



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 493 OF 2004**

**HASSAN A.A. ZUBEIDI .....PLAINTIFF**

**- VERSUS -**

**THIKA MUSLIM HOUSING CO-OPERATIVE SOCIETY LIMITED.....DEFENDANT**

**RULING NO. 2**

1. The application dated 20<sup>th</sup> August 2015 seeks the stay of further execution of the Decree.
2. The defendant's contention was that the execution proceedings were obtained irregularly; were an abuse of the process of the court; and were therefore a nullity.
3. In the circumstances, the defendant sought an injunction to restrain the plaintiff from alienating, transferring or in any other manner, dealing with **L.R. No. 10821/53**, until this application was heard and determined.
4. Secondly, the defendant sought leave of this court, to enable it lodge an appeal to the Court of Appeal.
5. The primary complaint lodged by the defendant was that it was never served with any Notice pertaining to the process of execution of the decree. The failure to serve the defendant was deemed to constitute a violation of the requirements spelt out by Order 22 Rule 18 of the Civil Procedure Rules.
6. According to the defendant, it first learnt about the process of execution when the suit land was advertised for sale by public auction.
7. It is because the defendant had not been aware of the said process of execution earlier, that they did not come to court earlier, to try and stop the said process: that is what the defendant told this court.
8. Meanwhile, as regards the delay in lodging a Notice of Appeal, the defendant explained that it was attributable to the leadership wrangles between the current and the former directors of the defendant. The said wrangles are said to have interfered with the day-to-day running of the Society's business.
9. The defendant cited the Criminal Case No. 2465 of 2005 as an example of the wrangles between the directors. The said case was, reportedly, before the Chief Magistrate's Court in Thika.
10. If given the opportunity to lodge its appeal late, the defendant believes that it will demonstrate that the said appeal was a,

***“Meritorious and credible case with solid grounds of appeal and very high chance of success?”***

11. Therefore, unless the court granted orders now, to stop further execution, the defendant believes that it would suffer great and irreparable loss.

12. The Thika Muslim Housing Co-operative Society Limited was said to have more than 750 members. Therefore, if the said members were forced out from the parcels of land which they were occupying, the defendant's appeal would be rendered nugatory.
13. The reason why the defendant was making that contention is that its members actually occupy parcels of land which had been created through the sub-division of the land which was the subject-matter of the suit.
14. If the members of the Co-operative Society were forced to vacate their respective properties, to pave way to the person who had purchased the suit land, they would suffer substantial loss.
15. In the understanding of the defendant, it was vital that further execution be put on hold in order to protect the members of the Co-operative Society from being evicted from their houses.
16. According to the defendant, a stoppage of further execution would not prejudice the plaintiff, as the plaintiff was described as a man of means.
17. The defendant then commented that whilst the plaintiff was a man of means, the members of the Co-operative Society owned nothing more than their respective plots, which were located within the suit land.
18. For that reason, the defendant submitted that the suffering which its members would suffer, if they were evicted was out of proportion compared to any suffering which the plaintiff may suffer if execution was stayed until the defendant's intended appeal was determined.
19. Why did the defendant say so?
20. It is because, in the opinion of the defendant, the transfer of the land to a third party would place the land beyond the reach of the defendant.
21. In answer to the application, the plaintiff reiterated that the defendant had been duly served with the Notice requiring it to show cause.
22. It is significant that the defendant had, in its application, indicated a wish to have an opportunity to cross-examine the process server who had allegedly served the Notice to Show Cause upon the defendant. I say that it is significant because if that opportunity was taken up, the court would have been in a position to evaluate the veracity of the defendant's contention to the effect that the process server had been dishonest when he deponed that he did serve the Notice upon the defendant.
23. Regrettably, the defendant did not pursue its quest, to cross-examine the process server.
24. In the result, the court is now left with 2 affidavits which were wholly inconsistent. In one affidavit, the process server stated that he did effect service upon the defendant; whilst in the other affidavit, the defendant stated that it was never served with the Notice.
25. In the absence of a process through which the respective deponents were cross-examined, it becomes very difficult for the court to have a firm foundation upon which to determine which of the 2 deponents would be believed.

