondent allegedly never disclosed to this court when the parties advocates appeared on 7/10/2020.

14. It was further asserted by the appellant's counsel that had the appellant been notified of the issue of noncompliance in advance, it could have responded which would have enabled the court reach a different conclusion.

15. That failure to comply with conditional stay is explained and excusable.

16. In the supporting affidavit which is very lengthy and detailed comprising 20 paragraphs, the appellant's counsel reiterates the grounds and annexes documents which include correspondence between his firm and the Respondent, and gives a chronology of events from the time the trial court issued a conditional stay to be complied within 45 days from 6/2/2020, to date adding that the appellant is willing to furnish security as ordered on 6/2/2020 for the due performance of decree and that no prejudice will be occasioned to the Respondent if the orders sought herein are granted. Counsel further deposes on the reasons for noncompliance with the conditional stay, blaming the Respondent for failing to submit his National Identity Card as requested and required for purposes of opening a joint interest earning account.

17. This application was also argued orally. The Respondent did not file any replying affidavit or grounds of opposition. In support of the application, Mr. Otieno Njoga counsel for the appellant argued, reiterating his grounds and depositions in the detailed supporting affidavit, maintaining that the Respondent's failure to submit copy of his National Identity card is what caused the delay in complying with the conditional stay of execution of decree in the lower court. Counsel submitted that the bundles of emails annexed show that the default was excusable, which information was not placed before this court by counsel handling the matter on 7/10/2020.

18. It was further submitted that counsel reminded the Respondent of the fact that the email attaching copy of identity card could not open and that despite reminders he did not respond. He urged the court to review the orders of 7/10/2020 and grant the appellant stay of 30 days to have the cheque issued by the client replaced or the court to order for depositing of the monies into court instead of opening a joint account.

19. Opposing the appellant's application, Mr. Mutuku submitted that after the Ruling of this court of 7/10/2020, the appellant's counsel went to the lower court and without disclosure, obtained a stay order which had the effect of overturning orders of this court dated 7/10/2020 and when a preliminary objection was raised disclosing the ruling of 7/10/2020, the trial court upheld that preliminary objection and struck out the application for stay hence this application.

20. Further, that this application was filed even before the ruling in the Bondo law Courts was delivered which amounts to abuse of the court process. Mr. Mutuku Counsel submitted that the principles for review and stay are clear. On the allegations that he delayed in submitting the copy of ID Card requested for, Mr. Mutuku submitted that the many emails annexed by the Appellant's counsel to his affidavit show that the Id Card was attached together with the KRA PIN Certificate yet they have never claimed that they never received the KRAPIN Certificate. In addition, it was argued that the appellant's counsel took their time from May to July before informing him that the attachment send to them in May could not open which was further delay on their part. is incapable of paying the decretal sum, counsel submitted that the value of the policy giving rise to the suit and judgment is KShs. 50 million which valuation was done by the appellant insurer and that he has practiced law for 30 years hence KShs. 600,000/= part of the decretal sum was not significant.

21. On allegations of non-provision of the identity card copy, the Respondent relied on the emails annexed to the appellant's counsel's supporting affidavit stating that he resent them several times and that from May 2020, he never heard from the appellant's counsel until July 2020 which was over two months when they claimed they were unable to open the email attachments. He submitted that Mr. Njoga even

responded saying that the image on the identify card was not clear hence the allegations that no identity card was submitted was not true. He further submitted that he had been in legal practice for 30 years and that his property subject of these proceedings was valued by the Appellant at Kshs 50 million the insurable value thereof hence the appellant could not allege that he was incapable of refunding the decretal sum should the appeal succeed.

22. The Respondent also submitted that if the appellants were willing to open a joint account but were in any way frustrated by the Respondent, they should have applied to court or deposited the money into court but waited until execution process was initiated before rushing to court.

23. He submitted that the appeal has no chances of success, and urged the court to dismiss the application for review.

24. In a rejoinder, Mr. Njoga submitted that there was nothing before court to show that the Respondent was in a position to refund the decretal sum should he be paid and the appeal succeeds. Further, that counsel who attended court on 7/10/2020 had no full facts on the issue of the ID Card for the Respondent which was a requirement for opening of a joint account.

25. Further, that in an email dated 13/8/2020, the Respondent had conceded in his Replying affidavit before the trial court that he had send an email to a wrong address of 'duncan' instead of 'dancan' that is why the appellant's counsel did not receive the identity card.

