



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 104 OF 2015

1. IBRAHIM MOHAMMED

2. BADAR HARDWARES LIMITED.....APPELLANTS

VERSUS

ALPHONSE LWANGA OWUOR.....RESPONDENT

RULING

1. The notice of motion dated 16th March, 2015 is for stay of execution of execution of warrants of attachment dated 5th March, 2015 and the proclamation dated 6th March, 2015 pending hearing and determination of this appeal and that they be granted leave to file this appeal out of time.
2. The application is premised on the grounds on the body of the application and the supporting affidavit of Sarah Weru. She averred that ex parte judgment was entered against the Appellants and an application dated 10th November, 2014 seeking to set aside that judgment was dismissed on 6th February, 2015. She averred that the Appellant has preferred an appeal against the trial court's ruling. That the Appellant's property has been proclaimed vide a proclamation dated 6th March, 2015 and warrants of attachment dated 5th March, 2015 and are at a risk of being carted away if this court does not intervene. She alleged that the proclamation was illegally obtained and were not properly served upon the Appellant since it was served upon the Appellant's driver en route and should be set aside. She stated that the decree was issued on 31st December, 2014 before the ruling was delivered. She also expressed that this appeal has high chances of success and that the failure to file this appeal in time was not deliberate.
3. In response thereto the Respondent filed a replying affidavit dated 10th April, 2015. Mr. Maina Kamau contended that the Appellants were duly served with the Respondent's summons to enter appearance but failed to enter appearance and as a consequence thereof a request for judgment was filed and entered against the Appellants. It is the Respondent's contention that it is not true that the decree was issued before the ruling. He particularly stated that the decree was issued 25th February, 2015 and not 31st December, 2014 as alleged by the Appellants and contended that the decree and warrants were properly obtained. It was contended that the Appellants have not given a reason for failure to file the appeal in good time and that they have not offered security.
4. I have considered the depositions of the parties and their submissions tendered herein. This being an application for stay of execution, the Appellants ought to demonstrate that the application herein has been filed timeously, that they stands to suffer irreparable loss if the orders sought are not granted and that they is willing to furnish security.
5. The decision of **Peter Ondande t/a Spreawett Chemis v. Josephine Wangari Karanja [2006]eKLR** is a guide to the principles for dealing with an application such as this one. It was held in the said case that:-

“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.”

6. The Appellant seeks to stay execution of the ruling of 6th February, 2015. This application has been brought about three (3) months after the ruling. Could such delay be considered as inordinate. In determining the issue it matters not how much time lapsed after the prescribed time within which an action ought to be taken. What the court considers is the explanation of the delay and whether even with the delay justice can be done. See **Utalii Transport Company Limited & 3 Others v. NIC Bank Limited & Another [2014] eKLR** where he stated as follows:-

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.” (emphasis own)

7. From the supporting affidavit, it is evident that no explanation has been given for the delay and it is therefore in my view inordinate. But even with that delay this court is called upon to act justiciously. What is the effect of such delay? It is my considered view that the delay being of about only three months is unlikely to prejudice the Respondent in a manner that cannot be compensated with costs.
8. On the issue of loss, the Appellant demonstrated the Respondent has commenced execution process which in my view is likely to render the intended appeal nugatory. The Appellants have not offered any security and shall be bound by this court's order as to security.
9. In view of the foregoing, I am inclined to allow the application herein in the following terms:-
- a. I hereby grant stay of execution of execution of warrants of attachment dated 5th March, 2015 and the proclamation dated 6th March, 2015 pending hearing and determination of the intended appeal.
 - b. leave is hereby granted to the Appellants to file their memorandum of appeal out of time within the next 10 days from this date.
 - c. The Appellant is ordered to deposit the decretal sum of ksh.1,105,955/= in a joint interest earning account in the joint names of the firms of advocates of the parties herein within the next 60 days from this date failure to which execution to issue.

Dated, Signed and Delivered in open court this 22nd day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... **for the Appellant**

..... **for the Respondent**