



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
MISC APPLICATION NO 393 OF 2014

1. JACHRIS INVESTMENTS (K) LTD

2. MUCHIRI MAINA

3. SAMUEL GAKUOMBECHER.....APPLICANTS

VERSUS

MARY WANDU

(alias MARY NJERI WAITHKA).....RESPONDENT

RULING

1. The Applicants sought two main orders in the **notice of motion dated 22nd April 2014** – leave to lodge appeal out of time and stay of execution of the decree pending disposal of such appeal. The decree is for money – a total of KShs 1,260,357/00 plus costs (assessed at KShs 215,630/00) - passed on 19th February 2014. Appeal should have been filed on or before 21st March 2014. The present application having been filed on 22nd April 2014, there has been delay of about one month. The reason for failure to appeal within time is rendered as follows at paragraphs 4, 5 and 6 of the supporting affidavit sworn by one **Erastus Mwaniki**, Legal Manager – Claims of **Directline Assurance Company Limited**, the Applicants’ insurers -

“4. On the 25th February 2014 the advocate who was handling this matter – one Miriam Mwaura – received notification of judgment and subsequently did not do a proper hand-over of the file. The said advocate has since left employment.

5. On 15th April 2014 the advocate who was allocated this matter knew the existence of judgment through a proclamation of attachment of property dated 15th April 2014 and draft decree from the plaintiff’s advocate which she received at her desk at 2.04 pm.

6. That due to the circumstances the time within which to file memorandum of appeal had since lapsed.”

2. The Respondent has opposed the application by two replying affidavits – one sworn by her and the other by her advocate, **Francis Mulu**, both filed on 29th (?) April 2014. The advocate has pointed out that the Applicants’ advocate was present when the judgment was passed, though the Respondent’s

advocate was not present; that the Applicants then obtained *ex parte* stay of execution for 45 days; that draft decree was forwarded to them by letter dated 28th March 2014; and that to the best of his knowledge this matter was handled at the lower court by **Advocate Ngari** who was still working with the firm of Kairu & McCourt, the Applicants' advocates.

3. I may point out that interim stay of execution was granted by consent on 13th May 2014 upon conditions as follows –

(i) That the Applicants' deposit KShs 710,621/50 in a joint interest-earning account to be opened in the names of the parties' advocates on record within twenty-one (21) days of that date, the joint account to be opened with Barclays Bank, Machakos branch.

(ii) That the Applicants' to pay to the Respondent through her advocate on record the sum of KShs 710,621/50 towards the decretal sum within fourteen (14) days of that date.

(ii) In default of any of these conditions the stay of execution to automatically lapse, and the Respondent to be at liberty to execute the decree or remainder thereof.

4. The conditions were met, though the deposit was made in court. The Applicants' said there was a problem in opening the joint account, the Respondent's advocates having returned to the Applicants' advocates the necessary deposit cheque in their joint names.

5. I am not too concerned here with the issue of stay of execution. The intended appeal is against quantum only. By consent of the parties half the decretal sum has already been paid to the Respondent and the other half secured, albeit not exactly in the manner agreed. If I grant the Applicants' leave to appeal out of time I will have no difficulties at all confirming stay of execution upon the terms already agreed.

6. Let us then look at the issue of leave to file appeal out of time. Under the *proviso* to **section 79G** of the **Civil Procedure Act, Cap 21** (the Act)

“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”.

Have the Applicants passed this test?

7. The Applicants' advocate then dealing with the matter on their behalf was present in court when judgment was delivered. She even sought and obtained stay of execution for 45 days. It is said she “did not do a proper hand-over of the file” when she left employment. But **when did she leave employment?** This vital information is not disclosed.

8. The Respondent's advocate on the other hand says that the advocate from the Applicant's advocates' firm who was dealing with the matter was in fact one **Madam Ngari** (not **Miriam Mwaure** as stated), and that as far as he knew she was still in the firm. The supplementary affidavit filed on 6th may 2014 does not address this challenge at all.

9. Having considered the submissions of the learned counsels appearing, including the cases cited, I am not satisfied that the Applicants' have placed before the court **good** and **sufficient cause** for not filing the appeal in time. I must therefore refuse leave to appeal out of time.

10. In the result the entire application is dismissed with costs. The interim stay of execution now in place is hereby vacated. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF OCTOBER 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER 2014