



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MISCELLANEOUS CIVIL APPLICATION NUMBER 30 OF 2017**  
**LAVINGTON SECURITY LIMITED.....APPLICANT**  
**VERSUS**  
**FLORA KAMENE KAVOI.....RESPONDENT**

**RULING**

This is an application by way of Chamber Summons dated 18<sup>th</sup> January, 2017 by the Defendant/Applicant brought under Section 3A, 79G and Section 95 of the Civil Procedure Act and Order 42 Rule 6(1), Order 50 Rule 6 of the Civil Procedure Rules seeking orders that: -

- 1. That there be a stay of execution of decree in CMCC No. 1795 of 2015 Nairobi Milimani pending the heard and determination of this application.***
- 2. That the Honourable court be pleased to grant the applicant leave to file appeal against the Lower Court judgment out of time.***
- 3. That the attached Memorandum of appeal be deemed as duly filed upon payment of court fees.***
- 4. There be an Order staying execution of the decree herein pending the hearing and determination of the intended appeal against the judgment and order of the Honourable Magistrate.***
- 5. The costs of this application be provided for.***

The application is premised on the grounds that: -

- i. That the applicant was not aware that the judgment was scheduled to be delivered on 28<sup>th</sup> October, 2017 or at all.***
- ii. That delay in filing appeal out of time was not inordinate.***
- iii. The initially judgment was to be delivered on 29<sup>th</sup> July, 2016 but we were advised that the same would be delivered on notice.***
- iv. That on perusal of the judgment and the Applicant is dissatisfied with Court's decision and***

***therefore intends to lodge an appeal.***

***v. That the Applicant intends to lodge an appeal in this court and the intended appeal will be rendered nugatory if the decree is executed.***

***vi. That the applicant is ready to make an undertaking on security and abide by conditions which the court may set pending the hearing and determination of the appeal.***

***vii. That the Respondent may not be able to refund the decretal amount in the likely event that the intended appeal is successful.***

The application is supported by the supporting affidavit of David Kigen the Operations Manager of the Applicant who reiterates the grounds of the application.

The Respondent opposed the application. The Respondent filed a Replying affidavit sworn on 13<sup>th</sup> February, 2017 deponing that: -

***a. That the hearing of CMCC No. 1795 of 2015 the Plaintiff took place on 9<sup>th</sup> March, 2016, where he testified and the Applicant who is the defendant therein testified.***

***b. That the trial court ordered that advocates file written submission on or before 6<sup>th</sup> April, 2016.***

***c. That on 6<sup>th</sup> April, 2016 when the matter came up for mention, the trial court gave a judgment date for 11<sup>th</sup> May, 2016.***

***d. That on 11<sup>th</sup> May, 2016, the Judgment was not ready and the trial court indicated that the judgment was to be delivered on notice.***

***e. That the trial court duly issued a notice of Delivery of judgment appropriately to CMCC No. 1795 of 2015. And Judgment was to be delivered on 28<sup>th</sup> October, 2016 at 10.030 a.m. Enclosed and marked "FK 1" is copy of the Notice to confirm this.***

By consent of the Advocates for the parties agreed that this application was to be disposed of by filing respective written submissions.

M/s Mathenge for the Applicant submitted that after hearing the evidence of both parties the trial magistrate directed the parties to file respective submissions and gave the date of 29<sup>th</sup> July, 2016 as the date for delivery of Judgment. On 29<sup>th</sup> July, 2016, Judgment was not delivered as the court was not sitting. Judgment was, however, delivered on 28<sup>th</sup> October, 2016, which date they had no notice of. Counsel submits that he only came to learn of the delivery of the judgment on 25<sup>th</sup> November, 2016 by which time the 30 days to file appeal had lapsed. He urged this court to be guided by the decision of Supreme Court in **Salat Vs IEBC & 7 others**. On the principles that guide the court in exercising its discretion to extend time.

On the second ground that the court should order stay of execution pending the hearing and determination of the appeal. M/s Mathenge submits that if the order is not granted the Appellant is likely to suffer substantial loss if the decretal amount is paid to the Plaintiff as the plaintiff may not be able to repay if appeal is successful as the Respondents means are not known. He further submits that the appeal filed is an arguable one, and that the Applicant has filed this application without undue delay.

Finally, counsel submits that the applicant is willing and able to offer any security ordered by the court on due execution of the decree.

