



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 9 OF 2015

ABBAS ADAN KALA APPLICANT

-VERSUS-

JAMA ADAN JALDESA (*suing as legal representative of*

ADAN JALDESA ADIKO (Deceased)..... RESPONDENT

RULING

1.The applicant ABBAS ADAN KALA through notice of motion dated 2nd March 2015 brought pursuant to **Section 3A, 79G and 95 of the Civil Procedure Act and Order 22 rule 22, Order 42 Rule 6, Order 50 rule 6 and Order 51 Rule 1 and 3 of Civil Procedure Rules 2010** seeks leave to appeal out of time against the judgment of Principal Magistrate J.M. Irura in Isiolo Principal Magistrate’s Civil Suit No. 67 of 2013 delivered on 9th December, 2014; stay of execution of the judgment and decree of the said judgment pending the hearing and determination of the appeal.

2. The application is based on the grounds on the face of the application inter alia, that the judgment was delivered on 9th December 2014 and the 30 days period within which the appeal was to be filed have lapsed; that the applicant is aggrieved by the judgment on quantum delivered on 9th December 2014; that the time for filing of the appeal lapsed when the applicant was waiting for a decree from the lower court; that the application is timely made and without any unnecessary delay; that the applicant stand to suffer substantial and irreparable loss and damage as there is likelihood that the applicant will be unable to recover the decretal sum awarded herein from the respondent; that unless the application is allowed the applicant’s intended appeal will be rendered nugatory;that the application has agood arguable appealwhich has high chance of success and that the respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs if this application is allowed.

3. The application is further supported by affidavit of Erastus Mwaniki who has deponed that he is a legal officer at Directline Assurance Company Limited the insurers of Motor Vehicle Registration Number KBR 070B and at whose instance the suit PMCC 67 of 2013 Isiolo was being defended; he has deponed that on 9th December 2014 as per information within his knowledge, a judgment was delivered where applicants were held liable at 85 per cent and ordered to pay the plaintiff Kshs. 2,933,714/- plus costs and interest; that delay in filing the appeal was due to a pending decree which has now been received; that they have instructed M/s. Kairu & McCourt to appeal as per draft Memorandum of Appeal “EM -1”; that the time for filing appeal

expired on 8th January 2015; that the intended appeal is merited; arguable and raises pertinent points of law; that it has overwhelming chance of success; that the applicant is ready, able and willing to furnish some reasonable security as court may deem fit; that decree has been supplied and annexed as marked “EM -2”, that applicant is preferring an appeal against quantum of damages which were excessive; that the applicant for the above reasons seeks extension of time to file appeal out of time, that application has been made without undue delay and the delay occasioned herein is not so inordinate as to be inexcusable; that the respondent will not suffer prejudice or any damage that is not capable of being compensated by way of costs; that the applicant stands to suffer prejudice and irreparable substantial loss as there is a likelihood that they will not recover the decretal amount if it is paid over to the respondent.

4. The application is on the other hand opposed. The respondent filed a replying affidavit dated 30th March 2015 through Jama Adan Jaldesa the respondent in this application who has deponed as follows:- that judgment was delivered on 9th December 2014 and the respondent’s advocate issued demand letter “JAJ3” for payment of the decretal sum; that the applicant’s advocate did not file a response nor did they apply for proceedings till 9th January, 2015; that after second demand letter “JAJ4” dated 20th February 2015 the applicant rushed to court to forestall the execution process; that the applicant is not a man of straw as he owns a fleet of buses and other assets at Isiolo, Marsabit and Nairobi; that the applicant has not filed any affidavit in court and that Erastus Mwaniki who swore the affidavit has not disclosed the sources and fact which he has deponed in his affidavit as he is a stranger to these proceedings; that this is a money decree and applicant’s alleged appeal has no chance of success; that the applicant is guilty of inordinate and unreasonable delay as the application was filed 3 months after delivery of judgment; that appeal has no chance of success since liability is not in issue; that the application has not deposited the decretal amount in court or with both advocates as security; that this application is incompetent as there is no appeal before court and that there are no valid reasons to seek a stay of execution in the matter as per annexure “JAJ5”; that there are no good grounds to deny the applicant fruits of his lawfully obtained decree; that the application has not shown that he will suffer substantial loss if stay is refused by this Honourable court; that the applicant will be prejudiced if denied decretal amount without good reason; and that the applicants application is unmerited and same should be rejected.

5. I have very carefully considered the application and the replying affidavit as well as the written submission by both the applicant’s and the respondent’s counsel. The issue for consideration is whether the applicant has met the laid down conditions for granting leave to appeal out of time and whether the applicant has also met conditions for granting stay of execution of the court’s decree pending hearing and final determination of the intended appeal ?

