



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

MISC. CIVIL APPLICATION NO. 24 OF 2010.

MATUNDA STORES)

JOSEPH MURIITHI NGOTHO)PLAINTIFF.

VERSUS

RASHID HAMISI MDOE.....DEFENDANT.

RULING.

1. By a judgment delivered on 31st March, 2010 in Kitale SPMCC No. 55 of 2007 **Rashid Hamisi Mdoe vs. Matunda Stores and several others**. Judgment was entered against the applicant in several suits thus he has filed Misc. Application Nos. 24 of 2010, 25 of 2010, 26 of 2010 and 27 of 2010 in which he is seeking for the enlargement of time for lodging an appeal against the above decision. The four applications were consolidated for purposes of hearing and determination. The applicant is also seeking for stay of execution pending the hearing and determination of this application. This prayer in my view is now overtaken by events as no interim order was granted after the application was filed.

2. According to the applicant, the period within which to lodge an Appeal lapsed and the applicant is desirous of filing an Appeal especially on the issue of liability. It was explained that the reason for the delay was caused by the Insurance Company which took time before making a decision on whether to file an Appeal. Counsel for the applicant submitted that the Appeals have overwhelming chances of success, the delay is also excusable and the applicant should be granted leave to Appeal as the issue of the merit of the Appeal would be addressed by the court that will hear them. In this regard the counsel relied on the case of **Mwangi Vs. Joshi [1988] KLR Pg. 618**. Where the Court of Appeal held that:-

“The proper approach is to be found in Gatti vs. Shoosmith[1939]3 All ER 916 which was elucidated in Palata Investments Ltd vs. Sinfield Ltd (see the Times Law Report of May, 28, 1985). It was then said:

“The previous practice of in relation to applications for leave to appeal out of time was for the Court to concentrate on the circumstances of the delay (see Gatti’s Cse above). In that case there had been a delay of a few days caused by the mistake of a legal adviser, and the Court of Appeal held that it was a

proper case for them to exercise their jurisdiction to grant leave. having drawn attention to the old procedure, their Lordships expressed the opinion that in cases where the delay was very short and there was an acceptable excuse in the delay as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal would arise.”

3. These applications were opposed, according to counsel for the respondent; the applicant was duly notified of the day of the delivery of judgments which was on 31st March, 2010. The applicant was granted stay for 30 days which lapsed before the applicant filed an appeal. The applicant has not adduced any evidence to support the contention that it is the Insurance Company that delayed in making a decision to file an appeal. The applicant has also participated in the taxation of bill of costs which was taxed by consent. Thus this application is a mere afterthought. Moreover, if the applicant is seeking for stay of execution no appeal has been lodged and in the absence of an appeal an order of stay cannot be granted.

4. I have considered the rival submissions by counsel for the applicant and the respondent. Firstly the judgments which the applicant intends to appeal against were not made available to this court thus I am not able to consider whether the appeals have chances of success or not. Secondly, although the applicant has not given very good reasons why the Appeals were not filed within time, I find this application was filed on 24th May, 2010 which in my opinion is within a reasonable time. Going by the principles set out by the Court of Appeal in the case of **Mwangi vs. Joshi**, (supra) the applicant can be granted leave to file an appeal out of time also bearing in mind the broader principles in the administration of justice that both parties should be afforded a fair trial, especially if no prejudice will be caused to the plaintiff. The only prejudice that I can see is the costs of this application and delay which is not so inordinate.

5. However, the applicant cannot be granted an order of stay of execution for reasons that no arguments or materials were put forward to support the prayer of stay of execution. The tests set out under order 42 Rule 6 & 7 of the Civil Procedure Rules have not been complied with. Accordingly, the applicant is granted 30 days within which to file the Appeals. The applicant shall pay costs of this application to the respondent.

Ruling read and signed this 25th Day of March 2011.

M. KOOME.

JUDGE.