



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 133 OF 2014**

**(Being an appeal against the Ruling of Hon. S.K. Gacheru Principal Magistrate at Mombasa law court in Civil suit no.1222 of 2013)**

**CHARLES GITHINJI MUIGWA.....APPELLANT**

**VERSUS**

**CHARLES KIIRU KARANJA.....RESPONDENT**

**RULING**

**Outline:**

1. Before the court for determination is the application by way of Notice of Motion dated 25.3.2015 and seeking orders:-

- a. That this application be certified as urgent and service dispensed with at the first instance.
- b. That this honourable court be pleased to order stay of execution of the decree herein pending the hearing of the application *interpartes*.
- c. That this honourable court be pleased to order a stay of execution of the decree in CMCC NO.1222 OF 2013 pending the hearing and determination of the Appeal herein.
- d. That this honourable court be pleased to grant leave to file an Appeal against the ruling of the Honourable S.K.Gacheru filed on 19/08/2014.
- e. That this honourable court be pleased to enlarge time for the filing of the Appeal CMCC NO.1222 of 2013 and the Appeal dated 24/10/2014 and filed on 3/03/2015 be deemed as duly filed with the leave of the court.
- f. That costs of this application be in the cause.

2. On 29.9.2015 both counsels for the parties attended court and the court gave directions that they attend court on the 2.11.2015 to highlight the submissions filed. Come the 2.11.2015 only the Respondent attended but not the applicant. The court waited for the applicant's court till 01.13 pm when it became apparent that no appearance was about to be made by them. The court then took the highlights from the Respondent and in making the determination, regard has been had to the submissions filed both sides and the highlights offered by the Respondent.

### **Arguments for the Parties:**

3. The facts leading to this application are that the Respondent filed a suit against the applicant in the lower court seeking to recover the sum of Kshs.2,500,000 plus costs and interests. At the request of the plaintiff(Respondent) a default judgment was entered against the defendant /applicant in that sum and execution process ensued.

4. The applicant instructed an advocate one Mr.Oduor who filed an application to set aside but later sought to cease acting for the Applicant and was indeed granted leave to cease acting on the 27.6.2014. On the same day, the Applicants application to set aside the default judgment was sought to be dismissed and by a ruling of 19/8/2014 dismissed. Consequently, and as would be expected, the Respondent as decree holder would and had the applicant arrested and committed to civil jail only to be released later by a consent. That consent, however, did not settle the matter between the parties for the decree holder then moved and attached that Applicants immovable property known as MWIGA/BLOCKV/1133.

5. Meanwhile this appeal was filed on the 24.10.2014 out of time and the applicant now seeks to have deemed duly filed and orders of stay granted on its basis.

6. In the application, the applicant contends that he was not aware of the ruling of 19/8/2015, that the application was heard without notice to him and equally the ruling delivered without notice to him at all.

7. In opposition the Respondent has contended by his replying affidavit that the applicant was duly served with summons to enter appearance but opted to ignore the same; that the applicant was recalcitrant and dilatory in prosecuting the application to set aside and that having filed the appeal no attempt has been made to prosecute the same and that there has been inordinate delay in presenting this application and that good faith is wanting on the part of the applicant. It is further contended that in so far as the appeal seeks to upset the decision to commit the applicant to civil jail leave was mandatory and the appeal having been filed without such leave it is incompetent.

8. Indeed a lot of paper work has been generated in this matter at this very interlocutory state.

9. In my reading and analysis of the matter before me, the issues that isolate themselves for determination as follows.

- Is there jurisdiction in court to enlarge time and deem the appeal already filed as duly filed.
- Has the applicant met the prerequisites for grant of stay of execution pending appeal.

### **Analysis and determination:**

10. It is true that a look at the memorandum of appeal dated and filed in court on the 24.10.2014 does not explicitly show which of the decisions of the lower court is sought to be challenged. However a reading of the grounds of the appeal are clear that what is sought to be impugned is the decisions of the trial court's which determined the application for stay on the basis that the application had not been fixed for hearing and that no notice was given for the date of delivery of the ruling rendered on the 19.8.2014.

11. The appeal sought to be deemed duly filed was itself filed on the 24.10.2014 and the current application on 26.3.2015. From the very lengthy and somehow convoluted affidavit of the applicant, it is discernible that he was arrested and committed to civil jail on 21.10.2014 and was only released on the 1.12.2015 While in jail an application was filed in this matter being the Notice of Motion 6.11.2014 which sought the release of the applicant from civil jail. He was subsequently released by consent.

12. Ultimately the dispute between the parties, is in the nature of a friendship gone sour. The application whose determination upon is sought to be challenged was by itself an attempt by the applicant to be heard after the default judgment was entered against him on alleged service while he was in jail pursuant to a complaint raised by the plaintiff in the same matter. Indeed the trial court is faulted by the applicant for

having revisited its decision declining to enter a default judgment. Equally the court is faulted in this application for determining an application on a date not set aside for the application and without notice to the applicant.

13. Those issues, to me, would at an appropriate time, present arguable questions and genuine complaints that the court would need to investigate and establish the veracity thereof. It surfeits to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contends the same was not due for hearing and when he had no notice.

14. Those complaints, coupled with the fact that the applicant has paid the ultimate price by losing his liberty when he was committed to civil jail lead me to view the application with some favour, while considering that the very purpose of a justice system is to hear and determine disputes. I am of the opinion that the complaints by the applicant on sentence and the way the application for setting aside was dealt with present arguable points on the appeal filed out of time for which reason I am inclined to find and do find that he has made out a case for extension of time. I therefore extend time within which to file the appeal.

15. That however does not end the question about the validity of the appeal because while the appellant prays that the appeal be deemed duly filed the Respondent has opposed the application and state on the authority of the decision by the supreme court that to deem the appeal filed out of time would be to bless an illegality.

16. I appreciate the decision in **NICHOLAS KAK SALAT -VS- IEBC & 7 OTHERS** and note that it was grounded upon the provisions of Rules 33(1) and 53 of the supreme court Rules. Those are not the rules I am to apply in this matter. Without saying more I hold the view that this application is premised on the inherent powers of the court as well as Order 50 Rule 6. That provision is worded as follows:

Power to enlarge time [Order 50, rule 6.]

***“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:***

***Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”***

17. As worded the discretion is very wide and only subject to terms being imposed. The purpose of the discretion as the supreme court pointed out is because lapses will always occur by all manner of reasons including inadvertence, error or just negligence. When it so occurs then the court must never lose sight of its principal purpose of doing justice. Justice will not have been done if a party leaves the court with that feeling, however ingenuine, that he has been denied the chance to present its case.

18. In the spirit of section 1A, 1B & 3A of the Civil Procedure Act, having extended the time to file the appeal, I order that the memorandum of appeal filed on the 24.10.2014 is deemed duly filed.

**Is the appellant entitled to stay pending appeal:**

19. The considerations whether or not to grant stay pending appeal as now well settled. The applicant need to show that the application has been presented without unreasonable delay, that he shall suffer substantial loss unless stay is granted and that he offers security for the due performance of the decree.

**Substantial loss and Security:**

20. Substantial loss has now been described and understood to be type of loss that may be irredeemable or one that essentially destroys the interest of the applicant in the litigation as to render the remainder thereof academic and worthless as an endeavour. In the matter before me there is execution by way of an attachment of the applicants immovable property. Once that is sold what shall the litigation in the appeal be intended for?

21. In my view this is one of the situations that the decree holder may be reasonably told to hold on and await the outcome of the appeal filed even if it be ordered that the attached property remains so attached pending the determination of the appeal.

22. That, the Respondent has already identified and attached the landed property of the applicant to me is a sufficient comfort because a draft consent has been exhibited which show that if the property is sold it may just realised the full decretal sum and a surplus. There is therefore a security for the due performance of the decree provided the prohibition registered against title is maintained.

23. The upshot is that I allow the application on both limbs for extension of time and for say pending appeal but order that costs be in the cause.

24. In order that the appeal be given direction towards conclusion; it is ordered that:

1. **The appellant shall within 30 days from the date of the ruling compile file and serve a record of appeal together with any submissions it may seek to rely upon.**
2. **The Respondent shall upon service also file and serve written submissions within 14 days from the date of service.**

25. For avoidance of doubt the appeal is hereby admitted and the requirements of order 42 Rule 11 & 12 are dispensed with.

**Dated, signed and delivered at Mombasa this 19th day of February 2016.**

In the presence of:-

Mr.Kariuki for Mr.Wameyo for the Applicant/plaintiff.

Ms Akee for Mr. Kongere for the Defendant/Respondent.

**P.J.O.OTIENO**

**JUDGE**