



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
MISC. CIVIL CASE NO.27 OF 2016
TOBIAS ODUNDO.....APPLICANT
VERSUS
AFRICA MERCHANT ASSURANCE COMPANY LIMITED.....RESPONDENT
RULING

By his Notice of Motion dated 9.3.2015 the applicant prays for the following orders:

1. **The court be pleased to enlarge time and hereby grant the applicant leave to file an appeal out of time.**
2. **An order of stay of execution of the judgment/decree herein pending the hearing and determination of the intended appeal.**

The same is supported by the applicant's supporting affidavit sworn on the even date.

The judgment in the lower court was delivered on 30.10.2015 vide Winam PMCC No.3/2014. There is a draft handwritten judgment annexed to the said affidavit. The applicant depones that thereafter he did not instruct a counsel to lodge an appeal as he did not have funds and consequently the period for filing the appeal expired. The applicant has also attached a draft copy of the Memorandum of Appeal which he claims that it has a high chance of success.

The respondent on the other hand has filed grounds of opposition dated 11.3.2016 as well as the replying affidavit of **Erick Kokul** sworn on 19.3.2016. He depones that the application lacks merit and frivolous as it is filed 5 months after the judgment. That in any case the applicant was represented by the same counsel who is currently making the application.

Having perused the two rival affidavits the Civil Procedure Act Section 95 on enlargement of time states as follows:

“Where any period was fixed or granted by the court for the doing of any act prescribed or allowed by the act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

My understanding of the above Section of the Act, clearly grants discretion to the court. I do agree entirely with the respondent that there is no sufficient reason by the applicant why he never filed his appeal within the requisite 30 days. What seemed to have jolted the applicant is the bill of costs dated

8.2.2016, attached to his supporting affidavit.

Section 1B of the Civil Procedure Act permits this court to look favourably to litigants of such nature. Section 95 aforequoted grant the court such discretion. The 5 months period delay by the applicant cannot be referred to as totally inordinate. For whatever reasons the counsel on record though present when the judgment was delivered did not file an appeal within the stipulated 30 days. The case nonetheless is for the client not the advocate.

Consequently and on applying this court's discretion, I shall allow the application dated 9/3/2016 on the following conditions:

- 1. The applicant shall pay the sum of Kshs.40,000/= to the respondent within 30 days from the date herein. This sum shall form part of the bill dated 8.2.2016 and shall be subtracted from the same.**
- 2. The applicant shall file his appeal within 14 days from the date herein.**
- 3. In default of (1) above the respondent shall be at liberty to execute.**
- 4. The respondent shall have the cost of this application.**

Dated. signed and delivered this 27th day of April 2016.

H. K. CHEMITEI

J U D G E