



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 31 OF 2017

JAMSHID MOHAMED.....APPLICANT

VERSUS

ELISHA LUSENO T/A TWILIGHT SECURITY SERVICES.....RESPONDENT

RULING

[THE APPLICANT'S NOTICE OF MOTION DATED 25TH MAY, 2017]

1. Through the notice of motion dated 25th May, 2017 the Applicant, Jamshid Mohamed seeks leave to file an appeal out of time against the judgement dated 13th July, 2016 entered in favour of the Respondent, Elisha Luseno t/a Twilight Security Services by the Chief Magistrate's Court at Malindi. The Applicant also seeks a stay of execution of the judgement pending the hearing and determination of the intended appeal.
2. The application is supported by an affidavit sworn by the Applicant's counsel in which he avers that the Applicant's application dated 14th February, 2017 seeking to stay the judgement before the trial court was dismissed on 25th April, 2017. That during the hearing of the said application the proceedings could not be typed hence the delay in the filing of the appeal.
3. Counsel further avers that the appeal is meritorious and arguable and the same will be rendered nugatory if the execution of the judgement is not stayed. It is the Applicant's case that the judgement entered against him by the trial court was irregular as he was not afforded an opportunity to defend his case.
4. The Respondent opposed the application through an affidavit sworn by his counsel on 21st June, 2017. It is the Respondent's case that the judgement the Applicant seeks to appeal against was delivered on 13th July, 2016 and the Applicant took no action upto 14th February, 2017 when he filed an application before the trial court seeking to set aside the judgement. Further, that it is only after the dismissal of the said application that the Applicant sought to file an appeal.
5. As to why the execution of the judgement should not be stayed, it is stated that the Respondent is a businessman with sufficient financial resources to refund the decretal amount were the intended appeal to succeed. According to the Respondent, the Applicant has not demonstrated that he will suffer substantial loss if the judgement is executed.
6. Section 79G of the Civil Procedure Act, Cap. 21 provides that the time for filing appeals from subordinate courts to this court shall be within thirty days from the date of the decree or order appealed against with the proviso that **"an appeal may be admitted out of time if the appellants satisfy the court that he had good and sufficient cause for not filing the appeal in time."**
7. It is thus incumbent upon he who seeks to file an appeal out of time to satisfy the court that there was good and sufficient cause for not filing the appeal in time.
8. In the case at hand, the Applicant has not stated why he did not file an appeal from the time of the delivery of the judgement on 13th July, 2016 upto the time he filed an application on 14th February, 2017 to set aside the judgement. He has thus failed to discharge his obligation in order to enable the court decide, on the reasons given, as to whether to exercise the discretion of extending time in his favour. He has not placed any evidence before the court which the court can use to engage its discretionary powers. Six months is such a long period of time and there was need for the Applicant to offer an explanation. The claim that proceedings could not be typed during the hearing of his application does not explain why he had not applied for proceedings prior to filing his application before the trial court.
9. The Applicant claims to have a meritorious and arguable appeal saying that he was never accorded an opportunity to be heard. The

judgement he seeks to challenge shows otherwise. It is stated that the case was adjourned twice to afford the Applicant an opportunity to testify but he simply did not turn up.

10. The application to enlarge the time for filing an appeal is therefore not merited.

11. For completeness of record, I will consider the application for stay of execution of judgement pending the hearing and determination of an intended appeal.

12. Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 (CPR) provides that:

“No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the applicant.”

13. As already stated there was unexplained delay in making this application. The Respondent has stated that he is capable of refunding the decretal amount in case the intended appeal succeeds. The Applicant has not demonstrated that he will suffer substantial loss if any intended appeal succeeds. The conditions for the grant of stay of execution of judgement pending appeal have not been met by the Applicant. This second application should also fail.

14. In summary, the Applicant's application dated 25th May, 2017 fails in its entirety. The same is therefore dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 17th day of April, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT