



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

MISC CIVIL APPLICATION NO 27 OF 2015

SASINI LIMITED.....APPLICANT

VERSUS

DAVID MASESE OBWORI.....RESPONDENT

RULING

1. This is an application (**notice of motion dated 29/04/2015**) seeking two main orders – enlargement of time to file appeal, and stay of execution of decree pending disposal of such appeal. The first prayer is sought under the *proviso* to **section 79G** of the *Civil Procedure Act, Cap 21* (the **Act**), while the second order is sought under **Order 42, Rule 6** of the *Civil Procedure Rules, 2010* (the **Rules**). The Respondent has opposed the application.

2. I have read both the supporting and replying affidavits. I have also considered the submissions of the learned counsels appearing.

3. The proviso to section 79G aforesaid states –

“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.”

The judgment sought to be appealed against was delivered on 20/11/2014. The Applicant therefore had until 19/12/2014 to lodge its appeal (section 7G aforesaid). The present application was filed on 30/04/2015. The Applicant was thus late by over four (4) months.

4. The explanation for this delay is given in paragraph 8 of the supporting affidavit as a “communication breakdown” between the Applicants’ insurer’s and its advocate on record, rendered as follows –

“...the instructions to file...appeal was (sic) never received by the Applicant’s advocate as at the time of giving the instructions the Applicant’s insurer was not aware that its advocate on record was experiencing serious technical failure as its server had crashed, as the instructions was (sic) forwarded via e-mail”.

There is no attempt at all to explain –

a. How the server could possibly have crashed for four (4) months.

- b. Why there was no follow-up by other means of communication when there was no acknowledgement of the instructions within a reasonable time.
- c. Why a copy of the e-mail sent has not been exhibited.

There is also what is deponed at paragraphs 4, 5 and 6 of the replying affidavit. A demand for payment of the decretal amount was made about 2 months after judgment was passed that appears to have been ignored; the Applicant apparently woke up only after execution issued.

5. I am not satisfied that there was any good and sufficient cause why appeal was not filed within time. I therefore refuse leave to admit the intended appeal out of time.

6. I need not consider stay of execution, having refused enlargement of time to appeal. But even if I had granted such leave I would not have granted stay of execution. The decree in question is a money decree, the decretal sum being the fairly modest sum of KShs 252,430/00. The Applicant has merely stated at paragraph 13 (appearing as 12) of the supporting affidavit that it -

“shall suffer irreparably if execution proceeds and the intended appeal succeeds, as the said judgment amount will be beyond the reach of the Respondent because (he) is a man of straw as will be later evidenced by the proceedings taken before the subordinate court.”

7. No evidence of the Respondent’s condition of a “man of straw” was placed before this court, and the proceedings of the lower court also have not been availed. The Applicant needed to establish the “substantial” loss it stood to suffer if execution proceeded. See Order 42, Rule 6 (2) of the Rules. Substantial loss is a matter of fact.

8. In the event the notice of motion dated 29/04/2015 is dismissed with costs. The interim stay of execution now in place is vacated. It is so ordered.

DATED AND SIGNED AT MURANG’A THIS 29TH DAY OF JULY 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 31ST DAY OF JULY 2015

