



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION 524 OF 2016

HON. ATTORNEY GENERAL.....APPLICANT

VERSUS

MONICA NTHIKWA SILA.....RESPONDENT

(Being an application or extension of time to file and serve a Memorandum of appeal and record of appeal out of time in an intended appeal from the whole judgment and decree of the Chief Magistrate's court in Civil Case No. 14127 of 2011 by Hon. D.W. Mburu Principal Magistrate dated and delivered on 24th March, 2016)

BETWEEN

MONICAH NTHIKWA SILA.....PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL.....DEFENDANT

RULING

This is an application by way of Notice of Motion dated 6th and filed on 10th October, 2016 for orders that the applicant be granted an extension of time to file and serve a Memorandum of Appeal and record of appeal from the judgment of the Principal Magistrate delivered on 24th March, 2016. There is also a prayer for stay of execution of the said judgment. The grounds upon which the application is premised appear on the face of the application alongside a supporting affidavit sworn by counsel for the applicant. The application is opposed and there is a replying affidavit sworn by the respondent.

On 14th November, 2016 the respondent filed a Notice of Preliminary Objection to the effect that this court has no jurisdiction to hear the Notice of Motion which is fatally and incurably defective. Both counsel have filed written submissions relating to the notice of Preliminary Objection. As would be expected, both counsel have delved into the merits of the application for obvious reasons, because they would not have addressed the issue of jurisdiction alone whereas the objection notice also alleges the application is fatally defective.

Several authorities have been cited by both counsel which I have heard the opportunity to read. Section 65 (1) of the Civil Procedure Act provides that an appeal shall lie to the High Court except where otherwise expressly provided by the Act and subject to provisions as to furnishing of security as may be prescribed. Section 79G of the Act also provides the timelines within which the appeal may be lodged, and also that an appeal may be admitted out of time, subject to the appellant satisfying the court that there is good and sufficient cause for not filing the appeal in time. There is every reason therefore to conclude that the applicant has correctly approached the court for the order sought.

As to whether the application is fatally and incurably defective, reference is to be made to Section 79G of the Act cited above, and also the circumstances leading to the filing of the application. There is the submission by counsel for the applicant that the judgment which was to be delivered on 19th February, 2016 was deferred to 11th March, 2016 and later delivered on 24th March, 2016. There is an admission on the part of the applicant that it was difficult to keep track of subsequent dates for the delivery of the judgment, and came to learn of the same when the draft decree was forwarded for approval. That admission alone is a pointer towards the credibility of counsel in the circumstances of the case.

The application was filed within a reasonable period considering the date when the applicant learnt of the delivery of the judgment. In the circumstances the delay is excusable and the applicant who has a right of appeal should not be locked out.

I have also looked at the submissions by the respondent and in particular the citation from the case of **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors (1969) EA 696**. The respondents may be right to have raised the objection but that objection

is not capable of determining conclusively the application before the court. Therefore, whereas I agree that jurisdiction is everything, and where the court finds itself without it the matter will come to an end, in the instant application, the Notice of Objection cannot determine the issues raised. If I were to accept the Notice of Preliminary Objection, the applicant would be driven from the seat of justice before a hearing.

I have looked at the draft Memorandum of Appeal; there are weighty matters that stand out for determination which include limitation of actions and proof of negligence. The applicant should be allowed to have his day in court and with that in mind, I allow the application and extend the time to file the Memorandum of Appeal and record thereof by 30 days from today.

There shall be a stay of execution of the lower court judgment until the appeal is heard and determined. Order 42 Rule 8 provides that no security is required from the government. The applicant herein is a representative of a government body, and therefore no security shall be posted.

I must add that the respondent has a judgment in her favour which she may be anxious to execute. In the event the applicant fails to comply with the orders in this ruling, the respondent shall be at liberty to proceed as appropriate. The costs of this application shall on appeal.

Dated, signed and delivered at Nairobi this 22nd Day of February, 2018.

A. MBOGHOLI MSAGHA

JUDGE