



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**MISC CIVIL APPLICATION NO. 202 OF 2014**

JOSEPHINE SHIATI.....APPLICANT

VERSUS

BRENDA ANABAKA.....RESPONDENT

**RULING**

1. The application for consideration before me is the Notice of Motion dated 23/07/2014 which seeks the following orders: -
  1. ***That the present application be and is hereby certified urgent and be heard exparte in the 1st instance.***
  2. ***That the applicant be granted leave to file an appeal out of time.***
  3. ***That pending the hearing of this application there be stay of execution of decree in Kakamega CMCC No. 399 of 2011.***
  4. ***That costs hereof be in the cause.***
2. The application is supported by the Affidavit of the Applicant sworn on 23/07/2014 and made on the following grounds:-
  - a. ***That the ruling against which the appeal is preferred was made on 17/06/2014.***
  - b. ***That upon delivery of the ruling the file went missing at the registry.***
  - c. ***That the applicant was served with notice to show cause for 22/07/2014.***
  - d. ***That this was in the cause of looking for the file.***
  - e. ***That the applicant was never served with the summons or any paper herein***
  - f. ***That the applicant has a good appeal with high chances of success.***
3. On 25/07/2014, Hon. Justice Dulu made the following orders: -
  1. ***The application dated 23/07/2014 is certified as urgent.***
  2. ***The application to be served for inter-partes hearing, service to be effected within 3 days from today.***
  3. ***This application be heard inter-partes on 25/9/2014.***
  4. ***That there be stay of execution of decree in Kakamega CMCC 399 of 2011 pending the hearing of this application.***
4. The said orders therefore disposed of prayers 1 and 3 of the application and what is now for consideration is prayer 2 and 4 thereof.
5. The application is opposed by the Respondent who filed a Replying Affidavit on 21/10/2014

sworn on 17/10/2014.

6. At the hearing of the application Mr. Anziya appeared for the Applicant whereas the Respondent appeared in person and invited this Court to call for the Lower Court file (Kakamega CMCC 399 of 2011) and make a ruling on the application.
7. This Court has carefully perused the said lower court file and is in clear view of the background to this application. Briefly put, the Respondent instituted the lower court suit against the Applicant (as the second defendant) and one Irene Dismas (as the first plaintiff). Ex-parte judgment was entered on 17/11/2011 against both the defendants and the matter proceeded for formal proof. It was a suit for defamation. The Respondent herein testified and called one witness and the lower Court delivered its judgment on 16/02/2012 where it found for the Respondent herein and assessed general damages at Kshs. 50,000/= further to costs and interests. The Respondent's costs were assessed on 08/03/2012 at Kshs. 18,175/=.
8. When the Respondent commenced the execution process, objection proceedings ensued where the objector was represented by the firm of Messrs Elungata & Co. Advocates. On 31/05/2012, the Court discharged the interim orders of stay of execution it has issued on account of non-attendance of the Objector. The record went silent on the objection proceedings.
9. On 10/07/2012 the Court on an application by the Respondent herein issued warrants of arrest in execution against the Applicant herein and her then co-defendant. It seems the Applicant was arrested and arraigned in Court on 25/02/2014 where she was released on bond to appear in court on 18/03/2014. On 06/03/2014 the Applicant herein appeared before Court and sought for time on grounds that she was not aware of the matter and needed time to consult. The matter was put for mention on 18/03/2014. On the said date, Mr. Munyendo appeared for the Applicant herein and also sought for time to apply to set aside the exparte judgment. The Court indulged him and Counsel was directed to file the application which was to be heard on 01/04/2014. The Counsel truly filed the Notice of Motion dated 01/04/2014 on the very day and which application was stood over for hearing on 03/06/2014 with leave to the Respondent herein to respond.
10. On 03/06/2014, the Counsel did not show up but the Court instead opted not to dismiss the application but set the ruling for 17/06/2014. The ruling was not in favor of the Applicant herein since the application was dismissed with costs to the Respondent.
11. An application for a warrant of arrest came up for hearing on 22/07/2014 and after the Court was satisfied of its service issued the warrant of arrest and that is when the Applicant rushed to this Court and filed the current application on 23/07/2014 seeking *inter alia* leave to the appeal of time.
12. The factors to be considered by this Court in such instant application were clearly stated by the Court of Appeal when it was considering an application for extension of time to file and serve a record of appeal under the Court of Appeal Rules in **GACHERU & ANOTHER –vs- PIONEER HOLDINGS (A) LTD & ANOTHER (2008) KLR 315**. The Court had the following to say:-  
  
