



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Miscellaneous Application 418 of 2008

CHRISTOPHER WAKULUCHA ATAVACH.....APPLICANT

VERSUS

MARY MUTHONI.....RESPONDENT

RULING

By a notice of motion dated 16th September, 2008 the applicant seeks two substantive orders, namely, an order of stay of execution pending the hearing and determination of the intended appeal and leave to file appeal out of time.

The application is brought on the ground that the judgment was delivered without notice to the applicant. That by the time his counsel learnt of the judgment the prescribed thirty (30) days for appeal had elapsed.

The respondent while not disputing the fact that judgment was delivered in the absence of the applicant, argues that immediately after the delivery, the applicant was accordingly notified.

I have considered these arguments as well as the authorities cited and find as a matter of fact that the judgment was originally scheduled to be delivered on 21st April, 2008. It was not delivered and instead rescheduled to 30th April, 2008. It was once more not delivered. Instead it was delivered 3rd June, 2008. I have noted that the respondent does not dispute this fact.

Learned counsel for the applicant learnt of the judgment when the auctioneers came to proclaim. That must have been in the month of August, 2008. One month later this application was filed.

Section 79G of the **Civil Procedure Act** limits to thirty (30) days the period within which an appeal from the subordinate court to this court must be filed.

Proviso to **section 79G** aforesaid states that:

“Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

See also **Order 49 rule 5** of the **Civil Procedure Rules**. Clearly from the foregoing provisions the decision whether or not to extend the time for appealing is essentially discretionary. It is generally settled that in exercising that discretion, the court must consider the length of delay, the reasons for the delay, the degree and nature of prejudice the other party is likely to suffer and, to a limited extent the chances of success of the appeal.

All these are summarized in the phrase "*good and sufficient cause.*" Has the applicant demonstrated that he has a good and sufficient cause why he did not file the appeal in time?

I have found as a fact that the judgment was delivered without notice to him. Between the time the judgment was delivered (3rd June, 2008) and the filing of this application on 26th September, 2008, only about two months had elapsed in the strict computation of time in terms of **section 57** of the **Interpretation and General Provisions Act**. By the time notice of judgment was being served on the applicant's counsel, the 30 days had elapsed.

In my considered view, the applicant has shown a good and sufficient cause. The delay was not inordinate. He deserves the court's discretion. The time within which to file the appeal is enlarged and the applicant ordered to file the appeal within fourteen (14) days from the date hereof.

Having granted leave to file appeal out of time, the next question is whether an order of stay of execution is available to the applicant. The decretal sum is Kshs.513,214/=. Execution has began, with the proclamation of the applicant's goods. He is apprehensive that should execution proceed he stands to suffer substantial loss as the respondent may not be in a position to retribute. He has further averred that he is ready to provide security. The respondent has not addressed the issues raised by the applicant as being the requirements for the grant of stay under **Order 41 rule 4** of the **Civil Procedure Rules**.

The applicant having raised doubt as to the respondent's ability to retribute, the burden is shifted to the respondent to rebut the doubt. That she has failed to do. See **National Industrial Credit**

Bank Ltd Vs. **Aquinas Francis Wasike & Another**, C.A. No.NAI. 238 of 2005.

In the result there will be an order of stay of execution pending the filing, hearing and determination of the appeal on condition that the applicant will deposit in an interest earning account, the decretal sum in the joint names of his advocate and the respondent's advocate within twenty one (21) days from the date of this order, failing which execution shall proceed without further orders. The applicant to bear the costs.

Dated, Signed and Delivered at Nakuru this 28th day of May, 2010.

W. OUKO
JUDGE