



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 59 OF 2011

P K M.....PLAINTIFF/RESPONDENT

M N K Minor suing through her father and next friend)

VERSUS

JOSEPH MWAURA.....DEFENDANT/APPLICANT

RULING

1. The application dated 2nd March, 2017 seeks orders that :

1. Spent.

2. That the consent letter dated 20th February, 2017 be adopted as an order of court consequently the firm Wokabi Mathenge & Co. Advocates be placed on record as acting for the defendant.

3. Spent.

4. That there be a stay of execution of the judgment and or any consequential orders that might ensue arising from the judgement in civil suit No. 59 of 2011 – delivered by Lady Justice R. Aburili on the 17th day of January 2017 at the High Court in Nairobi pending hearing and determination of the intended appeal.

5. That the period for lodging the Notice of appeal and requesting for certified copies proceedings be enlarged consequently the pleadings dated 20th February, 2017 be deemed as being properly on record.

6. That costs of this application be provided for.

2. It is stated in the grounds and the affidavit in support of the application that the Applicant wishes to appeal from the judgment herein delivered on 17th January, 2017. The delay in filing the Appeal is blamed on the Applicant's former advocate's failure to attend court for the delivery of the judgment due to misdiarization of the matter. The Applicant is apprehensive that the Respondent may move to execute the decree and thereby render the Appeal nugatory. It is further stated that the Respondent will not suffer any prejudice. The Applicant is willing to deposit security for the due performance of the decree.

3. The application is opposed on the following grounds:

(a) There is no appeal on record and the said application is grossly incompetent.

(b) This honourable court has no jurisdiction to hear and determine the main prayers in the said application.

(c) The Applicant has not demonstrated the loss and damage he will suffer should execution be issued proceed to enforcement.

(d)The application is intended to delay the Plaintiff from realizing the fruits of his judgment.

(e) The Applicant has come to court with unclean hands and hence equity cannot come to his aid.

(f) Under the circumstances of this case, the conduct of the Defendant during the entire proceedings, it is just and equitable that this application be dismissed.

4. The application was canvassed by way of written submission which I have considered.

5. On 22nd February, 2017 a consent was recorded by the advocates on record for the Defendant when judgment was delivered, Ms Mbiyu Kamau & Co. Advocates and Ms Wokabi Mathenge & Co. Advocate who wishes to come on record for the Defendant/Applicant.

6. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

7. The court therefore has the discretion to extend time within which to file an Appeal. As stated by the Court of Appeal in the case of **Aviation Cargo Limited v St. Mark Freight Services Limited [2014] eKLR:**

“...whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”

8. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution shall be made under sub-rule (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 order as may ultimately be binding on him has been given by the applicant.”

9. The instant application was filed on 2nd March, 2017. This was 15 days following the delivery of the judgment on 17th January, 2017. The delay was not inordinate and has been explained.

10. The averments made by the Applicant regarding the delay remain uncontroverted by any other evidence. The Applicant is willing to deposit security for the decretal sum.

11. To balance the competing interests of both parties, I exercise discretion and allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning bank account of the counsels for both parties herein or in court within 30 days from the date hereof.

Dated, signed and delivered at Nairobi this 24th day of May, 2018

B. THURANIRA JADEN

JUDGE