REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HC. MISC. CASE NO.87 OF 2009

PIUS KAWINZI KITHOKA..... APPLICANT

VERSUS

GRACE WAYUA MWANZA..... RESPONDENT

RULING

The applicant, **Pius Kawinzi Kithoka**, on 31st March, 2009 filed the application, the subject of this ruling seeking in the main that;

"***this court be pleased to enlarge the time for filing the memorandum of appeal to 15 days after the determination of the application***"

and that;

"***this Court to grant stay of execution of the decree in Kangundo SRMCC No.61 of 2005 pending the hearing and determination of the appeal***".

He also prayed that the costs of the application be provided for. The application is stated to be brought under the then Orders XLIX rule 5, XX rule 1, L rule 1 of the Civil Procedure Rules and sections 3A and 79 G of the Civil Procedure Act

The grounds in support of the application are that, the judgment in Kangundo SRMCC No.61 of 2005 was delivered without notice to the advocates involved as required by law and the applicant only became aware of the judgment after the time for filing the appeal had elapsed. The applicant should therefore be allowed to exercise his undoubted right of appeal. Finally, he contends that it is in the interest of justice that he be allowed to appeal and he is ready and willing to comply with conditions that this court may impose in allowing the application.

The applicant also swore an affidavit in support of the application. That affidavit merely reiterated and or elaborated on the foregoing. Suffice to add however that, **Grace Wayua Mwanza** hereinafter "**the respondent**" on 10th May, 2005 filed a civil suit in Kangundo SRM's court being Kangundo SRMCC No.61 of 2005 against the applicant claiming damages in relation to a traffic accident which occurred on 8th March, 2005 involving motor vehicle registration numbers KAD 807K owned and driven by the applicant and KAF 755G owned and driven by a third party. The suit which was defended was eventually heard by **Hon. Shadrack Okato PM** and judgment reserved for 9th November, 2008. Come that day and the judgment was not delivered as it was not ready. It was not until 9th March, 2009 that the applicant was

called by his father and informed that auctioneers had proclaimed his properties on the basis of a judgment entered in the aforesaid case. His advocates confirmed to him that they had not been served with a judgment notice as required. Indeed the judgment was delivered in the absence of the advocates for both parties and without notice. Accordingly, the delay in lodging the appeal was not deliberate but was due to the failure by the court to issue the notice of judgment. Otherwise, he had a meritorious appeal and prayed to court for extension of time to enable him lodge an appeal against the judgment and decree in Kangundo SRMCC No.61 of 2005.

As expected the application was opposed. In a replying affidavit sworn by the respondent, she stated where pertinent, that the application was frivolous, incompetent, vexatious, bad in law, incurably defective, an abuse of the court process, an afterthought and brought in bad faith. The application had been brought solely to frustrate the process of execution of the decree under way yet the applicant had all along been aware of the judgment since 23rd January, 2009 when he was duly informed by her counsel. The applicant thus had time to lodge the appeal within time. The applicant too, had not offered security for costs.

When the application came up for interpartes hearing on 22nd October, 2009 before **Lenaola J.**, he directed that parties file written submissions over the same. Parties duly complied. However, by 20th November, 2010 when the application was to come up with a view to the judge giving a date for ruling, he had left the station on transfer. The application therefore remained in limbo until 8th November, 2011 when it came before me for mention for further orders and or directions. Parties however agreed that I could proceed and act on the submissions on record, craft and deliver the ruling on the application.

I have carefully read and considered the written submissions and authorities cited. The issues for determination by this court are whether the applicant has established sufficient grounds to enable this court to grant him extension of time within which to lodge and appeal and also to stay the execution of the decree.

The principles upon which a court grants an order extending time within which a party should lodge an appeal are settled. First and foremost, that relief is discretionary. In exercising such discretion, however, the court must consider the indolence or lack of it of the applicant, the length of the delay and reasons for such delay. The court too will consider whether the ends of justice will be best served by such extension of time and whether the respondent could adequately be compensated for the delay by an award of thrown away costs. Above all, the court will consider whether the intended appeal is arguable.

