



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC CIVIL APPLICATION NO 83 OF 2018

HARJEET SINGH PANDAL.....APPELLANT

VERSUS

ALOYCE OLOO RANDA.....RESPONDENT

RULING

1. By a notice of motion dated 30.4.18 brought under Sections 3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya; Order 42 Rule 6 of the Civil Procedure Rules together with all enabling provisions of the law, the applicant/appellant prays for orders that

a.*Spent*

b. *Spent*

c. *The Honourable Court be pleased to grant orders of stay of execution of the decree in TAMU SRMCC NO. 15 OF 2015 delivered on 1.3.18 pending the hearing and determination of the intended appeal*

d. *That the applicant be granted leave to lodge an appeal out of time*

e. *THAT the costs of this application be provided for*

2. The application is based on the grounds that among others that:

i. The time for filing the appeal has elapse

ii. That the delay in lodging the appeal was not intentional

iii. That the appeal is arguable and has high chances of success

iv. Respondent's means of income are unknown and he may not be able to refund the decretal sum in the event that the appeal succeeds

v. Appellant is ready and willing to furnish security

3. The application is supported by the affidavit sworn on 30.4.18 by Innocent Muma Mogaka, advocate for the applicant in which he reiterates the grounds on the face of the application and further avers that he became aware of the judgment on 8.3.18. Annexed to the supporting affidavit is a copy of draft Memorandum of Appeal.

4. The application is opposed on the basis of a replying affidavit sworn on 7.5.18 by Denis Odero Okeyo, advocate for the respondent, who avers that applicant has had sufficient time to file an appeal if he so wished.

5. The impugned judgment was delivered on 1.3.18. This application was filed on 30.4.18 which is 1 month from the date of the impugned ruling.

6. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court. In the case of CITY CHEMIST (NBI) & ANOTHER V. ORIENTAL BANK LIMITED Civil Application No. Nai 302 of 2008 (UR 199/2008), the court held: -

“the overriding objective thus confers on the Court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. The overriding objective does not however facilitate the granting of orders seeking leave or extension of time to file record of appeal where the applicant has not shown to the satisfaction of the Court that the delay is not inordinate or has been explained to the satisfaction of the Court. In the instant application, the applicant is guilty of inordinate delay and has failed to explain it to the satisfaction of the Court. Consequently, I am unable to exercise my discretion in favour of the applicant as his application lacks merit.”

7. The applicant has not explained the 1 month delay in filing the appeal on time, to the satisfaction of the court. The one month's delay is however not inordinate. Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya gives this court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I find that it would be in the interest of justice for the applicant to ventilate his intended appeal.

8. In the end, the notice of motion dated 30.4.18 is allowed on the following terms:

a. The Honourable Court hereby extends time to file the Appeal for 14 days from today's date

b. The Honourable Court hereby grants orders of stay of execution of the decree in TAMU SRMCC NO. 15 OF 2015 delivered on 1.3.18 pending the hearing and determination of the intended appeal on condition that applicant deposits the total decretal sum and costs in an interest earning account in the name of both advocates within 30 days from today's date

c. The costs of this application shall abide the outcome of the appeal

DATED, DELIVERED AND SIGNED THIS 31st DAY OF July 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Applicant - N/A

For the respondent - Ms. Namoji