26. Counsel submitted that this court could call for the trial court record to assist in making a proper determination.

DETERMINATION

27. I have carefully considered the two applications and oral responses thereto. Both applications were filed under Certificate of urgency hence the necessity to consider them expeditiously as agreed by both counsel who were ready to proceed.

APPLICATION DATED 7/10/2020

28. The application for leave to file a cross appeal out of time was brought under Sections 1A, 1B, 3, 3A, 63(e) & 79G of the Civil Procedure Act and order 50 Rule (6) and Order 51 Rule 1 of the Civil Procedure Rules.

29. The only reference to the term cross appeal in the Civil Procedure Rules is in Order 42 Rule 32 which provides:

“32. The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further, or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents although such respondents may not have filed any appeal or cross appeal.”

30. The above provisions, read together with Section 79G of the Civil Procedure Act presupposes that a respondent can also file a cross appeal, upon being served with a Memorandum of Appeal. Section 79G of the Civil Procedure Act provides:

“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 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.”

31. The appellant having filed an appeal on 5/11/2019 challenging the trial court's judgment and decree of 9/10/2019, it was expected that the Respondent, upon being served with the appeal, should have filed a cross appeal within 30 days from date of service which is 21/11/2019.

32. The Respondent was equally at liberty to file a separate appeal challenging the judgment/decree of 9/10/2019 upon which the two separate appeals could have been consolidated and heard together. The Respondent concedes that he was served with a Memorandum of Appeal on 21/11/2019 and as correctly asserted, time does not run from 21/12/2019 until 13/1/2020 hence the cross appeal should have been filed on or before 14/1/2020. None was filed.

33. The Respondent further claims that the judgment in the lower court was delivered upon which the trial magistrate was transferred from the station and he left with pending files to complete writing his rulings/judgments and in this case, that there was an application for stay of execution of decree pending appeal whose ruling was delivered on 6/2/2020 without notice to the respondent and he only learnt of it in March 2020.

34. However, it is clear from the grounds and affidavit of Mr. Mutuku that clearly, judgment was delivered on 9/10/2019 and between that date and thirty days thereafter which lapsed on 9/11/2019, if he wanted to file an appeal challenging quantum of damages awarded to him, nothing prevented him from so lodging an appeal. The Respondent is a seasoned advocate of the High Court, and of thirty years standing and therefore operating from Nairobi to Bondo could not have hindered him from lodging an appeal challenging quantum of damages awarded to him. He did not have to wait until the appellant files an appeal before he files a cross appeal. In addition, albeit time did not run from 21/12/2019 to 13/1/2020, this is not a bar to filing of any documents into court. The Respondent did file his bill of costs on 7th November 2019 which bill of costs was drawn or dated 11th October 2019. Furthermore, a few days after judgment was delivered, on 11th October

2019, he wrote to court asking for issuance of decree.

35. In my humble view, considering that the Respondent was essentially a self-represented litigant who is highly learned in matters law and procedure, he did not require instructions of a thirty party client to decide whether to file an appeal or cross appeal in time or to seek for enlargement of time within a reasonable period of time.

36. My humble view is that as at the time that the Respondent was arguing (in opposition) to the application for stay of execution of decree issued in his favour, he already had knowledge of the judgment in his favour and even if he was learning of the Ruling on conditional stay made on 6/2/2020 later in March 2020, having filed a replying affidavit opposing the stay is a clear indication that he was aware of the judgment and decree that was being stayed. He could have filed the Appeal or cross appeal simultaneous with the filing of his Reply to the application for stay.

37. Furthermore, the Respondent has already set in motion the process of executing decree as passed on 9/10/2019 before filing this application for leave to file a cross appeal out of time. In my humble view, the explanation given for the delay is not acceptable.

38. There is no sufficient or good cause why counsel would not act with alacrity to protect his own interests within reasonable time. The delay which is nearly one year in inordinate and inexcusable to warrant exercise of judicial discretion of this court in his favour. I do not find any inadvertence.

39. In **Thuita Mwangi Vs Kenya Airways Ltd [2003] eKLR** the court stated:

“It is well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for delay; and thirdly; (possibly) the chances of the appeal succeeding if the Application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”

40. Similarly, in **Nicholas Kiptoo Arap Koriri Salat Vs IEBC & & Others [2014]eKLR** the Supreme Court of Kenya stated:

“(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

(3) Whether the court should exercise discretion to extend, is a consideration to be made on a case to case basis;

(4) Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;

(5) Whether there will be any prejudice suffered by the Respondent if the extension is granted;

(6) Whether the application has been brought without undue delay; and

(7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

41. Whereas the delay between 21/12/2019 to 14/1/2020 is catered for by law, there is no satisfactory explanation for the delay from 14/1/2020 to 7/10/2020 when this application was filed. Even during the covid-19 pandemic, courts were never closed. Pleadings or documents were filed and continue to be filed via email.

