



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MATRIMONIAL PROPERTY CAUSE NO. 1 OF 2016**

**(FORMERLY CIVIL SUIT NO. 207 OF 2015)**

**1. TMG**

**2. QFG (Minor suing through**

**his mother and next friend of TMG).....PLAINTIFFS**

**VERSUS**

**AP.....DEFENDANT**

**R U L I N G**

1. Before the court for determination is the Notice of Motion dated 14/6/2019 which was on the 1/8/2019 directed by the trial court to be heard during vacation.
2. The Notice of Motion seeks orders of extension of time to file a Notice of Appeal out of time by deeming the notice filed on 22/5/2019 to have been properly filed and also an order of stay of execution pending appeal, if the leave be granted.
3. The application discloses on its face and on the Affidavit filed in support thereof, the grounds for delay to have been the fact of delivery of the judgment on a date not fixed and without notice to the Applicants.
4. For stay, it is deponed in the Affidavit that the suit property is the only home of the plaintiffs and that unless stay is granted, they stand to be evicted a development that would destroy the substratum of the appeal, if time be extended, and render further proceeding in the appeal moot and academic.
5. For the Respondent/Decree holder the application was opposed on the basis of the grounds of opposition dated and filed in court on 29/7/2019. In those grounds the defendant/decreed holder term the application is being bad for inordinate and inexcusable delay; that stay ought not to be granted because there had not been demonstrated an irreparable loss capable of visited upon the judgment debtor/Applicant; no security had been offered; no appeal is pending as no leave has been granted; that there was no meritorious appeal demonstrated and lastly that the applicant had due notice and knowledge of the delivery of the judgment and the time of such delivery.
6. The application was argued orally before me by Miss Murage appearing for the Applicant while Mr. Munzyu appeared for the Respondent.
7. Miss Murage took the position that the applicant's side were not notified of the date for the delivery of the judgement after the date set for 22/3/2019 passed. That Mr. Gikandi was only informed by Mr. Mulei for the Respondent on the 16/5/2019 that the judgment had indeed been delivered on the 10/4/2019. Upon such information, it was argued that, Mr. Gikandi managed to peruse the court file on the 20/5/2019 and on 22/5/2019 filed the Notice of Appeal. To the applicant, the delay in filing the Notice of Appeal was occasioned by failure to notify them of the date for delivery of the judgment by the court and the period taken after the information was obtained is neither inordinate nor in excusable for which reason the Applicant is entitled to an extension of time to have the Notice of Appeal filed out of time deemed duly filed.
8. On stay pending appeal, counsel noted and submitted, and I do agree with her, that the same shall only be a consideration once the leave is granted. The counsel thus submitted that if leave be granted, then there should issue an order of stay pending appeal to preserve the subject of the suit being only home of the two plaintiffs and that unless stay is granted, the time to render vacant possession having lapsed on the 31/7/2019, there is nothing that would stop the dependant from enforcing the judgment by way of an eviction in which event the appeal

would then stand meaningless just as any further proceedings thereafter would turn moot and only academic.

9. In opposing the application, Mr. Munzyu adopted his grounds of opposition, stressed the fact that even though there was no notice shown to have been given to the plaintiffs, after the 22/3/2019, the suit was theirs since they had a personal interest in the matter and were not expected to just wait. The counsel took the view that the delay between 10/4/2019 when the judgment was delivered, and 22/5/2019 when notice of Appeal was filed a period of some 42days, was an inordinate and inexcusable delay.

10. He added that an order for the extension of time is not a right and only available to a discerning party while contending that the Applicant here was not a deserving party. He however made a critical concession that there was no evidence to show that the plaintiff were ever given a notice of the delivery of the judgment on the 10/4/2019.

### **Analysis and determination**

11. Extension of time is one of the various remedies available to court and justification for the exercise of discretion to further a party's right to access the court system on appeal. The rationale and purpose of the court's power to extend time is that for very good reasons, in each peculiar circumstances to each case, a party may be prevented from taking an action within the time prescribed by the law or by an order of the court. When such occurs, the onus and burden is upon the person in default to explain the reason for delay and demonstrate that the delay is not inordinate or unreasonable. For extension of time to appeal however, the court takes into account the fact that even if there exist a right to appeal, as a route to access justice, an appeal only arises once a party has had his day in court and the circumstances must be distinguished from extension of time to file a suit for example<sup>[1]</sup>.

12. The major consideration, after noting that it is never a right to have time extended, are as said before, the reasons for delay and the period of delay. The other consideration are in fact correlated to the two considerations largely.