#### **Order 42 Rule 6**

26. That rule envisages an application for the stay of either proceedings or of execution, pending the hearing and determination of an appeal.
27. In **ROSE CHEPKORIR Vs MWINYI MOHAMED RIVA & ANOTHER Hccc No. 27 of 2009** (at Kericho), Ong'undi J. said;

***“I wish, on the onset to point out that the applicant cited Order 42 Rule 6 of the Civil Procedure Rules as one of the provisions he is relying on for this application. The said provision is inapplicable as there is no appeal or intended appeal before this court?.”***

28. In this case the defendant had filed a Notice of Appeal earlier. However, the said Notice of Appeal was struck out by the Court of Appeal on 11<sup>th</sup> February 2015. Therefore, there is no pending appeal, currently.
29. That may, perhaps, explain why the relief sought by the defendant is only for stay of execution until this application was heard and determined.
30. Ordinarily, when a party was seeking an order for stay of execution, it would be because the pending or the intended appeal arose from the same orders that gave rise to the execution which he was seeking to stay.

31. In this case, however, the appeal which the defendant intends to file, if it is given leave, is in relation to the Ruling delivered by Muga Apondi J. on 20<sup>th</sup> December 2010.
32. Meanwhile, the execution which the defendant wishes to have stayed, arose from a Notice To Show Cause application which was determined by Hon. Elizabeth Tanui, Deputy Registrar, on 3<sup>rd</sup> June 2015.
33. In effect there was no nexus between the application for stay of execution and the intended appeal.
34. In respect to the process of execution, the defendant has not sought to appeal. However, the defendant has sought orders to declare the execution proceedings as being a nullity because the same were irregular, and therefore constituted an abuse of the court process.
35. The only reason why I have pointed out the lack of connectivity between the 2 reliefs is because it is, therefore, possible for the court to grant one and not the other. That is not an end in itself. The important point to be noted is that the ingredients which the defendant was required to prove in respect to the 2 reliefs, were different.
36. The plaintiff submitted that the learned Deputy Registrar had the requisite jurisdiction, pursuant to Order 49 Rule 7 (2) of the Civil Procedure Rules, to grant the orders which gave rise to the process of execution. In that respect, the defendant did not assert that the learned Deputy Registrar lacked jurisdiction. It is therefore a non-issue.
37. But, does that mean that if the defendant did not appeal against the decision of the Deputy Registrar, it could not ask this court to declare the execution proceedings a nullity?
38. The answer is in the negative. When the interests of Justice demand that something which was done irregularly be undone, the Court will take appropriate action to ensure that Justice is made a reality.
39. An appeal is not the only process through which an error can be corrected. Other processes such as review, setting aside and variation of orders may be called upon, in appropriate circumstances, to provide answers.
40. Considering that there is yet no appeal lodged by the defendant, if the court granted a stay of execution, the inevitable question would be about the scope of such an order. That question would arise because ordinarily, when a court puts execution on ice, it would normally remain in that state until a pending appeal was determined.
41. In this case, if stay was granted it would only remain in force until this application was concluded.
42. The fact that I am reading my Ruling on the application means that the application has been concluded. And until now, there has been a freeze on the process of execution. Therefore, the prayer for stay of further execution is now spent. I do not, and cannot make further orders in that respect.
43. The only issues which are still live relate to the quest for a declaration that the execution proceedings were a nullity; an injunction prohibiting the alienation or transfer of the suit property; and leave to file an appeal out of time.
44. As the Ruling in relation to which the intended appeal relates was made on 20<sup>th</sup> December 2010, the plaintiff expressed the view that the application for leave to appeal out of time, was brought after undue delay.
45. Secondly, the plaintiff submitted that this court lacks jurisdiction to grant leave to the defendant to file the intended appeal before the Court of Appeal. As far as the plaintiff was concerned, it was only the Court of Appeal which could grant the requisite leave to file the appeal late.
46. On the issue of the alleged undue delay, it is true that by the time the defendant filed its application to seek leave to appeal, the period which had lapsed, from the time the Ruling in question was delivered, was over 4 years.
47. If viewed from that perspective alone, it would certainly appear like the defendant was in slumberland for a long period of time. It would then be difficult to justify the time taken before the application was filed.
48. However, it must be appreciated that in this case the defendant had actually filed a Notice of Appeal on 23<sup>rd</sup> March 2011.
49. From that date, until 11<sup>th</sup> February 2015, when the initial Notice of Appeal was struck out, the defendant had no reason to seek leave of the court to file another Notice of Appeal.
50. The need to seek leave to file a Notice of Appeal out of time, only arose after the initial Notice had been struck out.
51. Thereafter, the defendant, which is a registered society under the Co-operative Societies Act,

