REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 285 OF 2017

1. SULEIMAN SUMRA

2. CHENGO KAHINDI BIRYA.....APPLICANTS

VERSUS

SAID MOHAMED SAID.....RESPONDENT

R U L I N G

1. In the application dated 10/11/2017 the applicant sought to get orders of extension of time to fill an appeal out of time and orders of stay of execution pending Appeal to be filed against the judgment and decision of in Mombasa CMCC No. 563 of 2014 dated 11/01/2017.

2. The application was filed on 10/11/2017 and the reasons advanced for failure to file the appeal within the time prescribed is given to be the fact that the judgment was read without due notice having been served on the Applicant and thereafter the Applicant sought to have the judgment reviewed. The application for review was determined on the 18/10/2018 by an order for dismissal. It is added on the grounds of the application that the intended appeal raises arguable points and that the applicant is willing and prepared to comply with such conditions the court imposes including the deposit of the part of the decretal sum within the time determined by the court.

3. The application was supported by the affidavit of CAROLINE KIMETO which set out the facts leading to delay and exhibited the application for review filed and determined before the trial court. The application for review seems to have targeted the quantum of damages assessed and premised on the fact that the defendants written submissions although filed in time did not reach the court file prior to the reading of the judgment. The applicant contents that those submissions gave rationale for arriving at an appropriate quantum of damages were not considered by the trial court because the court file could not be traced at the court registry.

4. The Application for extension of time was opposed by the Replying Affidavit of the Respondent which before delving onto the merits castigates the Affidavit in Support for having been sworn and filed without authority of the Applicant or the disclosed insurance company.

5. On the merits the Respondent took the position that there was a notice posted on the court's notice board notifying parties of the judgment date and that Applicants advocates were therefore aware of the date. On prayer for stay pending appeal the Respondent contends that the same does lie here but should first be made before the trial court or ominously, the ***High Court of Appeal*** (*whatever that means!*). Lastly the Respondent contend that if the court be inclined to grant stay the full decretal sum ought to be deposited within 14 days into a joint interest bearing account.

6. The Respondent equally filed a Notice of Preliminary objection which essentially contended that the court lacked jurisdiction and therefore had no capacity to grant the orders sought and therefore the application is an abuse of the court process.

7. The deponent of the applicants affidavit in support filed a supplementary affidavit whose main intendment was to exhibit the deponents authority to swear the affidavits and to deny the assertion that notice of judgment was pinned at the court notice board and there having been talks towards payment. It is additionally asserted and contended that an appeal to this court is by a Memorandum of Appeal rather than a notice of appeal and that the court is fully seized of jurisdiction by dint of the provisions of section 79G and order 42 Rule (6) of the Act. The Affidavit concludes by saying that the applicants are prepared to comply with any conditions imposed by court on grant of stay.

8. Even the respondent filed a further affidavit purposely to reiterate the accusation that, applicants deponent to the affidavit lacked valid authority to swear the affidavit and that the application was bad for inordinate delay.

Submissions by the parties

9. When parties attended court to urge the application, Mr. Mulama took the view that there are only two substantive issues for determination and the consequent one on costs. The two issues are basically whether time should be enlarged and if stay should be granted pending the intended appeal.

10. On need to extend time, reliance was put on the decision by the supreme court in ***Nicholas Kiptoo Arap Korir Salat vs IEBC and other [2014] eKLR*** for the proposition that the power to extend time is a residual discretion upon the court to do justice. Premium was placed on the fact that judgment was delivered without notice and as soon as the information was received the application for review was filed with promptitude and that as soon as the application of review was determined, on 18/10/2017, the current application was also filed soon thereafter. To the applicant's advocate it was only after the application for review was dismissed that instructions to appeal were issued and that the period of about some 22 days was utilized in tracing the court file. In his view, there had been proffered sufficient reasons to enlarge time and the draft memorandum of Appeal revealed on arguable appeal.

11. On stay the Applicant urged that unless stay is granted, execution shall proceed and that it cannot be assured of recovery of sums if paid should the appeal be successful because the respondents means is not known. To counsel, it was not the applicants duty to demonstrate the respondent's inability to effect a refund rather it was the duty of the Respondent to demonstrate an ability to effect a refund in the event of the appeal succeeding.