6. The Applicant did not in his submission refer to any authority but simply relied on the provision of the Civil Procedure Act and Rules as cited in the heading of the application. The respondent relied on the case of **GERALD MWINGI M’MBUI VS M’MBUI M’MWIRICHIA & DOUGLAS MEME MERU – HCCC MISC. CIVIL APPLICATION NO. 102 OF 2006. (MERU)** where it was held; *“that a delay of close to 5 years is inexcusable”*.

In the case of **JOSELINE KINANU MURIUNGI (sued as the legal representative and administrator of the estate of Stanley Micheni) VS ANICETA KAJUJU HC.MISC. 183 OF 2009 (MERU)**; It was held:-

“that the deponent was required to disclose his source of information and the identity of the person who told him the letter had been misfiled and that there was no sufficient reason on record showing why the applicants intended appeal was not filed within time and that there was no basis for staying the lower court judgment because there was no pending appeal.”

7. In the case of **BENJAMIN GAKULA MUTUA –VS- GEOFFREY NTHUKUMUTIA HC.**

MISC. APP. 45 OF 2013 (MERU) the court held:-

“In granting leave to appeal out of time this court is obliged to look at the reasons for delay in each case and each case should be looked at in the specific context and conclusions. The court in each case should find whether the delay is inordinate and that depends on facts of each case to ensure that justice is done to both parties. ... that in instance application no appeal has been filed to date and in view of the provisions of Order 42 Rule 6 (1) of Civil Procedure Rules there is no basis of staying the lower court judgment as there is no pending appeal.”

8. **Section 79 (g) of the Civil Procedure Act** provides as follows:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

9. That before the court can exercise its discretion to grant leave to appeal out of time the applicant is required to satisfy the court that he had good and sufficient causes for not filing the appeal in time. The court has to take into account several factors in dealing with an application for leave to appeal out of time. These include amongst others, the reasonable explanation for the delay, length of the delay; the prejudice of the delay to the other party, the substance of the proposed appeal, however these factors should not be taken as justification for parties to ignore the interlocutory limits provided in the relevant statutes since an important feature in deciding what justice requires is to bear in mind that time limits are there to be observed and do away with mischief as justice may be defeated if laxity in respect of compliance with legal provisions is sacrificed for the sake of it.

10. In applying the above principles and considering the facts of the instant application; I have observed that the applicant and his counsel did not swear any affidavit in support of the application but one Erastus Mwaniki a Legal Officer at Directline Assurance Company Ltd, the insurer of the applicant did. He relied on information by the then advocates on record and purported that the delay in filing the appeal was due to pending decree and as such they instructed the advocates to appeal. There is no dispute that judgment was delivered on 9th December 2014; the applicant did not apply for court proceedings, judgment and decree till after the time allowed for lodging appeal had lapsed. Annexure “EM1” a letter by the advocate seeking to be supplied with typed proceedings exhibits, and copy of the judgment and decree is dated 9th January 2015. It is received at the court on 21st January 2015. The court’s decree was ready on 9th January 2015 as per annexure “JAJ5”. The present application was not filed with the court till on 2nd March 2015.

11. I have very carefully considered the applicant’s affidavit in support of the application and I am satisfied that the applicant did not give reasonable explanation for the delay. The applicant to say the least did not attempt to swear an affidavit to explain the delay nor did the advocate. The delay between the date of the judgment and filing of the application is close to 3 months. The applicant has not satisfied the court that he had good and sufficient cause for not filing the appeal in time; that had the applicant and the counsel made an affidavit may be they would have shed light to the court why the appeal could not be filed in time. The deponent in supporting affidavit of the application is not an advocate for the applicant and he is in my view not the correct person to have sworn the affidavit and furthermore he relied on hearsay. I find his affidavit did not sufficiently support the applicant’s application.

12. In the instant application there is no pending appeal and in view of the provisions of **Order 42 Rule 6 (1) of the Civil Procedure Rules** I am satisfied that the order sought for stay of execution pending hearing and determination of the appeal cannot issue. The applicant did not pray for orders of stay pending filing and determination of the intended appeal but sought orders to issue

pending determination of appeal, which alleged appeal is as per record yet to be filed. There is therefore no pending appeal as such.

13. In view of the foregoing the notice of motion dated 2nd March 2015 is dismissed with costs to the respondent.

DATED at Meru this 24th day of September 2015

J.A.MAKAU

JUDGE

24.9.2015

Delivered in open court in the presence of:

Mr. Kiogora Ariithi for respondent

M/s. Kairu McCourt for applicant

Court clerks – Faith/Ibrahim

R.P.V. WENDOH

JUDGE

24.9.2015