



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**[CORAM: MRIMA, J.]**

**CIVIL APPEAL NO. 69 OF 2019**

**JOSEPH KIBITI M'INOTI.....APPELLANT/APPLICANT**

**-VERSUS-**

**MIRIAM KANYUA.....RESPONDENT**

**RULING**

1. Before me is an application by way of the Notice of Motion dated 25/07/2019. It was filed by the Appellant. The application sought two prayers; that is leave to admit the Record of Appeal out of time and a stay of execution pending the hearing and determination of the appeal.

2. The application was made on the grounds as appearing on the face thereof and was supported by the Affidavit sworn by the Appellant on 25/07/2019.

3. The Respondent opposed the application.

4. The application was thereafter heard by way of oral submissions where both parties were duly represented by Counsels. Rival submissions were tendered.

5. I have carefully perused the record. I am fully aware of the history of this matter. I will first deal with the limb of leave to admit the Record of Appeal out of time.

6. On 19/06/2019 the Appellant/Applicant was ordered to file the Record of Appeal within 7 days. That was in *Misc. Civil Application No. 53 of 2019*. The Memorandum of Appeal was filed on 24/06/2019. The Record of Appeal was filed on 01/07/2019. The lower court file was readily available. The appeal was admitted to hearing on 07/08/2019.

7. Opposing the application, the Respondent contended that the Applicant has all along been guilty of laches. He further contended that the Applicant has not been complying with timelines fixed by the Court. He cannot therefore seek the discretion of the very Court.

8. The principles for consideration in applications for extension of time are now well settled. The Court of Appeal in considering an application for extension of time to file and serve a Record of Appeal under the Court of Appeal Rules (which principles equally apply in the current instance) in **Gachero & Ano -vs- Pioneer Holdings (A) Ltd & Ano. (2008) KLR 315** had the following to say:

***The powers of the Court (of Appeal) in an application for extension of time (under the Court of Appeal Rules, Rule 4) were discretionary and unfettered. However in executing its discretion, this Court would consider the length of the delay, the explanation or reason given for it (and) whether the intended appeal was arguable.....***

9. Other factors for such consideration were stated by the Court of Appeal in **Civil Application No. Nai. 41 of 2014 Samiyan Kaur Devinder Singh vs Speedway Investment Ltd & CFC Stanbic Bank Limited (UR 31/2014)** to include: -

(a) The effect of the delay in public administration of justice;

(b) The importance of compliance with time-lines in litigation;

(c) The resources of the parties;

(d) Whether the matter raises issued of public importance;

(e) If the Applicant has been diligent.

10. The net effect of all the above considerations is to foster a quicker, fair and equitable disposal of disputes between parties. That is a calling which all are constitutionally-bound to uphold. However, in doing so this Court must endeavor to do justice to the parties.

11. The Record of Appeal was filed 4 days out of the time prescribed the Court. The current application was filed three weeks thereafter. The Applicant did not give any reasons for the delay. However, this Court takes judicial notice of the exactitudes of running a law firm. I have also gathered from the record that there is every reason to believe that the parties are intent on disposing the appeal earliest possible. I therefore find that in the unique circumstances of this matter the delay of 4 days is excusable.

12. The next issue of consideration is the stay of execution pending the hearing and determination of the appeal. **Order 42 Rule 6(2) of the Civil Procedure Rules** gives the conditions precedent to granting a stay of execution order. The conditions are that the Applicant must demonstrate that it will suffer substantial loss unless the order is made, that the application is made without any unreasonable delay and that the Applicant offers security for the due performance of the decree.

13. The Applicant deponed that it stands to suffer substantial loss unless the order of stay is granted. He primarily pointed out that the Respondent's sources of income are unknown. He further pointed out that in the event the appeal succeeds then the possibility of recovery of the decretal sum is uncertain.

14. The Respondent did not respond to the aspect of her ability to refund the decretal sum in the event the appeal succeeds. Whenever an Applicant raises the issue of the Respondent's inability to refund the sums in issue, the burden shifts to the Respondent to disprove the Applicant. The reason being that it will be unreasonable to expect the Applicant to know the financial position of the Respondent. It is for the Respondent to come out and demonstrate his/her/its ability to make good the refund if called upon to do so.

15. As the Respondent did not discharge the burden when it shifted to her, then the presumption is as posed by the Applicant.

16. On the issue of security, I am alive to the genesis of this matter. It arose from an alleged assault. Subject to the outcome of this application, the Applicant has complied with the directions and the appeal is ready for hearing. An order to that effect was made on 14/08/2019.

17. Having said so, I am persuaded that the appeal can be heard and determined earliest possible. Imposing conditions on security may slow down the determination of the appeal more so when issues of non-compliance arise. To me, the ends of justice will be readily met in this matter if the appeal is heard forthwith the aspect of security notwithstanding.

18. The upshot is that the following orders do hereby issue: -

**(a) The Record of Appeal is hereby admitted out of time and is deemed as properly filed with leave of the Court.**

**(b) There be a stay of execution of the decree in Nkubu PMCC No. 135 of 2011 pending the hearing and determination of the appeal.**

**(c) Costs of the application shall be borne by the Applicant.**

19. Orders accordingly.

**SIGNED BY:**

**A. C. MRIMA**

**JUDGE**

**DATED, COUNTERSIGNED and DELIVERED at MERU this 30th day of October, 2019.**

**A. MABEYA**

**JUDGE**

**Ruling delivered in open Court and in the presence of: -**

..... for the Appellant/Applicant

..... for the Respondents.

..... Court Assistant