12. For the Respondent, Mr. Wachenje resisted the application on the basis of undue delay, that the appeal does not lie as the Applicant having opted to seek review cannot thereafter seek to appeal on the same point. For that point reliance was placed on the provision of Order 45 Rule 1 as well as Section 80 of the Act.

13. The capacity of the deponent of the two affidavit was raised and it was contended that no nexus had been established between that deponent and the applicant hence his affidavit should not be the basis of grant of the orders sought because no valid authority had been shown to have been given to the deponent. Additionally it was argued that only the advocate had the capacity to assert lack of service of notice of delivery of judgment and without the affidavit by the advocate that allegation cannot be taken seriously.

14. On stay it was submitted that only a litigant with pending appeal has the right to seek stay pending the determination of that appeal unlike here where there is no appeal pending hence the court has no jurisdiction to grant stay prior to an appeal being filed. It was concluded that the thresholds of grant of stay pending appeal had not been met and the application therefore should not be granted but ought to be dismissed.

15. In his rejoinder to the replying submissions, Mr. Mulama asserted that merely that the Applicant had sought and failed to be granted review was not a bar to the same applicant preferring an appeal. On failure by counsel to swear to the absence of notice, it was submitted that the facts deponed by Caroline Kimeto, being the legal officer of the Applicants insurer were sufficient.

Issue for determination

16. From the facts and the law cited to support and be applied to the facts, there are four substantial issues for determination. Of those issues ton are preliminary while the other two go to the merits. The issues are as follows:-

i) Whether or not a party who has preferred review has the right to pursue an appeal on the same point?

ii) Whether there is jurisdiction in a court of law to grant stay pending an intended appeal?

iii) Whether the applicant has demonstrated being deserving of extension of time?

iv) Whether stay should be granted?

17. I propose to deal with the four issues in the order set out above:

Review vs Appeal

18. Both Section 80 and Order 45 Rule 1 are conclusive in terms that a party has the option to choose whether to appeal or seek review. There is no liberty for one to seek both simultaneously, contemporaneously or in a consecutive manner over the same point.

19. In this case, there is ample evidence by the Appellants themselves that prior to filing this application for extension of time they had sought to review the judgment. That application dated 29/5/2017 and filed in court the same day, was worded as follows:-

"3) This honourable court be pleased to review and/or set aside and/or vacate the judgment delivered in the matter on 11.01.2017 and consider submissions filed by the Applicant on 24/11/2016 and pronounce a fresh judgment on the matter".

20. That prayer when juxtaposed on the judgment of the court exhibited in this application, in which liability was recorded by consent, can only be seen to have been challenging the sum assessed as quantum of damages. That challenge was heard on the merit and the court found no merit on it and had it dismissed. As against the order for dismissed the applicant had the right of Appeal, which had it chosen to exercise at the time this application was filed, would have avoided there current application and the objection on the competence of the application.

21. For me, I take the view and hold that the applicants having chosen to prosecute an application for review challenging the quantum of damages assessed, they are barred by law from seeking to mount same challenge on the same matter by way of an appeal. I coming to this conclusion I am guided by the express words of Section 80 and Order 45 Rule 1 Civil Procedure Act which I interpret to say that review and Appeal on the same point cannot be pursued concurrently or consecutively. This is informed by the fact that the outcome of an appeal and review in many situations amount to the same thing and to pursue both at the same time or consecutively portends a fertile ground for two counts at different levels, giving two different verdicts. As said before, once the Applicant chose the review route, it could only challenge the outcome by appealing against the decision on review but not appealing against the decision on which a review had been sought and dismissed. To that extent I hold that no competent nor arguable appeal would ensue even if I was to extend time.

Stay pending an intended appeal

22. The Rules of procedure are not only handmaids of justice but critical cogs and lubricants of the justice system. They are not merely some pius nortions or decorations to fill our statute books to be ignored and treated with contempt or disregarded with abandon. In this case the Applicant has invoked the provisions of Order 42 Rule 6 to ground their prayer for stay. That provision governs the grant of stay pending appeal. No ingeneous or novel interpretation need be added to understand that the jurisdiction on the court is to grant stay to protect the substratum of the litigation in the appeal. The side notes are leaded "stay in case of Appeal".