Mr. Mogikoyo for the Respondent in reply submits that due notice of delivery of judgment was made as

evidenced by the annexed notice of delivery of judgment to her application he further submits that: -

*a. In paragraph 4 of the supporting affidavit by David Kigen, the Applicant depones on oath that the discovered that judgment had already been delivered in the matter when his advocate perused the court file on 25<sup>th</sup> November, 2016. On a strict computation of time and given that judgment was delivered on 28<sup>th</sup> October, 2016. There was a window of about 3 days before expiry of time to file appeal. Applicant has not explained why he would not file appeal any time between 25<sup>th</sup> November, 2016 and 28<sup>th</sup> November, 2016.*

*b. For the litigant, who is minded of defending his right, a delay of 2 months form discovery of delivery of judgment is too inordinate and inexcusable particularly when the same is not explained.*

*c. That the Applicant using this court as a shield. This should not be condoned by this Honourable Court. Extending time and granting stay of execution are discretionary orders. It is our submission that in view of our submissions above, the Applicant does not merit the orders. He is not a litigant of truth and has not demonstrated the seriousness of pursuing the Appeal other than stopping execution of the decree.*

Finally he submits that: -

*d. The Respondent has been and will, greatly be prejudiced if the orders of extension or stay are granted. She lost all her household goods. She lost the comfort and enjoyment of those goods to delay her from getting the decretal sum which she can use to restore her premises to the position it was before the break-in and theft, will not only be prejudiced but greatly unjust.*

The issues as I discern from the applications and submissions are two fold: -

- 1. Whether the applicant ought to be granted leave to file the appeal out of time and*
- 2. Whether the stay of execution should issue pending the hearing of the intended appeal.*

The principles that guide the court discretion in the grant of extension of time and which the Applicant must establish as stated in Supreme Case **Kiptoo Arap Korir Salat Vs IEBC & 7 others** that: -

- a. Extension of time is not a right of a party. It's an equitable remedy only available to a deserving party.*
- b. The burden of laying a basis of satisfaction of the Court is to the party seeking extension.*
- c. Delay should be explained to court.*
- d. Whether there will be any prejudice suffered.*

The primary concern of the courts is to have matters litigation and finalized on their merits for that determination settles the issues under litigation. In this application, it is not in dispute that the Applicant did not appeal within the 30 days of the judgment as provided. His explanation for the delay is that he came to learn of the Judgment later after it had been delivered. He, however, submits that once he became aware of it, he took immediate steps to file the same by filing this application. It is on this basis that he urges the court to exercise its discretion to extend time to lodge the appeal.

In **Branco Arabe Epano Vs Bank of Uganda (1999) 2EA 22** it was observed that: -

*“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessary debar a*

***litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes should be fostered rather than hindered.”***

In this application I am satisfied that the delay in filing the appeal has been satisfactorily explained and that the granting of the extension will not cause any prejudice to the Respondent which cannot be compensated by cost. I, therefore, grant the Applicant leave to file appeal out of time and direct that the memorandum of appeal annexed to the Applicant be deemed to be filed upon payment of requisite court fees.

The second issue raised in the application is whether the court should grant stay of execution pending the filing, hearing and determination of the appeal. The grounds upon which a court can grant order of stay of execution as per Order 42 Rule 6 which provides: -

***“1. No appeal or second appeal shall operate as a stay of section or proceedings under a decree or order appealed from except in so far as the court appealed from may order but; the court appealed from may for sufficient cause order stay of execution of such decree or order.***

***2. No order of stay of execution shall be made under Sub-rule (1) unless: -***

***b. The court is satisfied that substantial loss may result to the applicant unless the order is made and that***

***b. The application has been made without unreasonable delay; and***

***c. 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.”***

The application for stay of execution has been made simultaneously with the one of extension of time. This court must be satisfied before granting the stay that substantial loss may result if the application is not granted and that the applicant has is ready to provide security for the due performance of the decree. I have considered the application and I am satisfied that while the grant of stay of execution will be appropriate, the Applicant must provide security for due execution of the decree. I, therefore, grant the order of stay of execution on conditions that the Defendant/applicant do deposit the whole of the decretal sum in an interest earning account in the joint names of the advocates of the Defendant/Applicant and Plaintiff/Respondent within 30 days. If the said deposit is not made within the 30 days, the order of stay of execution to lapse.

Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of April, 2017.

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**S N RIECHI**

**JUDGE**