



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 478 OF 2014

PHILIP AYAYA

ALUCHIO.....RESPONDENT

VERSUS

PAUL OWUOR OBADO

**GENEVIEVE ATIENO OWUOR T/A TETRALINK TAYLOR & ASSOCIATES EAST
AFRICA.....APPELLANTS**

RULING

1. Before me is a Notice of Motion dated 30th May, 2014 seeking leave to file memorandum of appeal out of time and stay of execution of the decree issued in Milimani Commercial Courts CMCC No. 1910 of 2010 on 11th April, 2014.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of Paul Owuor Obado sworn on 30th May, 2014. He averred that he gave instructions to his advocates to file the appeal late as he had travelled outside the country. That through an inadvertent mistake on the part of the advocate the appeal was not filed within time. He lamented that on 29th May, 2014 his office goods were proclaimed by Nairobi Connection Services Auctioneers in execution of the decree. He stated that he is willing to comply by the terms and conditions of security that this court may find fair.
3. The application was opposed vide the replying affidavit of Philip Ayaya Aluchio sworn on 10th June, 2014. He contended that the attachment was levied after the expiry of thirty days from the date of delivery of judgment. That no copy of the letter requesting for copies has been annexed to the application. He contended that no good reason for failure to file the appeal within time has been advanced.
4. This application was canvassed by way of written submissions. The Appellants reiterated the averments in the affidavit. He relied on **Amuga & Company Advocates v. Arthur Githinji Maina (2013) eKLR** and **Bagajo v. Christian's Children Fund Inc. (2004) 2KLR 73** where the principles to be relied on while seeking extension of time was discussed thus; the length of delay, the reason for the delay, prejudice that may be occasioned to the respondent, success of the appeal, public importance and requirements of interest of justice. The Appellants relied on **Eres N.V. & Another v. Maina Murage & Co. Advocates (2013) eKLR** to demonstrate that an applicant ought to be given a chance in instances where the error is remediable. The Respondent basically reiterated the averments in the replying affidavit.
5. This application is based on Order 42 Rule 6 (2). That Rule provides:-

" (2) No order for stay of execution shall be made under sub-rule (1)

unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

6. The above Rule was discussed in the case **Peter Ondande t/a Spreawett Chemis v. Josephine Wangari Karanja [2006]eKLR** where it was held as follows:-

“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

7. It was contended that the Appellants' office items were proclaimed and he annexed a proclamation. The items outlined therein were two printers, 3 desks, work station, copier, water dispenser, among others which items are tools of trade. Which under Section 44 (1) (ii) are not liable to attachment or sale. On the other hand the Respondent has not demonstrated that he is likely to be prejudiced if the orders sought are granted. It is therefore my view that the Appellants have proved that they are likely to suffer substantial loss. See **Blackwood Hodge Kenya Ltd v. Lead Gasoline Tank Clearing Sam and Chase (K) Ltd** where Bosire J (as he then was) held:-

“Section 44 of the Civil Procedure Act (Cap 21), in which it is provided that the tools and implements of a person for the performance of his trade or profession shall not be liable to attachment or sale, is not intended to protect corporate entities but artisans whose livelihood depends on their workmanship. The word person in that section does not include a corporate body.”

8. The application herein was filed forty eight (48) days after the prescribed time. The 1st Appellant explained that the delay was occasioned by his travelling out of the country thereby giving instructions late in the day and that the delay in filing was an inadvertent mistake on the part of his advocate. As was held in **Eres N.V. & Another v. Maina Murage & Co. Advocates (2013) eKLR**, when an error of an advocate is remediable his client ought to be given a chance to be heard.

9. Having also agreed to abide by the terms as to security. I find that the Appellants have satisfied all the requirements of granting the orders sought. The application herein is allowed as prayed. The Appellants are however ordered to deposit the decretal sum in a joint interest earning account in the names of the advocates for Appellant and Respondents within fourteen (14) days from the date of this ruling in default the motion shall stand automatically dismissed. The Respondent is ordered to ensure the release of the Appellant's proclaimed items forthwith.

Dated, Signed and Delivered in open court this 13th day of March, 2015.

J. K. SERGON

JUDGE

In the presence of:

Wilson h/b C.N. Kihara for the Appellants.

N/A for the Respondent.