REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 232 of 2012

KARUNGURU ESTATE LIMITED…..…..…..…..…..APPLICANT

VERSUS

BEATRICE WAMERE KARANJA..... RESPONDENT

R U L I N G

This miscellaneous application has been brought by the applicant herein by way of a Notice of Motion expressed to be brought under the provisions of Sections 3A and 79G of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules Cap 21 Laws of Kenya seeking the following orders:

a. That there be stay of execution pending the hearing and determination of the intended Appeal.

b. That the Applicant be granted leave to file his Appeal out of time in respect of SRMCC No. 167 of 2007 at Gatundu Law Courts Beatrice Wamere Karanja Vs. Karunguru Estate Limited

c. That the time for filing the Appeal be extended.

d. That costs to be in the cause.

The application is grounded on the fact that judgement was delivered without notice to the applicant or its advocate and that by the time the applicant came to know that the same had been delivered the time limited for appealing had lapsed. Further the applicant will suffer substantial loss if stay of execution is denied and it is wiling to deposit the decretal amount in Court pending the hearing and determination of the intended appeal.

The application is supported by an affidavit sworn by **Susan Murage**, an advocate in the firm of **Wagaki Murage & Co Advocates**. According to the deponent, the respondent herein instituted Gatundu SRMCC No. 167 of 2007 against the applicant on 19th June 2007. The matter proceeded to full hearing on 25th August 2011 when both parties testified before the **Mr. Karani** and submissions were duly filed. The delivery of judgement was then scheduled for 10th November 2011 on which date the same was re-scheduled to 27th December 2011. Once again judgement was not ready and the same was due for delivery on notice. It was only after delivery thereof that the applicants came to know that judgement was delivered on 16th February 2012 through the respondent's advocates. Since the respondent has no stable means of earning, unless the stay is granted, it is deposed, the applicant who is wiling to deposit the decretal sum in court will suffer substantial security.

In opposition to the application, the respondent swore a replying affidavit on 10th May 2012 in which she averred that she suffered a spider bite while working at the applicant's coffee Estate and was issued with a note authorising her to seek treatment but the treatment document from the clinic she attended was forcibly taken away by her supervisor and the applicants declined to produce the same in Court. According to the respondent the applicant is not being candid and to prove this she has annexed an affidavit sworn by the applicant in support of an application for stay of execution on the lower Court. The applicant, according to the respondent was aware of the date of delivery of the Judgement but failed to exercise due diligence by making periodical checks with the Court registry. According to her advocate, although the latter did not attend Court when judgement was due for delivery on 16th February 2012, on 28th March 2012, she perused the Court file and read the Judgement whereupon she communicated the outcome to the applicant's advocates. According to the respondent the application lacks merit and pleads with the court to dismiss the same with costs.

In its submissions the applicant alludes to two affidavits by **Susan W. Murage** and **Jonathan Mutisya**. From the record and from the application itself, it is clear that the application is only supported by an affidavit sworn by the former. The affidavit relied upon as sworn by the said **Jonathan Mutisya** actually appears as annexture to the respondent's replying affidavit. Accordingly some of the submissions made are based on matters not disclosed in the supporting affidavit. Apart from reiterating the contents of the supporting affidavit, it is submitted that since the applicant came to know of the judgement after the time limited for appealing had lapsed, the application should be granted since the same is made sincerely without unreasonable delay. It is further submitted that substantial loss will be occasioned to the applicant if the respondent executed as she is ***not*** a person of straw. Since the respondent does not address her financial means in the event that the appeal succeeds, its most probable that she will not be able to refund the amount while the applicant is willing to deposit security. In support of the application the applicant relies on Nairobi HCMA No. 427 of 2000- **Central Bank of Kenya vs. Kamal Shah;** HCCA No. 716 of 2003 – **Johnson Mwiruti Mburu vs. Samuel Macharia Ngure**; and Mombasa HCCC No. 320 of 1998 – **Omar Sheriff Abdalla vs. CIC Limited.**

On her part the respondent made a one paragraph submission which stated:

"The respondent in reply to Applicant's Submissions dated 4th July 2012 submits that a party has a right of Appeal. The respondent relies on O. 42 2(b) of the Civil Procedure rules 2012".

Obviously the respondent's submissions were done in hurried manner since even the Rules cited do not exist.

