



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISC. CIVIL APPLICATION NO. 55 OF 2017

STEPHEN KIPKOECH KEITANY.....APPLICANT

VERSUS

CHEBII JEOFREY KIPCHUMBA.....RESPONDENT

RULING

1. The applicant prays for *extension of time* to lodge an appeal. The intended appeal is against the judgment and decree of the lower court delivered on 15th September 2016 in Eldoret Chief Magistrates Civil Suit 654 of 2014. There is also a prayer for stay of execution of the decree pending appeal.
2. The respondent's suit in the lower court was for *specific performance* to compel the applicant to deliver the log book and transfer forms for motor vehicle KBM 727Q. The lower court granted the decree as prayed together with costs. The applicant is aggrieved; and, intends to lodge an appeal in terms of the annexed *draft memorandum of appeal* marked "S7".
3. The applicant filed the present notice of motion on 23rd May 2017. The gravamen of the motion is that the suit vehicle was mortgaged to Chase Bank; and, that the log book is held by the bank. The applicant's case is that the intended appeal is arguable and that unless the orders are granted, he will suffer irreparable harm; or, the intended appeal will be rendered nugatory. The applicant blames the lower court for not delivering *notice* of the judgment.
4. Those matters are set out at length in the deposition of the applicant sworn on 23rd May 2017. At paragraphs 12 to 18; and, 28 of the affidavit, he avers as follows-
 - “12. That upon realizing that the presence of Chase Bank (K) Limited; was necessary in the matter, vide the amended plaint dated 28th January, 2015 filed in court on 29th January 2015, the respondent enjoined the said bank onto the matter but when the bank protested (see annexure marked “S1”), the respondent consented that the name of the bank be struck out from his suit.
 13. That by conceding as aforesaid, I am not having in [my] possession the log book and with [sic] no powers regarding the transfer of the said motor vehicle.
 14. That the respondent (the plaintiff in the subordinate court) testified and he was cross-examined by my advocate.
 15. That parties were directed by a new court (the trial Magistrate had gone on transfer) to file their respective written submissions.

16. That I am informed by my advocate which information I verily believe to be true, that on 20.7.2016, [the] learned Magistrate who had replaced the trial magistrate at the station gave 31.8.2016 as the date when judgment was to be rendered in the matter.

17. That I am informed by my said advocate which information I verily believe to be true, that judgment was not delivered on the said 31.8.2016.

18. That I am informed by my said advocate on record which information I verily believed to be true, that he did make a lot [sic] toward perusing the court file but that was only possible on 4th May 2017 for all along the court file could not be traced either at the Registry and or at the container [sic].

28. That if that was [sic] to happen, I will suffer irreparable harm and further my intended appeal will be rendered nugatory. That for some time now I have been undergoing treatment because of ill health (depression). Annexed hereto are medical chits”

5. The motion is contested. There is a replying affidavit sworn by the respondent on 31st May 2017. The pith of the deposition is that a notice of judgment was delivered; and, a copy of the decree served personally upon the applicant. The respondent contends that the delay to lodge an appeal is inexcusable. The respondent averred that Chase Bank was removed from the proceedings by consent. The respondent’s case is that the motion is a gimmick to delay the fruits of his decree.

6. Paragraphs 4 to 8; and, 11 of the replying affidavit state as follows-

“4. Subsequently judgment [was] slated for 31st August, 2016 but the same was however not ready and was rescheduled for [sic] 3rd October 2016 by notice to all parties (annexed and marked “CJK 1” is a copy of notice dated 20th September 2016 by the Honourable Court).

5. That I have been informed by my lawyers which information I verily believe to be true that the said judgment was delivered as scheduled as per the notice bringing to the attention of the parties herein by the Honourable E. Kigen on behalf of Honourable Olando who had been transferred.

6. That it is within my personal knowledge that the decree of the subordinate court was served upon the applicant as demonstrated by the return of service sworn and filed in court.

7. That I have no doubt in my mind that the supplicant was personally served but has continued to blatantly disregard court orders.

