



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS CIVIL APPLICATION 367 OF 2011

ERUSTUS K. M'MBIJIWE 1ST DEFENDANT/APPLICANT

F.T. GATHENYA 2ND DEFENDANT

ABDUL M. ABDULLA 3RD DEFENDANT

VERSUS

**JOSEPH KAURA M'BURIA (Suing as the Administrator of the estate of the father of late
MARTIN MURIUNGKAURA (Deceased) PLAINTIFF/RESPONDENT**

RULING

The Notice of Motion dated 27th October 2011 is brought pursuant to provisions of **Section 1A, 1B, 3, 3A and 79G** of the **Civil Procedure Act, Order 42 Rule 6** and **Order 50 Rule 6** of the **Civil Procedure Rules**, seeking that the applicant be granted leave to file his appeal out of time.

Secondly, that there be stay of execution of the decree issued herein pending hearing and determination of the intended Appeal. The basis for this application is that the applicant intends to appeal against the judgment which was delivered on 2nd June 2011, in the absence of the Applicant's advocates. Initially, the judgment was scheduled for 24/03/2011 but the court did not sit on that date and no notice as to when the judgment would be delivered, was served.

On 26th September 2011, the applicant's advocate learnt through a letter addressed to them by Messrs Mugambi Nguthani & Company Advocates that judgment had been delivered on 2nd June 2011.

Applicant's grievance is that the award given in the judgement was excessive and not in accordance with the legal provisions. Further that the deceased was a single person with no dependants to warrant the award made in the said decree. It is also contested that since the Respondent does not have any known means, the applicant will suffer considerable prejudice if the Decree is executed before the hearing and determination of his appeal; and it will be impossible to recover the money, should the appeal succeed. Further that the Respondents will not suffer any prejudice if the application is granted, and in any event, the applicant and his advocates are blameless.

In the supporting affidavit sworn by the applicant, in which he laments that after judgment was deferred, no notice was ever served to alert him or his advocate, of a new date. The judgment condemned him to pay the plaintiff a total sum of Kshs.303,500/= which he considers unfair, hence his intention to appeal.

The application is opposed, on grounds that the applicant does not explain what steps he took between March and September to find out the status of the judgment, and in any event, the judgment is legally

sound, fair and in excess. In the replying affidavit sworn by the Respondent, he deposes that he is a man of means and capable of refunding the decretal sum to the applicant, in the event that the appeal succeeds. Furthermore that the applicant will not suffer substantial loss if the application is denied, and in any event the application has been brought after an unreasonable delay and the 1st applicant has not even offered security for costs.

The application was disposed off, by way of written submission. It was argued on behalf of the applicant that there has been demonstrated good and sufficient cause as to why the appeal was not filed on time, due to the lack of communication by the court regarding the new date when judgment was to be delivered. Further, that the minute the applicant's counsel learnt about the judgment, he immediately took steps;

- a) to inform the court that judgment was delivered without any notice,
- b) requested for copies of proceedings and judgment to enable him file an appeal
- c) filed this application seeking leave to appeal out of time.

All these efforts, it is argued demonstrate that there was no unreasonable delay on the part of the applicant. In support of this position, the applicant's counsel has cited the decision in **NIAZONS (K) LTD V CHINA ROAD & BRIDGE CORPORATION (K)** Civil Application No.109 of 2000 (Nrb) where the Court of Appeal stated that the decision on whether or not to extend time for appealing is essentially discretion, but the court ought to take into account:

- (1) The length of the delay.
- (2) The reason for the delay.
- (3) The chances of the Appeal succeeding if the application is granted.
- (4) The degree of prejudice to the Respondent if the application is granted.

There were no submissions filed by the Respondents counsel. Taking the facts noted by the Court of Appeal into consideration I hold that he acted in a timely fashion, the moment he got to learn that judgment had been delivered and intending period before prosecuting the appeal cannot be described as inordinately long.

The reason for failing to file the appeal within the stipulated time has been sufficiently explained – the court after failing to deliver judgment on the due date, did not notify the Applicant of a new date, although court had been intimated to parties that judgment would be on notice. The omission of notice cannot be blamed on the applicant. Once it was indicated that judgment would be on notice, it was upto the court to act and not for the applicant to prompt it.

The issue raised, which causes the applicant grief is arguable – so the applicant has an arguable appeal.

I therefore find that there is merit in the application and grant the prayer that appeal be filed out of time. This must be done within 21 (twenty one) days from today.

With regard to orders of stay, the applicant's fear is that the Respondents are persons of strain and may not have the financial muscle to refund the sum if the same is paid out, and the appeal succeeds. Applicant's counsel cites two decisions: (a) **BUTT V RENT RESTRICTION TRIBUNAL** (1982) KLR 417 where the Court of Appeal held that in considering such a prayer, the court ought to consider the special circumstances of the case, and the unique requirements.

The other case cited is **NEW STANLEY HOTEL LTD V ARCADE TOBACCONISTS LTD** (1986) KLR 757 where the Hon. Justice Porter held that:

“Before making an order stating the execution of the judgment, the court has to be satisfied that substantial loss may result to the applicant. . . .”

The sum awarded of Kshs.303,500/= may appear little, inordinate or colossal depending on which financial eye is focusing on the figure. The 1st Respondent says he is a man of means, though he does not disclose his means of livelihood or any known assets. I think the locus classicus in this regard is the case of **Benjamin Karanja & Another V Kenya Shell**. This present case can easily be distinguished from the **Karanja case** because in that case, the Karanjas were able to sufficiently demonstrate to the court that they were persons of financial substance, with a known means of income. That is not the case here, and the Respondent’s non-committal in this regard justifies the fears expressed by the applicants that if the decretal sum is paid out and the appeal succeeds, it may never be recovered. But his only could well be misused to keep the decree holders from fruits of judgment.

I therefore order that pending hearing and determination of the appeal, there be a stay of execution on condition that the applicant deposits the decretal sum awarded in an interest earning account in the joint names of the applicant and Respondent’s respective counsel, in a financial institution to be agreed on, within the next 21 days in default of which the stay orders will immediately lapse.

The costs of this application shall be borne by Respondents.

Delivered and dated this 30th day of July, 2012 at Nakuru.

**H.A. OMONDI
JUDGE**