



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISC.CIVIL APPLICATION NO. 86 OF 2017**

**J S C.....APPLICANT**

**-VERSUS-**

**F J.....RESPONDENT**

**RULING**

**[1]** The Notice of Motion dated **25 July 2017** was filed herein by the Applicant, **J S C** under **Sections 79G and 95** of the **Civil Procedure Act** and **Order 42** of the **Civil Procedure Rule, 2010** for orders that:

**[a]** Spent

**[b]** That the Applicant be granted leave to appeal out of time against the whole Judgment of **Hon. M. Kesse**, Resident Magistrate, delivered on **18 January 2017** at Kapsabet in **Kapsabet PM's Divorce Cause No. 3 of 2016**; and that the Memorandum of Appeal annexed to the application be deemed as duly filed on payment of the requisite fees;

**[c]** That there be an Order of Stay of Execution of the Judgment and Order passed on the **18 January 2017** in **Kapsabet PM's Divorce Cause No. 3 of 2016** pending the hearing and final determination of the application.

**[d]** That the costs of the application be provided for.

**[2]** The application was premised on the grounds that Judgment was delivered by the Kapsabet Court on **18 January 2017** against the Applicant; and that his Counsel did not advise him of the outcome, such that by the time his attention was drawn thereto, the appeal period had already ran out. It was the contention of the Applicant that the delay is not so inordinate as to be inexcusable; and that the appeal is arguable and has a high probability of success. He also asserted that the Respondent is unlikely to suffer any prejudice.

**[3]** The grounds aforesaid were amplified in the Applicant's Supporting Affidavit sworn on **25 July 2017** to which he annexed a copy of the letter dated **21 July 2017** by which his Advocate, **Mr. Tororei**, requested for copies of typed proceedings and judgment, a copy of the Notice to Show Cause dated **20 March 2017**, and a draft Memorandum of Appeal in support of his application.

**[4]** The Respondent, **F J**, opposed the application vide her Replying Affidavit sworn and filed on **28 September 2017**. She averred that the Applicant was all along aware of the Judgment, having been served with Notice of Entry of Judgment along with a copy of the Decree; and that he was only jolted into action upon being served with Notice to Show Cause. According to the Respondent, the application has been brought in bad faith with the objective of frustrating her. She annexed to her application copies of the Decree and Notice of Entry of Judgment as well as a copy of the Affidavit of Service indicating that the Notice was duly served on the Applicant. She accordingly urged the Court to dismiss the application.

**[5]** The application was argued on the **24 July 2018** and **Mr. Tororei** for the Applicant reiterated the grounds set out on the face of the application and the averments in the Supporting Affidavit. He submitted that the draft Memorandum of Appeal annexed to the Supporting Affidavit does show that the proposed appeal is arguable and therefore the Applicant ought to be afforded an opportunity to present the same for a determination on the merits. He also submitted that the delay to file the appeal was attributable to the Applicant's erstwhile Counsel; for which the Applicant should not be penalized. He relied on the persuasive authority of **Monicah A.S. Ougo & Another vs. Dr. Samson Robert Misango [2015] eKLR** for the proposition that the Court should opt for the lower rather than the higher risk of injustice by allowing the application.

**[6]** In resisting the application, the Respondent highlighted her averment that the Applicant was duly served with Notice of Entry of

Judgment and that a Consent Order was recorded before the lower court to permit the Applicant's new Advocates to come on record after Judgment, which Consent could not have been filed without his instructions. She therefore submitted that the Applicant is not sincere and is just out to buy time to dispose of the properties they acquired jointly so as to defeat the Decree. She added that she is entitled to the fruits of her Judgment. The Respondent filed a Supplementary Affidavit in which she averred the Applicant was well aware of the Judgment as way back as **27 January 2017**.

[7] I have give due consideration to the application, the affidavits filed herein together with their annexures as well as the oral submissions made by the parties on **24 July 2018**. The enabling provisions of the law cited by the Applicant are **Sections 79G and 95** of the **Civil Procedure Act**. **Section 79G** of the said 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 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."**

[8] **Section 95** on the other hand provides that:

**"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."**

[9] Clearly therefore, the Court does have the discretion to enlarge time where necessary; the only consideration being whether sufficient cause has been shown for the exercise of the discretion under the aforementioned provisions; and it is now settled that some of the guiding principles are:

[a] That there be a good and reasonable explanation for the delay;

[b] That the application be brought without undue delay;

[c] That no prejudice will be suffered by Respondent.

**[a] On the Explanation for the Delay:**

[10] The Applicant's explanation for not filing his appeal within 30 days of delivery of the lower court Judgment was that he was unaware of the date of judgment and therefore did not attend court; and that this was because his erstwhile Advocate, **Ms. Victoria Lagat**, was then on maternity leave and therefore did not attend court either. The Respondent has however shown that a Change of Advocates occurred by consent soon after the delivery of the Judgment sought to be appealed, as shown by the Consent Letter dated **27 January 2017**; which consent was necessitated by the very fact that Judgment had been entered by that time.(See **Order 9 Rule 9** of the **Civil Procedure Rules**).

[11] The Respondent has further shown that the Applicant was served with a Notice of Entry of Judgment dated **24 January 2017** along with a copy of the Decree on **12 April 2017**, as confirmed by the annexed copy of the Affidavit of Service filed before the lower court. Moreover, one of the documents relied on by the Applicant is the Notice to Show Cause that was served on him. The Notice to Show Cause is itself dated **20 March 2017** and was fixed for consideration by the Court on **26 July 2017**.

[12] Clearly therefore, it was to no avail for the Applicant to blame his erstwhile Advocates, **M/s Chepseba Lagat & Company Advocates**, for the delay, when it is manifest that he was all along aware of the Judgment. In any case, the case was his, and he was under obligation to follow up its progress at each and every stage. Hence, I would agree with the expressions of **Kimaru, J.** in **Savings & Loans Limited vs. Susan Wanjiru Muritu HCCC No. 397 of 2002** that:

**"whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case...It is the duty of the litigant to constantly check with the advocate the progress of her case...For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application ...it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."**

**[b] On whether the application was filed without delay:**

[13] Granted that the Applicant was well aware of the existence of the Judgment dated **18 January 2017**, there is absolutely no explanation as to why the Applicant did not move the Court earlier for reprieve. There is, therefore, good basis to surmise that his application was only prompted by the Notice to Show Cause dated **20 March 2017**. It is noteworthy too that the Applicant did not specify when he was served with the Notice to Show Cause; but it is instructive that the Notice was due for consideration on **26 July 2017**. The Applicant's motion is dated **25 July 2017** and was filed on **27 July 2017**. Thus, upon a careful consideration of the Supporting Affidavit, I find absolutely no justification as to why the application was not filed earlier.

**[c] On whether the Respondent will be prejudiced:**

**[14]** The contention of the Applicant was that the Respondent would suffer no prejudice if the application is allowed. It is vital to put into consideration that the Applicant is yet to pay a single cent to the Respondent in satisfaction of the Decree. He did not, as a sign of good faith, offer to make a deposit herein as security for the performance of the Decree or make a proposal in that regard. In effect, the Applicant comes across an inward oriented litigant that has little regard for the existing Decree passed against him by the lower court; and therefore is not entitled to the Court's discretion.

**[15]** In the result, I find no merit in the application dated **25 July 2017** and would dismiss the same with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 8<sup>TH</sup> DAY OF AUGUST 2018**

**OLGA SEWE**

**JUDGE**