



REPUBLIC OF KENYA

IN THE REPUBLIC OF KENYA

AT KISUMU

MISC. APPL. NO. 230 OF 2010

ERASTUS MAGERE JUMA.....APPLICANT

VERSUS

ELISHA WADIDA & 3 OTHERS.....DEFENDANTS

RULING

The appellant/applicant herein has moved to this court by way of a notice of motion dated 13th day of July 2010 brought under the old order XLIX rule 5 of the CPR section 3, 3A and 79(a) of the CPA cap 21 Laws of Kenya. Two reliefs are sought namely:-

(a) That this honourable court be pleased to allow the applicant herein appeal out of time from the original Winam SRMC CC. No. 88/2009 in a judgment delivered on 24-3-2010.

(b) That the cost of this application be in the cause.

The grounds in support are set out in the body of the application and supporting affidavit as well as oral representations in court namely:-

- The judgment was delivered in his absence and it took long before he learnt of it.

- The preparation of typed proceedings took long and by the time he received them, time for filing of the appeal had runout.

- He has become aggrieved of the judgment which dismissed his claim and he is desirous of seeking a second opinion on his claim.

The respondent opposed the application by filing a replying affidavit deponed by their counsel and the points stressed by them are as follows:-

- That judgment was delivered in the presence of the applicant.

- Pray that their costs be deposited into court before he can be granted the relief he is seeking.

- That there is no certificate of delay attached to the application to show that the proceedings were not typed in time.

- That there has been inordinate delay and for this reason the relief sought should not be granted.

This court has given due consideration to the afore setout rival arguments as read from papers filed for and against the application and the court proceeds to make the following findings on the same.

(1) The appellant applicant has a right to exercise his undoubted right of appeal.

(2) The respondent has no objection to the applicant moving to exercise that right but they argue that the same should be exercised on condition that the taxed costs are deposited into court.

(3) That there is no certificate of delay annexed to the application confirming that indeed the proceedings were delayed in being supplied. But this court declines to use this as a reason for declining the applicant the relief sought because in doing so the court would be upholding technicalities as opposed to upholding substantial justice which could be contrary to the call to the court vide article 22 (3) (d) which reads;

“Article 22 (3) (d) the court while observing the rules of natural justice shall not be unreasonably restricted by procedural technicalities. Also article 159 (2) (d) of the same constitution which reads:- article 159 (2) (d) justice shall be administered without undue regard to procedural technicalities”.

Applying these constitutional provisions to the respondent’s argument, it is clear that no mention has been made of any prejudice suffered by the respondent by reason of failure of the applicant to get a certificate of delay.

(4) There is mention by the respondent that the right of appeal should be tied to a requirement that costs incurred be deposited first as the respondent might have difficulty recovering the same. In response to that argument, the applicant says he cannot raise that amount.

This court has given due consideration to the above argument and it is of the opinion that tying a condition to the free exercise of a right of appeal will amount to giving a relief with one hand and then taking it away with another. Failure to attach such a condition does not render the respondent remedies as there is room to execute for the costs or revisit the issue once the appeal is file by

seeking an order for security for costs as a condition for pursuing and prosecuting of the appeal.

For the reasons given in the assessment the applicant's application dated 13th day of July 2010, and filed on the 13-7-2010 be and is hereby allowed on the following forms:-

(1) Leave to appeal out of time granted.

(2) The appeal to be filed within 30 days from the date of the reading of this ruling.

(3) The respondent will have costs of the application.

(4) The grant of leave in number 1 above will not be tied to the condition of payment of costs and the respondent is at liberty to seek this relief in the application for stay of execution if any and in an application for security for costs presented in the appeal file.

Dated, signed and delivered at Kisumu this 10th day of March 2011.

ROSELYN N. NAMBUYE

JUDGE

RNN/va