42. In my humble view, the Respondent did not have to wait until the appeal herein is ready for trial before seeking to file a cross appeal out of time. He has also not demonstrated that he will suffer any prejudice unless the leave sought so belatedly, is granted.

43. On whether the Respondent is likely to suffer any prejudice, it is my humble view that inordinate delay in itself causes prejudice and impedes on the adverse party’s legitimate expectation to expeditious disposal of proceedings.

44. Article 159 of the Constitution is clear that justice shall be administered without undue delay. The inordinate delay in this case disentitles the Respondent the discretion of this court. As was held in **E T Monks & Company Limited V Evans & 3 Others [1974] eKLR**, public policy demands that the business of the court be conducted with expedition. And in **DICKSON MIRITI KAMONDE v KENYA COMMERCIAL BANK LTD [2006] eKLR**, it was held that:

“...The delay cannot be excused and an indolent party must reckon with consequences of inaction.”

45. In **Fitzpatrick Vs Batger and Co. Ltd [1967]2 ALL ER 657** the court held:

“I have great sympathy with many solicitors in the difficulties which they had to face in litigation of this kind; but grossly inordinate delay of the kind which has occurred in this case is quite inexcusable and ought not to be tolerated. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition. It is not only in the interest of the defendants that this should be done but it is perhaps even in the interest of the Plaintiff themselves.”

46. In Gideon **Sitelu Konchella Vs Daima Bank Ltd [2013] eKLR** citing **Mobil Kitale Service Station v Mobil Oil Kenya Limited & another [2004] eKLR** it was held:

“It is the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously. The overriding objectives of the Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

47. In the instant case, the application for extension of time has been made after undue delay and the explanation for the delay is unsatisfactory. I find no sufficient or good cause for the Respondent not filing an appeal or cross appeal in time or applying for extension of the lapsed time within reasonable time.

48. I decline to grant the orders sought and dismiss the application dated **7/10/2020**.

49. Order accordingly.

APPLICATION DATED 15/10/2020

50. On the Application for review of the Ruling of 15/10/2020 made by this court with regard to the conditional stay, I must first and foremost clarify that Ruling. The Ruling was clear that the matter was before the court for directions on appeal, which appeal had been admitted to hearing on 16/7/2020. On that very day, the court was confronted with the question of whether there was a valid stay order, the conditional stay granted on 6/2/2020 having lapsed after 45 days and there being no compliance or order extending the period for compliance.

51. The conditional stay order was made by the trial Magistrate **Hon. Nandi, Principal Magistrate at Bondo** on 6/2/2020, after delivering a Ruling written by **Hon. E. N. Wasike SRM**. The order of stay of execution of decree pending appeal was not made by this court. It follows that only the court that made the Order for stay can enlarge or extend the time for compliance and where the court declines is when the aggrieved party can approach this court for appropriate orders as provided for in law. Jurisdiction to review orders of the court primarily lie with the court that made the orders in question.

52. To call upon this court to enlarge time on the orders of 6/2/2020 is tantamount to interference with judicial discretion and jurisdiction of the trial court.

53. On 7/10/2020, this court gave directions on appeal and directed the trial court record which had been requested for by the trial court, on application by the Respondent decree holder to be returned to the lower court as it was apparent that the Respondent was interested in executing decree yet the lower court file was held up in this court without any valid order of stay of execution of decree.

54. It is that ruling on directions which the appellant herein seeks for review, variation or setting aside and in the affidavit sworn by Mr. Njoga, he urges this court to enlarge the time for compliance with the conditional stay granted by the trial court.

55. Section 80 of the Civil procedure Act provides that: -

“Review:

Any person who considers himself aggrieved: -

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.”

64. Under Order 45 Rule 1 of the Civil Procedure Rules:

“Application for review of decree or order [Order 45, rule 1.]

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or

order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

2. To whom applications for review may be made [Order 45, rule 2.]

(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

3. When court may grant or reject application [Order 45, rule 3.]

(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

4. Application where more than one judge hears [Order 45, rule 4.]

(1) Where the application for a review is heard by more than one judge and the court is equally divided the application shall be dismissed.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

5. Re-hearing upon application granted [Order 45, rule 5.]

When an application for review is granted, a note thereof shall be made in the register, and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

6. Bar of subsequent applications [Order 45, rule 6.]

No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.