13. When those principles are applied to the facts of this case, the notes of the proceedings in the file present a good guide and a clear picture of what really took place as far as compliance with the requirements of Order 21 Rule 1 is concerned.

14. That law provides that a judgment be pronounced in open court immediately after the hearing or within 60 days thereafter on a date notice which must be given to the parties or their advocates.

15. When mirrored against the records of the court, it is revealed that on the 7/2/2019 the court, in the presence of the parties, set the judgment for the 22/3/2019 when the records reveal no proceedings took place. The next notes reveal that the matter was then placed before the judge on the 29/3/2019 when a judgment dated 10/4/2019 was delivered in the presence of the advocate for the defendant but in the absence of the plaintiff's.

16. There is no indication in the file, at all, if any notice was ever issued and served for the delivery of the judgment after the 22/3/2019. That being the case, I do not hesitate to find that the plaintiff cannot be faulted for having failed to file a notice of appeal against a judgment whose delivery he was never notified and which he was thus unaware about. To the contrary the plaintiff is entitle to assert that he was entitled to a notice which was never given and the court can only remedy its failure to give notice by extending time so that the right lost by lack of notice is restored.

17. In essence and effect, I do find that the failure to file a notice of appeal within 14 days from the 10/4/2019 was never a mistake or default attributable to the plaintiffs. I thus do find that the reason given for delay is plausible, understandable and justifiable.

18. On the period for delay, the applicants say, and there has not been rebuttal, that their advocate only came to know about the delivery of the judgment on 16/5/2019, accessed the file for perusal on 20/5/2019 and filed the Notice of appeal on the 22/5/2019. The question the court is to answer is whether that demonstrates a period of inactivity that qualifies to be termed inordinate or inexcusable?

19. While the Defendant/Respondent says that the delay is calculable from the date of the judgment to the date the notice of appeal was filed, my finding is that one cannot be faulted for not acting on a fact is unaware about. Accordingly I do consider the period the Applicant has to account for to be the period from the 16/5/2019, when he (Mr. Gikandi) received the information from Mr. Mulei, to the 22/5/2019, when he filed the Notice of Appeal. In my calculation, that is a period of same six days. To this court, a delay of six days cannot qualify as inordinate and thus inexcusable.

20. The foregoing lead me to the conclusion that the Applicant has demonstrated that the failure to file the Notice of Appeal was occasioned by failure by the court to notify them of the date of the delivery of the judgment and that once the information was availed after time of lodging the appeal had lapsed there was a prompt and expeditious action in filing the Notice of Appeal dated 20/5/2019 and filed on 22/5/2019. I thus find that the applicants are entitled to an extension of time to lodge the Notice of Appeal, and there having been filed a notice of appeal, as aforesaid, the same is deemed duly filed.

21. Having extended the time to lodge the Notice of Appeal, the next question is whether the Applicant should be granted stay pending appeal.

22. It has been asserted and confirmed by the respondents in their submissions that the plaintiffs indeed use the suit property as their only home. It is also averred that the 2<sup>nd</sup> plaintiff being a minor should have his best interests as a child, taken regard of.

23. The purpose of stay pending appeal is to preserve the subject of litigation in the appeal so that at the conclusion thereof the successful party get the value thereof by real realization of the fruits of litigation. All the consideration in effect seek to achieve that one purpose otherwise called "*to obviate the appeal being rendered nugatory*"<sup>[2]</sup>.

24. On the facts disclosed, I do find that unless stay is granted, the appeal I have ratified by the extension of time, will not serve any purpose because there is nothing to stop the imminent eviction and once eviction takes place no guarantee exists that the property would remain available pending the outcome of the Appeal. So that the subject of the appeal is preserved and sustained I do order that there be stay pending appeal but on terms that the record of Appeal be lodged to the court within 60 days from today.

25. Having found that the Applicant cannot be blamed for the failure to act in time and the provisions of Order 50 Rule 6 notwithstanding, I do direct that the costs of the application shall abide the costs of the appeal.

**Dated and delivered at Mombasa on this 7th day of August 2019.**

**P.J.O. OTIENO**

**JUDGE**

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[\[1\]](#) Nicholas Korir Arap Salat vs IEBC & Others [2014] eKLR

[\[2\]](#) Bhatt vs Rent restriction [1982] KLR 417 cited in Standard Group Ltd vs Milka Mwende Kiwak – Hauser [2019] eKLR