11. The 2nd defendant (Chase Bank Ltd) in the lower court’s proceedings was excluded from the proceedings by consent of all parties dated 3rd October, 2015 as it was merely a lender and the applicant through his advocate on record executed the same without coercion and is stopped [sic] from stating otherwise”

7. On 31st May 2017, I heard brief submissions from the learned counsel for both parties. I have considered the application, depositions and the rival submissions.

8. The legal parameters in a matter of this nature are well settled. This court has wide and unfettered discretion to *extend time*. The discretion must however be exercised judiciously. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See generally, Leo Sila Mutiso v Rose Mwangi, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported).

9. The Court must also pay heed to the overriding objective to do justice to the parties. See Article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act. See also Harit Sheth T/a Harit Sheth Advocate v Shamas Charania, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010]

eKLR.

10. There is no dispute that the impugned judgment was delivered. But the *date* cited in the motion of 15th September 2016 could be erroneous. I will revisit that matter shortly. But assuming that the date is correct, the time prescribed for lodging an appeal expired on or about the 15th October 2016. The present motion was only lodged on 23rd May 2017.

11. There was thus a delay of nearly *eight months*. The applicant claims he was unaware of the judgment. I am not persuaded by the argument. On 20th July 2016 parties appeared before the learned Magistrate who had taken over the trial. Judgment was reserved for 31st August 2016. It was not ready and was to be delivered by notice. I have seen exhibit *CJK1*. It is a notice addressed to all counsel indicating that judgment would be delivered on 3rd October 2016.

12. There is also a return of service showing that the applicant was served with the *decree* on 8th March 2017. There is a delay of nearly two and half months before presenting the motion. There is thus a pattern of delays by the applicant. That in turn prejudices the grant of a discretionary remedy.

13. I have however studied the copy of the decree marked *CJK2*. Whereas the respondent claims that judgment was delivered “as scheduled” on 3rd October 2016, the decree reads 15th September 2016. The notice from the court is itself dated 20th September 2016 advising counsel that judgment would be delivered on 3rd October 2016. The applicant claims he never received it. I do not have the records of the lower court at this stage. I cannot thus say for sure that the notice was received by R. M. Wafula & Company, the applicant’s counsel. It may be inferred from the fact that the respondent’s lawyer received it. But it does *not* prove it was served on the other firm.

14. That said I would have expected the respondent’s counsel to be a little more diligent. He could have made enquiries from the registry for example. There is *no* evidence that the court file was *missing*. If that were the case, I would have expected to see evidence of a letter addressed to the Executive Officer of the court enquiring over the matter. The respondent’s counsel on the other hand could have been a little more *courteous* by serving the decree upon his colleague. But it still does *not* excuse the long delay before filing of the present motion. The applicant seems to have been woken up from slumber only after service of the decree.

15. Granted all those reasons, I am *disinclined* to enlarge time to file an appeal. The prayer for leave to appeal out of time is *dismissed*.

16. That leaves the matter of *stay*. Order 42 of the Civil Procedure Rules requires the applicant to satisfy the court that he stands to suffer *substantial loss* unless the order is made; and, to make the application the application for stay without *unreasonable delay*. The applicant must also *furnish security* for due performance of the decree. I have already found that the delay in presenting the motion is too lengthy and *inexcusable*. I am alive that the applicant avers that he is suffering from *depression*. Unfortunately, that does not constitute *substantial loss*. The applicant contends that there was a chattels mortgage over suit vehicle; and, that the log book is held by the bank. The trouble is that the applicant entered into *consent* to remove the bank as a *party* to the suit. The applicant has *not* also made an offer to *furnish security* for due performance of the decree.

17. In the end, I am *not* satisfied that the conditions for stay of execution pending appeal have been established. Furthermore, the court has *declined* to extend *time* for filing such appeal. The upshot is that the applicant’s notice of motion dated 23rd May 2017 is *dismissed*. In the interests of justice, and considering the predicament the applicant finds himself in, I order that each party shall bear his own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 27th day of June 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Applicant (absent).

Respondent (absent).

Mr. J. Kemboi, Court Clerk.