



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 485 OF 2012**

**THOMAS NJUGUNA MATU.....1<sup>ST</sup> PLAINTIFF**

**JANE WAMBUI MULWA.....2<sup>ND</sup> PLAINTIFF**

**VS.**

**LILIAN WAMBUI MATHU.....1<sup>ST</sup> DEFENDANT**

**DR. EUSTUS FRED.....2<sup>ND</sup> DEFENDANT**

**CONSOLIDATED BANK LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Section 7 of The Appellate Jurisdiction Act (Chapter 9 Laws of Kenya) provides as follows:-

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

2. Although not invoked or cited, it is under those provisions that this Court would consider and determine the Notice of Motion dated 22<sup>nd</sup> July 2016 which seeks the following prayers:-

1. Spent

2. THAT the Honourable Court do grant leave for the Notice of Appeal filed on 18<sup>th</sup> July, 2016 being an appeal against a Ruling of Hon. Justice C. Kariuki delivered on 27<sup>th</sup> May, 2016 be deemed to be properly on record and or alternatively, the time for lodging and serving the Notice of Appeal be extended.

3. THAT there be an order of stay of execution of the Ruling/Order of this Court delivered by Hon. Justice C. Kariuki on 27<sup>th</sup> May, 2016, pending the hearing of this application inter parties.

4. THAT there be an order of stay of execution of the Ruling/order of this Court delivered by Hon. Justice C. Kariuki on 27<sup>th</sup> May, 2016 pending the hearing of the intended Appeal to the Court of Appeal against the said Ruling/Order under such terms as the Court may deem fit.

5. THAT the costs of this application be provided for.

3. The Ruling sought to be appealed against was in respect to the question of costs after a Consent compromising the Suit herein was entered on 15<sup>th</sup> October 2015. The hearing of the issue came up on 24<sup>th</sup> March 2016 and was canvassed by way of written submissions. The Trial

Judge, then Hon. Justice Kariuki, reserved the Ruling for 5<sup>th</sup> May 2016. The Ruling was not delivered on that day and was instead delivered on 27<sup>th</sup> May 2016. Counsel for the Applicant says that he was not aware of the Ruling date.

4. The Respondents have deponed that the Ruling was delivered on 27<sup>th</sup> May 2016 after the Court gave Notice of it in the Daily Cause list.
5. The principles upon which a Court can grant an Order for extension are settled. The Powers are discretionary and unfettered. The list of factors which a Court should take into account is not exhaustive. These include:-
  - a. The period of delay.
  - b. Reason for delay.
  - c. Chances of the Appeal succeeding.
  - d. Degree of prejudice to the Respondent if granted.
  - e. Effect of delay on Public administration.
  - f. Importance of compliance with time limits.
  - g. Resources of parties.
  - h. Whether matter raises issues of public importance.

(See Stanley Kahoro Mwangi & 2 others vs. Kanyamwi Trading Company Ltd [2015] eKLR.)

6. This Court is willing to accept that the reason given by the Respondents for not attending Court is plausible. It is common ground that no Notice of the new Ruling date was served on the Advocates on record. Instead, the matter appeared on the Cause list. It is in my view excusable if Counsel for the Applicant did not see the list.
7. The Application was filed about 60 days after the Ruling was delivered. Is the delay of 60 days explained? It was not until 13<sup>th</sup> July 2016 when the Advocates for the Applicant became aware of the Ruling. This was after the Respondents' Counsel served them with a Bill of Costs. This Application was brought only 9 days after the Applicant became aware of the Ruling. The delay is explained and is at any rate not unreasonable.
8. These two factors are sufficient to persuade this Court to grant the extension sought.
9. There is then the plea for Stay of Execution of the Ruling. That Ruling was in respect of Costs which have now been taxed at Kshs.560,000/=. While seeking Stay of Execution, this Court is not told of the substantial loss that the Applicant will suffer if the costs are paid. It is not said that the Respondents are so impecunious that they will be unable to pay back the amount if the Appellate Court was to find in the Applicants' favour. Neither is it said that payment of the amount would impoverish the Applicants beyond redemption. I am not satisfied that stay is deserved.
10. So in answer to the Notice of Motion dated 22<sup>nd</sup> July 2016, I grant prayer (2) only. Prayers (3) and (4) are declined. The Applicant shall file and serve a Notice of Appeal within 14 days thereof. There has been half success and each party will meet its respective Costs of the Application.

**Dated, Signed and Delivered in Court at Nairobi this 26<sup>th</sup> day of October, 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Mubangi for Plaintiff/Respondent

N/A for Applicant

Nixon - Court Assistant