



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 150 OF 2010

1. CYRUS MBUGUA NDUWA
2. BRAODWAYS BAKERY LTD..... APPELLANTS

VERSUS

MONICA GATHONI MUGWE RESPONDENT

(Being an appeal from the Judgment of the Hon. C. Obulutsa Principal Magistrate in Principal Magistrate's Court at Kangungo Civil Case No. 74 of 2010 dated 8th October 2010)

(Before B. Thurania Jaden J)

R U L I N G

1. The application dated 21/3/14 is brought under **section 80** of the **Civil Procedure Act** and **Orders 45 Rules 1 and 2 and Order 51 Rules 1 and 2 of the Civil Procedure Rules**.

2. The application seeks the following orders:-

1. (Spent).

2. That there be a stay of execution of the judgment of the lower court until this application is heard and determined.

3. The orders made on 16/10/2012 by Justice A. Makhandia giving the Appellant 90 days to compile the appeal record and in default the appeal was to be dismissed be reviewed and be set aside.

4. The orders made on 5/2/2014 by this Honourable Court dismissing the appeal for failure to comply with Order 42 of the Civil Procedure Rules be reviewed and set aside and the appeal be reinstated to be heard *inter partes*.

5. The costs of the application be in the cause.”

3. The Applicant blames the failure to compile the record of appeal on the court. It is deponed in the

affidavit in support that the Deputy Registrar failed to request for the lower court file. That efforts made by the Applicant to be supplied with the certified copies of the proceedings and judgment of the lower court bore no fruit. That this court gave the Applicant 90 days within which to compile the record of appeal but the 90 days lapsed before the Applicant was supplied with the certified copies of the proceedings and judgment. That the Applicant complied with the conditions for stay pending appeal and deposited 50% of the decretal sum in court.

4. The application is opposed. It is stated in the replying affidavit that the order dated 16/10/12 giving the Applicant 90 days within which to have the appeal fixed for hearing was entered into by consent. That a consent order can only be set aside if it was entered into by duress, coercion or fraud. That there is no error apparent on the face of the record. That there was no application for extension of time after the lapse of the 90 days. The Respondents blame the Applicants for inordinate delay in this appeal.

5. The application was canvassed by way of written submissions which I have duly considered.

6. Under **Order 45 rule 1** of the **Civil Procedure Act:-**

“Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed,

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

7. The consent order was entered on 16/10/12. The appeal was admitted on 19/7/2013. There is an error apparent on the court record. There was no appeal worthy of being dismissed on 16/10/12 as the appeal had not yet been admitted.

8. The delay in providing the Appellant with the certified copies of the proceedings and judgment of the lower court cannot be attributed to the Applicant. The Applicants uncontroverted affidavit evidence is that the Executive Officer did not provide him with the certified copies of the proceedings and judgment within time. The Applicant has exhibited copies of letters sent to the court requesting to be supplied with the same. However, the Applicant ought to have gone back to court to apply for extension of time and explain his predicament.

9. This court is inclined to exercise its discretion and allow the application so that the appeal can be heard on merits. Consequently, I allow the application with costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **20th** day of **March** 2015.

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B. THURANIRA JADEN

JUDGE