- explains that it had to first call for a General Meeting, to enable its members make a decision on the way forward.
- 52.The General Meeting was held in April 2015, paving the way for the defendant to come to court to seek leave to re-institute the process of appeal.
- 53.In my considered view, although it would have been desirable for the defendant to conduct its affairs with a greater sense of urgency, it cannot be said that the time taken before the application herein was filed, was inordinately long.
- 54.But does the High Court have jurisdiction to grant leave to the defendant to file its appeal before the Court of Appeal?
- 55.Section 7 of the Appellate Jurisdiction Act stipulates as follows:

***“Power of High Court to extend time.***

***The High Court may extend the time for giving notice of intention to appeal from a judgement 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?.***

- 56.Kimaru J. had occasion to hold that the provision of Rule 4 of the Court of Appeal Rules granted to the Court of Appeal the exclusive jurisdiction to determine whether or not to grant an extension of time for the filing of an appeal to the Court of Appeal. That holding was made in **SIMON TOWETT MARITIM Vs JOTHAM MUIRURI KIBARU, HIGH COURT Misc. APPLICATION No. 172 of 2004** (at Nakuru).
- 57.Nonetheless, the learned Judge granted to the applicant 45 days within which to make an appropriate application to the Court of Appeal.
- 58.Meanwhile, in the case of **LOISE CHEMUTAI NGURULE & ANOTHER Vs WILFRED LESHWARI KIMUNG’ENI & 2 OTHERS ELC No. 335 of 2012** (at Nakuru), Munyao J. held as follows;

***“In my opinion, the power to extend time for the filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. One can approach either court for the order?.***

- 59.Clearly, the High Court has not spoken in one voice on that issue.
- 60.In **KENYA AIRPORTS AUTHORITY & ANOTHER Vs TIMOTHY NDUVI MUTUNGI CIVIL APPLICATION No. NAI 165 of 2013**, Githinji JA said;

***“The application of 10<sup>th</sup> December, 2012 (the application for extension of time to lodge Notice of Appeal out of time), was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of the Court of Appeal Rules.***

...

***Since the application for extension of time for lodging a notice of appeal made in the High Court was competent...the High Court should have determined it?.***

- 61.I believe that the learned Judge of Appeal intended to make reference to Section 7 of the Appellate Jurisdiction Act; not Rule 7 of the Court of Appeal Rules.
- 62.In the light of the Ruling by Githinji JA, I find that the High Court has jurisdiction to determine whether or not to grant an extension of time to lodge an appeal to the Court of Appeal.
- 63.Having earlier filed a Notice of Appeal as long ago as 2011, I think that that was an expression of the defendant’s intention to appeal against the Ruling dated 20<sup>th</sup> December 2010.
- 64.The Notice of Appeal was struck out, as it had been filed late.
- 65.In my considered opinion, the circumstances in this case require that the court deems the