***“The powers of the Court (of Appeal) in an application for extension of time (under the court of appeal rules, rule 4), were discretionary and unfettered. However in exercising its discretion, the court would consider the length of the delay, the explanation or reason given for it (and) whether the intended appeal was arguable...”***
13. Indeed the orders sought by the Applicant are discretionary. I have perused the application together with the response and the lower Court file and I do note that the delay in issue was for about 5 days since the application was dismissed on 17/06/2014 and the Applicant had 30 days to prefer the appeal under Section 79G of the Civil Procedure Act, Cap. 21 Laws of Kenya. The application under consideration was filed on 22/07/2014. In mitigating the lapse aforesaid, the Applicant alleges that the Court file went missing immediately after the delivery of the ruling.

But, the record reveals otherwise. The Court file was available since the Respondent herein appeared at the registry on 03/07/2014 and fixed the application for Notice to Show Cause why execution should not issue for hearing on 22/07/2014. Again the matter proceeded in Court on 07/10/2014 and on 21/10/2014. The allegations of a missing file are opposed by the Respondent citing normal delaying tactics on the part of the Applicant in concluding this matter. I have also noted that the Applicant never protested to the Court on the allegation of the missing Court file missing since no correspondence to that effect was annexed in support of the application. I therefore reject that ground.

14. I will therefore consider the issue of the intended appeal if it is arguable. Without losing focus that this is an application for leave to appeal out of time and that the Court is not considering the appeal itself, I will briefly have a look at the draft Memorandum of Appeal annexed as Exhibit JS-4 in the Applicant's affidavit. Three grounds have been preferred in challenge to the ruling in issue. The Applicant raises issues of fact and law touching on how the application to set-aside the *exparte* judgment was handled, which in her view was contrary to law and would wish to canvass at the hearing of the appeal if leave is granted. On consideration of the intended grounds and looking at the history of his matter, I find that the intended appeal is arguable in law.
15. This Court notes that it is duty-bound to exercise its discretion judicially with a view of doing justice. Each case depends on its own merit. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. This Court is 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 leave to file out of time. As said, in the instant application the delay was for only 5 days, though the reasons given were not plausible.
16. The Court will then consider if it can take refuge in the Oxygen Rule as enshrined in Sections 1A and 1B of the Civil Procedure Act, Cap 21. This overriding objective principle is intended to re-energize the powers of the Court, encourage good management of cases and to ensure that interpretation of any of the provisions of the Act and the rules made thereunder are oxygen-compliant (**See the case of Hunter Trading Company Limited vs ELF Oil Kenya, Court of Appeal at Nairobi, Civil Application No. 6 of 2010 (unreported).**)

The principle is also aimed at conferring on the Courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder. This was the ratio *dicidendi* in the case of **CITY CHEERS (NBI) and MOHAMED KASABULI suing for and on behalf of the Estate of HALIMA WAMUKOYA KASABULI VS ORIENTCOMMERCIAL BANK LTD, Court of Appeal at Nairobi, Civil Application No. 302 of 2008 (unreported).**

And Article 159 (2) (d) roots for substantive justice as opposed to technical and procedural justice. The Court of Appeal in the case of **MACHARIA MWANGI MAINA & 87 others vs DAVIDSON MWANGI KAGIRI, Civil Appeal No. 6 of 2011(unreported)** emphasized on the need for Courts to deliver substantive justice as opposed to technical and procedural justice and went ahead to overturn decisions which had been in force for many years, but when looked under the new constitutional dispensation.

17. In light of the above analysis, and in consideration of period of delay herein, this Court is inclined to exercise its discretion in favour of the Applicant and makes the following orders: -
- a. ***The Applicant be and is hereby granted leave to file and serve a Memorandum of Appeal against the decision of Hon. C. Kendagor, SRM made on 17/06/2014 within 7 days of today's date and in default the Notice of Motion dated 23/07/2014 shall stand dismissed with costs.***
  - b. ***Costs of the application to be borne by the Applicant and to be agreed or taxed and in any event to be paid before hearing of the intended appeal.***

Orders accordingly.

**DATED AND SIGNED AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF JANUARY 2015.**

**A. C. MRIMA**

**JUDGE**