



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 334 OF 2017

ARK TENTS & LEATHER LIMITED.....APPLICANT

VERSUS

SONGE OJEMARESPONDENT

RULING

1. The application dated 18th August, 2017 seeks orders that this Honourable court be pleased to grant leave to the Appellant/Applicant to file an appeal out of time and that the annexed draft memorandum of appeal be deemed filed.
2. It is stated in the affidavit in support that the judgment of the Lower Court was delivered on 29th June, 2017. The Applicant is dissatisfied with the said judgment and wishes to appeal. The delay in filing the appeal within time is attributed to not being supplied with the Lower Court proceedings in time. It is stated that the Applicant's goods have been proclaimed by Auctioneers and if stay of execution orders are not granted the execution process will proceed. It is further stated that the appeal has high chances of success and the Applicant is willing to comply with the orders of this court.
3. The application is opposed. It is deposed in the replying affidavit that there was laxity on the Applicant's part. The Respondent saw this application as a tactic to delay him from enjoying the fruits of his judgment. The Applicant contended that in the unlikely event that the application is allowed the Applicant should deposit security for the due performance of the decree.
4. During the hearing of the application, the parties opted to file written submissions. The Respondent's submissions have been considered. The Applicant did not file any.
5. Section 79G of the Civil Procedure 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 the 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 in time.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

6. The court therefore has the discretion to extend time within which to file an Appeal. As stated by the Court of Appeal in the case of **Aviation Cargo Limited v St. Mark Freight Services Limited [2014] eKLR**:

“....whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”

7. The Applicant has expressed his apprehension that the Respondent will execute the decree and thereby cause him irreparable harm. As stated by the Court of Appeal in the case of **Kenya Shell limited vs Kibiru (1986) KLR**:

“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented.”

8. The judgment of the Lower court was delivered on 29th June, 2017. The application at hand was filed on 18th August, 2017. That's a delay of about twenty (20) days. The delay has been explained. The Applicant has exhibited a letter to the Executive Officer dated 10th July, 2017 which was received on 17th July, 2017. In the said letter, the Applicant requests to be supplied with certified copies of the proceedings and judgment of the Lower Court. However, there is no evidence when the said proceedings were supplied.

9. To balance the competing interest of both parties, I allow the application on the following condition that the Applicant do deposit the decretal sum in a joint interest earning bank account of the counsels for both parties herein or in court within 30 days from the date hereof. The requisite court fees for the filing of the Appeal to be paid within 7 days from the date hereof.

Date, signed and delivered at Nairobi this 19^h day of Dec., 2017

B. THURANIRA JADEN

JUDGE