In this application, the delay appears to have been slightly above two months since the judgment was delivered on 19th December, 2008 and execution ensued on 9th March, 2009. The delay has been explained on the basis that the judgment was delivered in the absence of the parties and without their knowledge. The respondent acknowledges that fact since in her letter dated 23rd January, 2009 annexed to her supporting affidavit she states

"***kindly note that judgment in the above matter was delivered on 19th December, 2008 in the absence of both parties ....***" *(emphasis added)*

It is also instructive that though the said letter was meant for counsel for the respondent, it was nonetheless delivered to Cannon Assurance (Kenya) Limited on 26th January, 2009. In those circumstances it is difficult to tell whether the letter reached to whom it was destined. It is also possible that the said letter was never received by counsel for the applicant. It may well be therefore that the applicant only came to know of the existence of the judgment and decree when the process of execution was underway. That was on 9th March, 2009. This application was filed on 31st March, 2009, some twenty two days later. That delay cannot be termed inordinate. Nor can the applicant be accused of indolence. The moment it came to his knowledge that he was under threat of execution over a judgment and decree he was not aware of, he moved with speed and alacrity to secure his interests by filing the instant application.

I have also looked at the draft memorandum of appeal annexed to the application. The intended appeal cannot be said to be frivolous since the applicant is seeking to challenge the learned magistrate's finding on both liability and quantum. No doubt it raises issues which ought to be determined or ventilated on merit in the appeal. This is only possible if the applicant is allowed to invoke and execute his undoubted right of appeal. Again if the respondent has suffered loss as a result, thrown away costs should be able to assuage such loss. To that extent, the prayer for extension of time in the application is allowed.

With regard to the prayer for stay of execution of the decree pending the hearing and determination of the appeal, I do not think that such remedy is available to the applicant at this stage. This jurisdiction can only be invoked once an appeal has been filed. In other words where there is no competent appeal against the decision being sought to be stayed, the appellate court has no jurisdiction to grant a stay of execution as the appellate court's jurisdiction to grant such an order stems or arises only when there is an appeal timeously filed. This court cannot grant a stay of execution pending an appeal to this court from the subordinate court where no appeal has been filed as there is no provision for filing a Notice of appeal to the High Court, unlike in the Court of Appeal where such notice originates an appeal. In the instant case, no appeal has been filed. Indeed what the applicant has done is to make an omnibus application for extension of time as well as stay of execution. This is improper. The two prayers should be separated and brought to court by separate applications. The rationale is that where the applicant's application for extension of time to file appeal is yet to be heard and determined, the appellate court has no jurisdiction to entertain the application for stay of execution. The application for extension of time ought to be heard and determined first. Once the extension is granted and the appeal is then lodged within time, the appellant can then on the basis of such an appeal, file an application for stay of execution. See Generally: **Singh Vs. Runda Estates Ltd [1960] EA. 263 B. N. Mucira t/a B. N. Mucira and Co. Advocates vs. Kenya Commercial Bank Ltd. Civil Application Nai No.180 of 2000**(*UR*), **United Insurance Company Ltd. Vs. Mary Ogembo Polo Kisumu HC.Misc. Appl. No.195 of 2001** (*UR*) and **Dickson Onyango and another Vs. Kenya Commercial Bank Ltd, Ksm HC.Misc. Appl.No.78 of 1998** (*UR*). Indeed even a careful reading of Order 42 rule 6 of the Civil Procedure rules no doubt contemplates that an appeal must be in first before an application for stay can be entertained. As it is therefore, it appears the applicant has placed the cart before the horse.

In a nutshell therefore, the application for extension of time is allowed. The applicant is granted fourteen (14) days from the date hereof to file and serve his intended appeal failing which the prayer shall stand dismissed. The applicant shall however, pay the respondent throws away costs which I assess at KShs.10,000/- to be paid within the same period of time. As for the prayer for stay of execution of the decree, the same is denied for now.

Dated and **delivered** at **Machakos**, this **30th** day of **November**, 2011.

ASIKE-MAKHANDIA

JUDGE