- defendant as having always had the desire and intention to appeal. If it were otherwise, the defendant would not have lodged the Notice of Appeal in the first instance.
66. I say so advisedly because even the Rules provide that a Notice of Appeal, when filed, constitutes the commencement of the process of an appeal.
67. In the case of **NICHOLAS KIPTOO ARAP KORIR SALAT Vs THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS, SUPREME COURT APPLICATION No. 16 of 2014**, the Supreme Court addressed itself thus;

*“Extension of time being a creature of equity, one can only enjoy it if he acts equitably; he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it?”*

68. In this case, the initial Notice of Appeal was struck out on 11<sup>th</sup> February 2015. In its Ruling in **HASSAN A.A. ZUBEIDI Vs THIKA MUSLIM HOUSING CO-OPERATIVE SOCIETY LIMITED, CIVIL APPLICATION No. 70 of 2011**, the Court of Appeal noted that;

*“Ms Kingara, learned counsel for the respondent concedes that there is no replying affidavit as grounds of opposition to the application filed almost 4 years after the filing of the application?”*

69. I understand that to mean that the respondent did not take steps to try and defend the legitimacy of the initial Notice of Appeal.
70. Thereafter, the defendant waited for 2 months, until its Annual General Meeting was held in April 2015, when the defendant was given instructions, by its members, on how to proceed with the intended appeal.
71. The defendant has not tendered any explanation why it could not have called for an urgent Special General Meeting.
72. It is to be borne in mind that the defendant had already been given authority, *(if any was needed)*, to appeal against the decision dated 20<sup>th</sup> December 2010. I so find, because without such authority, the defendant could not have lodged the initial Notice of Appeal.
73. When that initial notice was struck out, I would presume that the authority which had been given in 2011, would still have been sufficient authority to enable the defendant re-start the process of appeal.
74. But even assuming that the defendant required a new resolution by members after 23<sup>rd</sup> February 2015, the said resolution was passed at the Annual General Meeting in April 2015.
75. The defendant has tendered no explanation for the further delay between April 2015 and 24<sup>th</sup> August 2015, when it lodged this application for extension of time to file an appeal.
76. A delay of about 4 months, when an earlier delay had already resulted in the striking out of an earlier Notice of Appeal, is deemed to be inordinate.
77. This court cannot be called upon to assess the possible chances of success of the appeal which the defendant wished to file in the Court of Appeal. Such an assessment if conducted by a Judge of concurrent jurisdiction, would be construed as an attempt by the Judge, to sit on an appeal over a decision emanating from a court whose jurisdiction was similar to that of the Judge whose decision was being challenged. That is not permissible. No court can sit on an appeal emanating from its own decision or from a decision of a court of concurrent jurisdiction.
78. Therefore, when the defendant asked this court to grant it leave to appeal out of time, the defendant deprived itself of an opportunity which could have been available to it, if he had filed the same application before the Court of Appeal. That court could have been in a position to determine whether or not the intended appeal had a probability of success.
79. In the final analysis, the defendant has not satisfied me that the Affidavit of Service, which indicated that it was duly served with the Notice to Show Cause was false. Therefore, there is no basis for declaring as a nullity, the process of execution which followed after the learned Deputy Registrar held that the defendant had failed to show cause.
80. Secondly, the applications for stay and for an injunction were both spent immediately after the

said applications were determined. That is the position because of the manner in which the reliefs were worded.

81. Finally, the application for leave to file a Notice of Appeal out of time is rejected because it was lodged after an unexplained period of inordinate delay.

82. Accordingly, the application dated 20<sup>th</sup> of August 2015 is hereby dismissed, with costs to the plaintiff.

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>th</sup> day of January 2016.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Kimondo for Kipungeno for the Plaintiff

Miss Kiongera for Kubo for the Defendant

Collins Odhiambo – Court clerk.