In an application of this nature, the matters to be taken into consideration are those which were set out in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. 255 of 1997** and these are the length of the delay, the reason for the delay, the possibility/chances of appeal succeeding and the degree of prejudice to the respondent. With respect to the first ground, the law as I understand it is that where there has been a delay of whatever period, some explanation for the same must be furnished. Dealing with the same issue, **Githinji, JA** in **Kenya Canners Limited vs. Titus Muiruri Doge Civil Application No. Nai. 119 of 1996** aptly expressed himself as follows:

"The power given by rule 4 of the Court of Appeal Rules to extend time is discretionary which discretion should be exercised judicially. However in exercising its discretion the Court is guided by such factors as the merits or otherwise of the intended appeal, the prejudice that the Respondent would suffer if the application is allowed and the length of the delay…For the Court to exercise its discretion judicially, the applicant should at least inform the Court of the nature of the dispute between the parties, the subject matter of the intended appeal and the magnitude of the loss that the applicant is likely to suffer if time to file the appeal is not extended. The applicant should place before the Court relevant material such as a copy of the Judgement intended to be appealed from, so that the Court could make its own assessment of all surrounding circumstances including the importance of the intended appeal to the applicant". (Underlining mine).

With respect to the first issue of the length of the delay the applicants have deposed that judgement was

delivered on 16th February 2012. The present application was filed slightly more than two moths later. The explanation for this delay is attributed to the fact that the applicant was not aware of the date of the judgement. In the affidavit in support of the application filed in the lower court, it was indicated that the applicant's advocates became aware of the judgement on 2nd April 2012. According **Jonathan Mutisya**, the applicant's advocate's clerk, he was in court on 16th February 2012 but judgement was not delivered on that day due to the fact that the plaintiff's submissions were not in the Court file. It would seem that thereafter he went to the court registry and confirmed that their submissions were on record. From his affidavit, it would seem that when he went to the court registry judgement had not been delivered. One then wonders how the same judgement was delivered the same day. Without a copy of the proceedings to show what actually took place on 16th February 2012, I am tempted to disbelieve the said Jonathan's version and agree with the respondent that the applicants were simply not keen in following up on the case. In **John Murigi Ngari vs. Kabuchu Rwario Kanja & Another Civil Application No. Nai. 301 of 2004, Gicheru, CJ** dismissed an application for extension of time on the ground that the reasons given for the delay in filing an appeal were porous and smacked of lack of seriousness in the pursuit of the said appeal. **Shah, JA** in **John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000** similarly dismissed an application seeking extension of time to file an appeal on the ground that the delay was not made *bona fide* and was sought to be explained away by contrived grounds. See also **Peter Gachege Njogu vs. Said Abdalla Azubedi Civil Application No. Nai. 370 of 2001; John Koyi Waluke vs. Moses Masika Wetangula & 2 Others Civil Appeal (Application) No. 307 of 2009 [Reference]; Shaban Hamisi Kuriwa & Another vs. Joe M Mwangi & 3 Others Civil Application No. Nai. 122 of 1996; Hon. Mzamil Omar Mzamil vs. Rafiq Mohamed Walimohamed Ansari Civil Appeal No. 44 of 1982.**

It is therefore clear that the applicant has failed to satisfy me on most of the conditions for granting extension of time to appeal. Had the application been seriously opposed I would have had no difficulty in disallowing the same. However, in **Touring Cars (K) Ltd & Anr vs. Ashok Kumar N. Mankanji Civil Application No. 78 of 1998Lakha, JA** held that in applications of this nature, the rule clearly requires the Court to look at the circumstances and recognises the overriding principle that justice must be done and further that prejudice or lack of it is a highly relevant matter in considering the justice; it may be an all-important one.

As no serious prejudice has been alleged by the respondent, I am inclined in the interest of justice to extend time within which the said appeal is to be filed with a further period of seven days from the date hereof.

On the application for stay, I am not inclined to grant the same in the absence of evidence of substantial loss that the applicant stands to suffer. Mere poverty of the judgement debtor, it has been held, does not justify the denial of a successful litigant's right to enjoy the fruits of the judgement. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* should remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the court sufficient materials to enable it to exercise its discretion in granting the order of stay. In its submissions the applicant contends that since the respondent has not addressed the issue of her financial means in the case the appeal succeeds, it is most probable that she will not be able to refund the amount. It must be remembered that the burden in this kind of application is on the applicant to show the substantial loss it stands to suffer. It is not on the respondent to show that she will refund the money since she already has judgement in her favour. The applicant cannot be said to have satisfied the onus on it by mere allegations as the applicant in this application has done. The respondent's cause of action seems to have arisen from an industrial incident. If the respondent is still in employment of the applicant, then it cannot be said that substantial loss is likely to be occasioned to the applicant since ordinarily there would be some financial benefit which the respondent's derives from the said employment which eventually may be resorted to by the applicant to recover the decretal sum. However, if the respondent is nolonger in the applicant's employment, that would be a different issue altogether since the respondent's financial position would then be a matter uniquely within the knowledge of the respondent. In other words the applicant is obliged to lay a basis for calling upon the respondent to show her financial status. An allegation of impecuniosity alone, it has been held is not a ground for allowing a

stay of execution. Accordingly the prayer for stay is unmerited.

The respondent will have the costs of this application.

Dated at Nairobi this 21st day of September 2012

G V ODUNGA
JUDGE

Delivered in the presence of

Mr. Mariaria for Kisia for the Applicant

No appearance for the Respondent