



REPUBLIC OF KENYA

High Court of Kisii

Miscellaneous Civil Appeal 175 of 2012

NO.699

**M/S KISII BOTTLERS LIMITED APEPLANT
AND**

MELCHIZEDEK M. ATIKA trading as

SERENGETI BAR & RESTAURANT RESPONDENT

(Being an appeal against the whole of the judgment and decree of the Honourable

P.L. Shinyada, SRM, in Kisii CMCC No.270 of 2009 delivered on 29th February 2012).

RULING

1. The applicant filed a Notice of Motion pursuant to **section 1B, 3A and 79G** of the **Civil Procedure Act** and **Article 159** of the **Constitution**. The Notice of Motion which is dated 11th May 2012 seeks orders that:-
 - a) *Time within which to lodge an appeal from the judgment entered and the decree passed in Kisii CMCC NO.270 of 2009 be and is hereby enlarged and leave be and is hereby granted to the applicant to lodge an appeal therefrom.*
 - b) *Costs of this application do abide the intended appeal.*
2. The application was supported by an affidavit sworn by Stephen Bosire Rosana in his capacity as the applicant's Human Resource Manager averring that a decree was issued in Kisii CMCC NO.270 of 2009 against the applicant and a proclamation of the same for attachment was issued on 8th May 2012. That upon calling the applicant's advocate, Mr. G.J.M. Masese he was informed that the last position on the matter was that judgment had been scheduled for delivery on 30th November 2011 and that judgment had however not been delivered on the said date and that he was not aware if the same had been delivered.
3. He states that he then instructed the firm of M/s Nyamurongi & Co. Advocates to assume conduct of Kisii CMCC NO.210 of 2009. He was subsequently advised by the advocate that judgment had been delivered on 29th February 2012. The deponent states further that notwithstanding lapse of the prescribed time within which an appeal could have been filed, the applicant was desirous of appealing on the same. He also avers that had the applicant been timeously aware of the judgment it would have lodged the appeal within the stipulated time frame.
4. In conclusion the deponent urged the court to take cognizance of and uphold the applicant's

constitutional right of access to justice.

5. The respondents on their part filed a replying affidavit dated 11th June 2012 sworn by one Melchizedek M. Atika averring that notice of delivery of judgment was given in court to all the parties, that the applicants counsel was notified of the judgment in time and that the applicant deliberately failed to file an appeal in time.
6. He further averred that the proclamation having been made on 8th May 2012 the applicant cannot be said to have known of the judgment on 10th May 2012. He also averred that the intended appeal has no high chances of success and that the instant application is meant to frustrate the respondent's efforts to enjoy the fruits of his judgment.
7. When the matter came for hearing inter partes on 30th January 2013 Mr. Nyamurongi for the applicant based his submissions on paragraph 12 of the supporting affidavit and argued that the applicant was not informed of the existence of the judgment by its counsel M/s G.J.M. Masese and as such could not have given instructions for the appeal within the stipulated time. Counsel urged the court not to hold the applicant responsible for the mistake of counsel.
8. It was further submitted that the applicant's conduct does not show him unworthy of enjoying the favourable discretion of the court, that no prejudice will be suffered by the respondent and that to disallow the application would be to punish an innocent litigant.
9. Mr. Aoga, counsel for the respondent opposed the application and submitted that both parties were represented by counsel up to the time of delivery of judgment, that all parties were aware of when the judgment in question was delivered, that the firm of M/s G.M. Nyambati took it upon itself to notify the firm of G.J.M. Masese of the judgment and that in the circumstances the applicant was not being candid to the court by alleging ignorance of the date of delivery of judgment.
10. On the issue of stay, counsel submitted that stay granted for 30 days, expired on 30th March 2012 and it was only after the said date that respondent sought to execute. It was counsel's position that the applicant has not given any explanation for delay.
11. Finally he submitted that the judgment from the trial court was based on merit and no reason has been given to why application should be allowed. He urged the court to dismiss the same with costs.
12. Mr. Nyamurongi in reply submitted that the gist of the application is not about representation but raises the issue as to whether the applicant was aware about the judgment before 10th May 2012. He submitted that the allegation of delay was misplaced as the application was filed within 4 days of the applicant becoming aware of the judgment and that insistence that the applicant knew of the judgment in February 2012 without reason cannot disentitle applicant from exercising his right of appeal.
13. On perusing CMCC No.270 of 2009 the following facts emerge:-
 - a) *Notice of delivery of judgment addressed to G.J.M. Masese and G.M. Nyambati was sent out though there was no return of service on 24th February 2012.*
 - b) *Judgment was read on 29th February 2012 in the absence of both plaintiff and defendant. Only Mr. Migiro counsel was present holding brief for Mr. Nyambati for the plaintiff.*
 - c) *Mr. Nyambati's letter as counsel of the plaintiff in reference to the judgment delivered addressed to G.J.M. Masese & Co. for the defendants informing him to draw a cheque in favour of his client to avoid execution.*
 - d) *A notice of change of advocates filed on 14th May 2012 stating that the defendants/applicants will now be represented by M/s Nyamurongi & Company advocates instead of M/s G.J.M. Masese & Co.*

Advocates.

14. The above factors have led me to the conclusion that it is highly possible that the defendant/applicant may have not known that judgment was indeed delivered on 29th February 2012.

15. On the whole I think that the instant application apply for extension of time within which to file appeal is merited. I also do not think that a delay of two months in the circumstances is so inordinate as to disentitle the applicant to the discretion of this court to grant the orders sought.

16. Considering all factors advanced before me, and especially the fact that the matter in issue is damage for loss of business, and the fact that the applicant ought not to suffer for the mistakes or inaction of his advocate I allow this application and order that the appeal be filed within the next 30 days. The applicant will however pay the costs of this application to the respondent which costs I assess at Kshs.5,000/=. These costs must be paid within the next 30 days failing which execution may issue.

Dated and delivered at Kisii this 21st day of February, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of

Mrs. Sagwa for Nyamurongi (present) for Applicant

Mr. Bigogo for G.M. Nyambati (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.