



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**MISC. CIVIL APPLICATION NO.286 OF 2010**

**DUNCAN WAINAINA.....1<sup>ST</sup> APPELLANT**

**SAMUEL MBUGUA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOSEPH NGIGE NJOROGE.....RESPONDENT**

**RULING**

Judgment was given in favour of the respondent and against the applicants in the sum of Kshs.132,000/= in Naivasha S.P.M. Civil suit No.1019 of 2004 on 15<sup>th</sup> April, 2010. On 14<sup>th</sup> June, 2010, the applicants brought the instant motion for two substantive prayers; a temporary order of stay of execution and leave to file an appeal out of time.

The applicants contended that the judgment was scheduled to be delivered on notice. It was, however, delivered without notice to either the applicants or their advocates. They learnt of the delivery of the judgment on 20<sup>th</sup> April, 2010 when counsel for the respondent wrote to the applicants' advocates advising them of the decretal sum.

The advocates took time to make inquiries regarding the manner in which the judgment was delivered. In the process the time limited for filing an appeal lapsed.

On his part, the respondent has opposed the application on the grounds that it is an afterthought, brought to delay the conclusion of the dispute; that although the judgment was not delivered on the day it was scheduled to be delivered, learned counsel for the applicants was present when the new date was given but chose to stay away on the new date; that immediately after judgment was delivered, the applicants' counsel was notified; that the applicants' insured were also notified of the judgment; that the applicants are guilty of laches.

I have considered the arguments and the single authority cited by learned counsel for the applicants. In that authority, like many others, it was reiterated that whether or not to extend time for the doing of act is a matter for the exercise of a judicial discretion, that judicial discretion must be exercised judicially and not capriciously. See **Section 95** of the **Civil Procedure Act** and **Order 50 rules 6** of the **Civil Procedure Rules**.

In terms of **Section 79G** of the **Civil Procedure Act**, an appeal from the court below to this court must be filed within a period by thirty (30) days from the date of the decree or order appealed against. The court,

however, may extend that period and order an appeal to be filed out of time if the applicant demonstrates that he was unable to file the appeal within the prescribed time for a good and sufficient reason.

See **Eveready Batteries (K) Limited & Another** V. **Samuel Ngugi Muigai**, Misc. Civil Application No.327 of 2003. It follows that irrespective of the period of delay, the court will grant leave to bring an appeal out of time so long as the applicant has shown a good and sufficient reason for failing to bring it within the prescribed period.

In this matter, judgment was delivered on 15<sup>th</sup> April, 2010. Within thirty days, as explained above, the applicant was required to have filed his appeal. That he did not do. Instead, he filed this application with a draft memorandum of appeal on 14<sup>th</sup> June, 2010.

On matters of computation of time regard must be had to the provision of **Section 57** of the **Interpretation and General Provisions Act** as well as **Order 50 rule 8** of the **Civil Procedure Rules**.

From the above provisions in computing time, the first and the last days are to be excluded. Similarly public holiday or official non-working days (Saturday and Sunday) must be excluded in computing time (called *excluded days*). Judgment having been delivered on 15<sup>th</sup> April, 2010, thirty (30) days allowed to lodge an appeal to this court fell on 26<sup>th</sup> May, 2010 taking into account the Saturday, Sunday and Labour Day holiday.

The applicants were late, from that computation for a period less than two weeks. They have explained that judgment was delivered without notice either to them or their counsel; that they only learnt of the judgment on 20<sup>th</sup> April, 2010. Between 20<sup>th</sup> April, 2010 and 26<sup>th</sup> May, 2010 when they ought to have filed the appeal, they have explained that their counsel sought to find out how the judgment was delivered without notice and that by the time that inquiry was completed and the applicants instructed their counsel to file appeal, time for doing so had already expired.

It is not controverted that judgment was not delivered as scheduled. The applicants are categorical that they were not aware of the date the judgment was delivered. The respondent has deposed that the court below communicated the new date for delivery of the judgment in the presence of a representative of the applicants. Nothing would have been easier than to avail to this court the proceedings of the court below for the period 7<sup>th</sup> April, 2010.

Seeing that the delay was not inordinate and further bearing in mind that the respondent will not suffer any injury/inconvenience incapable of being compensated by an award of costs, I am inclined to grant leave to the applicants to file and serve the appeal within seven (7) days from the date of this ruling. Although the prayer for stay of execution was expressed to last until the *inter partes* hearing, no useful purpose will be served after that stage if orders of stay are not extended to the hearing and determination of the appeal. In exercise of the courts discretion, (including the oxygen principle), I have considered the application for stay and find that it was brought timeously. The applicants have deposed that if the decretal sum which is substantial is paid over to the respondent, the appeal will be rendered nugatory. I understand this statement to question the capability of the respondent to reconstitute the decretal sum in the event the appeal succeeds.

The burden shifted to the respondent to demonstrate that he would be in a position to reconstitute. He has not discharged that burden. The applicants have also expressed their willingness to abide by any order as to security.

For the reasons stated there will be an order of stay of execution pending the filing, hearing and determination of the appeal herein subject to the applicants investing in a joint bank account of their counsel and counsel for the respondent the decretal sum within twenty one (21) days from the date of this order failing which execution shall proceed without further orders.

Costs to be costs in the appeal.

**Dated, Signed and Delivered at Nakuru this 3<sup>rd</sup> day of November, 2011.**

**W. OUKO  
JUDGE**