56. From the above provision, a court can only review its orders if the following conditions exist or are fulfilled:

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; Or

(b) There as a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay.

57. The main question in the application beforehand is whether the appellant has fulfilled the above preconditions to warrant an order of review.

58. I have considered the reasons for review of this court's ruling of 7/10/2020. I observe that the appellant filed the application expeditiously within 8 days from the date of ruling which is not an inordinate delay. The appellant had been granted conditional stay of execution of decree in the lower court. That conditional stay was made on 6/2/2020. The condition was that the appellant deposits Kshs, 600,000/= into a joint interest earning account to be operated by both parties' advocates and as the Respondent Advocate party/Plaintiff was self-represented, he was automatically to be one of the joint account holders. The deposit was to be made within 45 days of the date of the ruling. There was no compliance with those orders of stay.

59. One of the key elements that a court of law is bound to consider when granting an order of stay of execution of decree pending appeal as stipulated under Order 42 Rule 6(2) of the Civil Procedure Rules is the security to be given by the party appealing, for the due performance of decree appealed from. It is upon such main consideration that the court will make a determination on an application for stay. The trial court did consider arguments made by each party on the application for stay of execution of decree, which application was made immediately after judgment was delivered in the lower court, before granting a conditional stay with timelines.

60. If for any reason, the appellant was prevented from implementing the conditional stay, the law is pretty clear. The appellant should have approached the court that issued a conditional stay, to seek for enlargement of time within which to comply with the orders of conditional stay.

61. This court is vested with jurisdiction under Order 42 Rule 6(2) of the Civil Procedure Rules to consider an application for stay of execution of decree of the lower court, where, whether the appellant has applied for such stay and the lower court has dismissed the application for stay or where no application for stay has been sought in the lower court.

62. In the instant case, there was no application for stay of execution of decree filed before this court, upon which this court could make any orders, which orders would be capable of being reviewed.

63. Albeit the appellant has given a chronology of events following grant of the conditional stay, those events are not relevant to this court in this application as this court did not issue any conditional stay which was not complied with. The chronology of events and such alleged non submission of a copy of an identity card by the Respondent are matters that should have been placed before the trial court in an appropriate application seeking for enlargement of time within which to comply with the conditional stay.

64. As at 7/10/2020, there were no orders of stay in place or application seeking for enlargement of time and therefore no orders of this court can be construed to have vacated the orders of 6/2/2020 which were nonexistent. This court simply acted on what was prevailing in the file and released the trial court file to be placed before the trial court for execution of decree as there was no valid stay order and as no order of enlargement of the time for compliance was in place.

65. I reiterate that there was no application for stay of execution of decree before this court. I therefore find no reason to delve into depths or whether or not the Applicant/Appellant has good reasons for not complying with the conditional stay or whether the Respondent contributed to the delay complained of, or whether the appeal herein has high chances of success.

66. What is clear to this court and what was clear as at 7/10/2020 is that there was no stay order that would have prevented this court from releasing the trial court file to the lower court for execution of decree. In releasing the said file, this court was cognizant of the fact there was no compliance with the conditional stay order granted on 6/2/2020 by the trial court and that there was no application pending before the lower court seeking for enlargement of the time for compliance with the conditional stay.

67. The appellant's counsel acknowledges that the Respondent had requested the Deputy Registrar of this court to release the lower court file for execution of decree for non compliance with stay Order of 6/2/2020. That is the factual position. The detailed reasons for noncompliance ought to have been placed before the trial court in an application for enlargement of time.

68. Having said so, I find this application for review of the Ruling of this court dated 7/10/2020 not merited. I dismiss it.

69. In the end, I dismiss the Respondent's application dated 7/10/2020. I also dismiss the Appellant's application dated 15/10/2020.

70. I however observe that the appellant's counsel at paragraph 7 of the supporting affidavit authorized a pupil/student to appear before this court as such to hold his brief to prosecute the appeal. Mr. Njoga Advocate under whose instruction Mr. Derrick was acting and the said student/pupil know very well that a pupil/student has no authority to act as advocate before a court of law. Such a person is unqualified. I say no more.

71. Each party shall bear their own costs of their respective applications.

Orders accordingly.

Dated, signed and Delivered in open court at Siaya this 22nd Day of October, 2020 via Microsoft teams both counsel present online.

R.E. ABURILI

JUDGE