23. I hold and find that the jurisdiction of the court to grant stay is only invoked by the filling of an appeal not before. Without a pending Appeal I hold the view that there is no jurisdiction to grant stay under the provision of the law cited. Even though the citing of inappropriate law would not by itself be a bar to grant befitting orders, in this matter I do not find anything to form the basis of granting orders of stay. I do find that the application for stay when there is no pending appeal is totally misconceived and cannot succeed.

24. The other reason I would be hesitant to grant stay, even if an appeal was pending, is the words of Rule 6 of Order 42. That law says:-

> **6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. (Emphasis provided)**

25. My understanding of this provision is that an appellant seeking stay pending appeal must of necessity begin at the trial court. The court appealed to will only consider an application for stay after the trial court has done so and only for purposes of having the order by the trial court set aside or varied. At this juncture when there is no evidence of a decision by trial court on stay pending Appeal, I find and hold that there is no jurisdiction on this court to grant stay to the Applicant.

Has the Applicant demonstrated a case for extension of time

26. On the merits, my foregoing findings notwithstanding, it is the duty of litigant who has been heard on the merits but has delayed to file an appeal in time to give a befitting explanation for the delay. An order for extension of time to file an appeal cannot and should not be given as of right without eroding on the constitutional demands and dictates for the proportionate and expeditious disposal of court business.

27. In this matter, that the judgment sought to be appealed against was delivered on 11/1/2017 is not in dispute. What is in disputed is whether there was notice served upon the applicant from the date of delivery.

28. Order 21 rule 1 provides:-

> **"In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.**
>
> **Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment".**

29. It is a cardinal principal of our constitution that the right to access justice be respected and defended not only by the litigants but by the court itself. For purposes of a judgment, the law has made it mandatory that parties be notified in the event it is not delivered at the conclusion of the case. This is important so that a party who feels aggrieved by the judgment takes his legal options and do so within the timelines provided by the law.

30. In this matter while the respondent contends that the notice of delivery of judgment was posted on the court notice board, that fact is denied by the applicant I wish to point out that mode of service as known to law is by issuance and delivery of the notice to the person to be served. That is the reason the rules governing pleadings and notice of address of service demand that parties provide their addresses for service. Postage on the court notice board without, more is not one of the modes of service of process.

31. The applicant did give a clear address of service together with postal telephone numbers, physical address together with an email address. Those availed details seem not to have been employed by the court. Atleast no evidence was availed to say how the service was effected. It is not enough for the Respondent to say that a notice was posted at the notice board without saying when it was so posted. Not even a copy of the alleged notice was displayed. I do not consider that to have been sufficient service and I consider the judgment therefore to have been delivered in the absence of the Applicant and without notice. That finding lead me to the conclusion that it was delivered in

violation of the explicit provision of the law and is therefore a good ground to seek extension of time. However, in the application for review, the applicant did not state when they became aware of the judgment. One can therefore safety say that the same having been dated 29/5/2017 and filed the same day, they learnt of the judgment during the month of May of 2017 or earlier than that date. That is the time they ought to have taken steps to apply for extension of time. It is not enough explanation that they had preferred a review nor did time stop running as they prosecuted the application for review.

32. Time started running in May and when the current application was filed on 10/11/2017, some five months had lapsed which delay has not been explained. Extension of time to file an appeal being a discretionary matter, failure to explain delay disentitles the appellant to the orders.

33. Here I do find that without explanation why the application was not filed with promptitude, I cannot exercise my discretion in favour of the Applicant. For that reason even if there had not been a review sought and their waiver of the right to appeal, I would still not grant the extension due to lack of explanation for the delay.

34. Having held that the application for extension of time does not lie on account of the review earlier on sought and having also found that this court lacks jurisdiction to grant an order of stay before an appeal is filed, it follows without repetition, that this application lacks merit and the same is hereby dismissed with costs to the Respondents.

Dated and delivered at Mombasa this 20th day of April 2018.

P.J.O. OTIENO

JUDGE