REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 13 OF 2016

ROBERT MISIANI MORIMBOCHO..APPELLANT

VERSUS

WILFRED MOGAKA MOKAYA... RESPONDENT

(An appeal from the judgment and decree of Hon. R.B. N. Maloba (Principal Magistrate) dated and delivered on the 31st day of December, 2015 in the Original KISII CMCC No. 141 of 2010.)

RULING

1. This ruling relates to the Notice of Motion dated 16th February 2016 brought under **Section 1A, 3A and 79 (G) of the Civil Procedure Act** by which the Applicant seeks orders, inter-alia, that there be a stay of execution of the judgment/decree in Kisii CMCC No. 141 of 2010 pending the hearing and determination of this application and that the applicant be granted leave to appeal out of time. The applicant also seeks for an order validating his appeal herein.

2. The application is premised on the grounds listed on the face of the application and on the supporting affidavit of Jeremiah Ongeri Samba in which he states that the impugned judgment in Kisii CMCC 141 of 2010 was delivered on 31st December, 2010 in the absence of advocates and without notice to the advocate for the applicant after which the file went missing from the registry for quite a long period of time between 8th November 2013 and 11th February 2016 when the applicants advocate was served with a bill of costs. The applicant contends that he is aggrieved by the judgment of the trial court and desires to appeal against it.

3. The application is opposed by the respondent through grounds of opposition dated 23rd March 2016 in which he states that the application lacks merit, has been brought to court in bad faith as the applicant's counsel never made efforts to find out the outcome of the judgment till 10th February 2016 when the respondent served the applicant's counsel with the bill of costs. The respondent contends that the instant application is intended to delay the conclusion of this case as the purported appeal has no chance of success.

4. When the application came up for hearing before me on 12th April, 2016, parties agreed to canvass it by way of written submissions.

5. I have carefully considered the instant application, the grounds of opposition filed by the respondent and the written submissions filed by the advocates for the respective parties. The main issue which arises in this application is whether or not the applicant has made out a proper case to warrant the exercise of the court's discretion to extend time within which the applicant should file his intended appeal and whether this court should validate the appeal that has already been filed.

6. The power to extend time is discretionary and unfettered. In the case of **Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** the Supreme Court stated as follows regarding the court's discretion to extend time.

> ***"….It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. We derive the following as the underlying principles that a court should consider in exercising such discretion:***
>
> ***1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the court;***
>
> ***2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the court;***
>
> ***3. whether the court should exercise the discretion to extend time, is a consideration to be made on a case – to- case basis;***
>
> ***4. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the court;***
>
> ***5. Whether there will be any prejudice suffered by the respondents, if extension is grated;***
>
> ***6. Whether the application has been brought without undue delay; and***
>
> ***7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."***

7. In the instant case, the applicant has attributed the delay in filing the appeal to the fact that the judgment was delivered on 31st December 2015 without notice to him or the respondent over 2 years after the case was closed on 9th October 2013. According to the applicant, the lower court file went missing from the registry after the case had been finalized in October 2013 only for it to resurface on 11th February 2016 when the respondent's advocates served him with the bill of costs and a copy of the handwritten judgment which he annexed to the supporting affidavit and marked as **"JOS1 and 2"** respectively."

8. The respondent has in his grounds of opposition, stated that judgment notice dated 21st December 2015 was served on both counsels. The respondent has however not furnished this court with any proof of service with the said judgment notice upon the applicant. I am in the circumstances inclined to believe and accept the applicant's claim that he was not made aware of the said judgment and that he only came to learn about it when the respondent's advocates served his advocates with their bill of costs.

9. I also find the period between when the case before the subordinate court was closed, being October 2013, to the time when the judgment was delivered in December 2015 to be an inordinately long period and this, to my mind, gives credence to the applicant's claim that the lower court file went missing from the registry for a long time only to resurface in February 2016. Furthermore, the applicant states that he learnt of the judgment on 11th February 2016 when a bill of costs was served upon his advocates and the instant application was filed on 16th February 2016. Clearly therefore, one can say that instant application was filed within reasonable time as the applicant endeavored to move the court with speed and within a record time upon learning of the impugned judgment that is the subject of the intended appeal.

10. It is therefore my finding that the instant application has been filed without undue delay. My position is further bolstered by the decision in **Ivita vs Kyumbu [1984] KLR 441**, Chesoni J. (as he then was) had the following to say on the subject of inordinate delay:

> ***"The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."***

11. **Section 79G of the Civil Procedure Act** under which this application has been filed provides as follows:

> **"79G. Time for filing appeals from subordinate courts**
>
> **Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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."**

12. As I have already stated in this ruling, I am satisfied that the applicant has provided good and sufficient reasons for not filing the appeal in time.

13. In respect to prayer of stay of execution, the applicant only sought a stay of execution pending the hearing and determination of this application and not pending the appeal. What comes to my mind is that the applicant did not seek for a stay of execution pending appeal in view of the fact that the said appeal had not been filed or validated in the first place. Under the above scenario, I find that the applicant will be at liberty to file an application for stay of execution pending the appeal should he deem it necessary. I will therefore not make any determination on the prayer for stay pending the determination of this application which has, in any case, been overtaken by events.

14. In summary, I allow the application in the following terms:

> **i. The applicant is granted leave to file and serve the Appeal out of time. The Memorandum of Appeal filed on 8th March, 2013 is hereby validated.**
>
> **ii. The costs of this application to abide the outcome of the Appeal.**

Dated, signed and delivered in open court this 14th day of December, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- N/A for the Appellant
- N/A for the Respondent
- Omwoyo court clerk