



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 9 OF 2018**

**KENYA COMMERCIAL BANK LIMITED.....APPLICANT**

**VERSUS**

**JULIUS ODHIAMBO AWUONDA.....RESPONDENT**

**RULING**

By a notice of motion dated 1.03.18 brought under Section 1A, 1B, 3A and 79G of the Civil Procedure Act Cap 21 Laws Order 42 rule 6 (1) and (2) and Order 51 rule 1 of the Civil Procedure Rules and, the applicant prays for orders that

- a.. The application be certified urgent
- b. That the Honourable Court be pleased to grant an interim order of stay of execution of decree and judgment in **Kisumu CMCC Case No. 84 Of 2015** pending the hearing and determination of this application
- c. That the Honourable Court be pleased to grant the applicant leave to appeal out of time from the judgment and decree in **Kisumu CMCC Case No. 84 Of 2015**
- d. That the Honourable Court be pleased to grant a stay of execution of decree in in **Kisumu CMCC Case No. 84 Of 2015** pending the hearing and determination of applicant's appeal to be preferred by applicant on such terms as it deems appropriate
- e. Costs of the application be provided for

The application is based on the grounds on face of the application and on supporting affidavit sworn by Jude Thadeus Ragot, advocate for the applicant on 1st March, 2018. In summary, it is averred that if the application is not granted, the appeal will be rendered nugatory and the applicant is likely to suffer substantial loss. The applicant has also offered to provide security to secure the judgment sum.

The application is opposed on the basis of grounds of a replying affidavit sworn by Mourice Ouam, advocate for the respondent on 13th March, 2018 in which he avers that applicant has not shown what substantial loss it will suffer if the judgment sum is paid to the respondent or that the applicant will be unable to refund the judgment sum if it is paid to him.

I have considered **Mwangi v Kenya Airways Ltd[2003] KLR** where the Court of Appeal cited **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)**, with approval and expressed itself thus:-

***“It is now well settled that the decision whether or not to extend the 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 the delay; 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”.***

**Issues for determination**

**i. Length of delay**

The judgment sought to be appealed from was delivered on 24th January, 2018. Delay in filing the intended appeal has not been explained. I am content to cite the case of **CIVIL APPLICATION NO. NAI 98 OF 2013 AVIATION CARGO SUPPORT LIMITED v ST. MARK FREIGHT SERVICES LIMITED** where G.B.M. KARIUKI, J.A. held:-

***“Even where an appeal is meritorious, if the delay is too inordinate and has not been explained at all, leave ought not to be***

***granted to lodge record of appeal out of time. An aspiring appellant ought to be zealous and to take the initiative to comply with the law”.***

From the foregoing; I find that the applicant filed this application over 35 days after the judgment sought to be appealed against was delivered and is the delay, though, unexplained is not inordinate.

**ii. The chances of appeal succeeding if the application is granted**

This court is not in a position to determine if the appeal has chances of success and that is left to the trial court on appeal.

**iii. The degree of prejudice to the respondent if the application is granted.**

No evidence was presented to prove that the respondent stands to suffer any prejudice if leave to appeal out of time is granted to the appellant. There is also no evidence that the respondent is not in a position to refund the judgment sum in the unlikely event that the appeal succeeds. The application for stay of execution is therefore unwarranted.

Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicant.

As a result, the notice of motion dated 21.6.17 is allowed on the following terms:

***a. THAT leave be and is hereby granted to appeal out of time against the judgment and decree in Kisumu CMCC Case No. 84 Of 2015***

***b. Application for stay of execution of the judgment and decree in Kisumu CMCC Case No. 84 Of 2015 is for the foregoing reasons disallowed***

***c. The appellant is granted 14 days from today's date to file its appeal***

***d. Costs shall be costs in the appeal.***

**DATED AND DELIVERED THIS 15th DAY OF March, 2018**

**T. WANJIKU CHERERE**

**JUDGE**

**In the presence of: -**

**Court Assistant - Felix/Carolyne**

**For the Appellant -Mr Anyul/Ragot**

**For the Respondent -N/A**