



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 407 of 2009

KHALIF JARSO GWIY.....PLAINTIFF/RESPONDENT

VERSUS

MICHAEL JUMA GONDA.....DEFENDANT/PROPOSED APPELLANT

Coram:

Mwera J.

Mwangi for Plaintiff

Onsarigo for Defendant/Applicant

Furaha Court Clerk

RULING

The party described as the proposed appellant, one Michael Juma Gonda moved this court on 5th June, 2012 under Order 42 rule 6, Order 51 rules 1, 3, Order 50 rule 6 of the Civil Procedure Rules, sections 95, 3, 3A of Civil Procedure Act and section 7 of the Appellate Jurisdiction Act for orders:

- (i) that execution following the judgment herein delivered on 2nd May, 2012 be stayed; and
- (ii) that leave be granted to file a notice of appeal out of time, giving the time within which to file and serve the same.

In the grounds it was contended that the applicant was dissatisfied with the quantum of damages awarded in the judgment and so on 10th May, 2012 he instructed his lawyer to appeal. That that lawyer fell ill for over two weeks. It only transpired on 28th May, 2012 that a notice to appeal had not been lodged within the statutory fourteen (14) days. All this was on no fault of the applicant who was ready to furnish any security ordered by the court for due performance of the decree.

The supporting affidavit exhibited a medical report from Dr. Theuri Nderitu to the effect that the applicant's lawyer, Beatrice Ngatunyi fell ill with bronchitis and attended the doctor on 10th May, 2012. She was given two weeks off-duty, to be reviewed on 30th May, 2012. So the appeal period plus the thirty (30) days stay granted lapsed before an appeal was filed, hence this application. The prayers should be granted otherwise the applicant suffers irreparable (substantial?) loss and damage.

There was probably a replying affidavit sworn and filed. A copy was not easily traced on the file but the supplementary affidavit filed on 4th September, 2012 by the applicant's lawyer, Stella Mbuli, alluded to one.

Directed to submit, the applicant relied *inter alia*, on section 7 of the Appellate Jurisdiction Act which empowers this court to enlarge time within which a party can appeal to the Court of Appeal. That the application was made without delay and so he deserved the orders. Some authorities were cited to guide the court.

On his part the respondent maintained that the prayers laid were omnibus and the applicant did not deserve them. It was pointed out but in error, that judgment was delivered on 14th April, 2012. No. That is not so. It was **signed** on that date but delivered on 2nd May, 2012 with an order granted for thirty (30) days stay. The applicant depones that those days expired on **3rd June, 2012**. And Dr. Nderitu's medical report directed that Beatrice Ngatunyi's state of health could be reviewed on 30th May, 2012 – 2 to 3 days before the stay period expired. What did the lawyer do then? Nothing is said of this.

The court notes that a total of Shs. 5.9 million was awarded on the subject judgment. There was no evidence that there were moves to execute – neither was a decree filed or more importantly copies of application to execute or notices of proclamation/attachment. In essence there is no execution to be stayed and this application brought under Order 42 rule 6 Civil Procedure Rules, among others, can rightly be described as premature.

However, the prayer to file notice/appeal out of time is granted. The same to be done in the next thirty (30) days. The prayer to stay execution is premature. But if the applicant is keen to have his day in court he should pay over to the respondent a sum of Shs. 2 million in the next forty five (45) days and move as deemed appropriate, lest the respondent feel that he is being kept away from fruits of his litigation without a valid reason. The claim that the respondent was a man of straw (paragraph 12 of supporting affidavit) was not backed by an affidavit of means of the respondent. That claim had no merit in suggesting that the respondent, if paid the decretal sum, was not in a position to repay it in the event of the appeal succeeding.

In sum the prayer to lodge notice of or appeal out of time is granted – 30 days. The prayer to stay execution is refused because it is premature. There is no evidence of execution at all. However, the applicant may pay the respondent Shs. 2 million of the decretal sum as directed above and thus have a stay order. In default the stay order to lapse after forty five (45) days as granted.

Orders accordingly.

Delivered on 20th November, 2012.

J. W. MWERA
JUDGE