



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

Civil Appeal 117 of 2010

[From Original Case No.156 of 2009 of SRMCC Kwale]

MURIITHI RICHARD.....APPELLANT

VERSUS

1. JUMA KASSIM

2. MWANAISHA ABDALLA.....RESPONDENTS

RULING

This is an application for mainly two orders of the court namely that the applicant be granted leave to lodge an appeal out of time against the ruling in Kwale SRMCC No. 156 of 2009 and that there be a stay of execution and/or proceedings in the said case pending the hearing and determination of the intended appeal. The applicant, Muriithi Richard, was the defendant in the said case which was filed by the respondents, Juma Kassim and Mwanaisha Abdalla. The application is brought under Order XLI Rule 4, Order L Rule 1 of the Civil Procedure Rules, Section 79G of the Civil Procedure Act and all enabling provisions of the Law.

The main grounds for the application are that the delay in lodging the appeal was occasioned by misdiarization on the part of the applicant's advocate, and that the applicant has a good and arguable appeal. There are two affidavits in support of the application sworn by the applicant and his counsel. It is deponed by the applicant in his affidavit that he was never served with summons to Enter Appearance in the lower court case; that his application to set aside the ex parte judgment was allowed on condition that the Decretal amount be deposited in a joint account of the parties' advocates which condition he is dissatisfied with and desires to appeal against the same; that he has a good and arguable appeal and that the delay in lodging the appeal was occasioned by misdiarization of the date of ruling in the Lower Court.

In his affidavit, the applicant's counsel has deponed, *inter alia*, that the applicant's application for setting aside the ex-parte judgment in the Lower court was argued and fixed for ruling on 31st March, 2010. However, he was informed by counsel who held his brief that ruling would be delivered on 7th April, 2010. It is further deponed that the said misdiarization of the date of ruling caused the delay in lodging an appeal against the ruling.

The respondents have opposed the application on the basis of separate affidavits filed in reply to the application. The respondents oppose the application on similar grounds namely that the application is incompetent, bad in Law and fatally defective; that there has been undue delay in bringing the application given that on 12th April, 2010, their advocate by letter dated 9th April, 2010 duly notified the applicant's advocate of the ruling of 31st March, 2010 and therefore that this application is an after thought and calculated to delay and defeat their entitlement to enjoy the fruits of their judgment.

To the affidavits are annexed two exhibits: a copy of the said letter of 9th April, 2010 and an affidavit of service sworn on 12th April, 2010 indicating that the said letter was served upon the applicant's advocates on 12th April, 2010.

The application was argued before me on 28th June, 2010 by Mr. Mokaya, Learned counsel for the applicant and Mr. Munyao, Learned counsel for the respondents. In his oral submission before me, counsel for the applicant contended that the conditional stay of execution granted by the Lower court was as a result of improper exercise of discretion by the Lower court and that the applicants have an appeal with high chances of success. With regard to delay, counsel submitted that the same was not deliberate but was due to counsel's mistake which should not be visited upon the applicant.

In his response, counsel for the respondents submitted that the application is incompetent as no valid appeal has been lodged and that the court has not been properly moved. Counsel further contended that the intended appeal is hopeless as the same is against the exercise of discretion properly exercised. In counsel's view, the applicant is guilty of inordinate delay and has not satisfied the requirements of Order XLI Rule 4 of the Civil Procedure Rules.

I have carefully considered the application, the affidavits filed by both sides, the annexures to the said affidavits and the submissions of counsel. Having done so, I take the following view of the matter. First, the prayer for leave to appeal out of time from the ruling of the Lower court dated 31st March 2010. The reason given for the delay in lodging the appeal is the misdiarizing of the date of ruling of the Lower court. Counsel for the applicant has sworn that the ruling on the applicant's application to set aside an ex parte judgment in the Lower court was set for 31st March, 2010. However, he was given 7th April, 2010 as the date the said ruling would be delivered by counsel who held his brief. He also swears that after several follow ups he came to discover upon perusal of the court file that the ruling was actually delivered on 31st March, 2010 and not 7th April, 2010. It is significant that counsel does not give the date he perused the Lower court file. It is in the premises not clear when counsel learnt of the results of the applicant's said application. Counsel is also silent as to whether he duly went to court on 7th April, 2010 as advised by the advocate who held his brief and if he did so, whether he had any difficulty in accessing the court file to establish the results of the applicant's application. 7th April, 2010 is significant because by then the appellant still had time within which to lodge his appeal.

There is then the uncontradicted affidavit evidence that counsel for the respondents by letter dated 9th April, 2010 duly notified counsel for the applicant that ruling on the application to set aside the ex-parte judgment had been delivered on 31st March, 2010 and that the default judgment had been set aside on condition that the applicant deposits the decretal sum in a joint account in the names of the parties' advocates. The notification was delivered to the office of the applicant's advocates on 12th April, 2010. 12th April, 2010 is significant because by that date the applicant had sufficient time within which to lodge his appeal.

The applicant himself also blames the delay in lodging his appeal on his counsel's misdiarizing of the date of ruling of the Lower court. He however knew that ruling in the Lower court on his application to set aside the default judgment was to be delivered on 31st March, 2010. He is silent as to what he did on learning of the fate of his application. He does not explain why he could not inform his advocates of the ruling soon after 31st March, 2010.

I have said enough to show that I am not persuaded that the delay in lodging an appeal against the ruling of the Lower court was occasioned by the misdiarizing of the date of ruling as contended by the applicant and his counsel. The 2 ½ months delay to lodge the appeal is therefore not explained at all.

With regard to the prayer for a stay of execution and/or proceedings of the Lower court, the applicant is not only guilty of delay in moving the court, he has not attempted to satisfy the conditions for the grant of stay set out in Order XLI Rule 4 of the Civil Procedure Rules. In any event a consideration of those conditions is superfluous since there is no valid appeal which has been lodged against the Lower court's ruling.

The upshot is that the application dated and filed on 16th June, 2010 is without merit and is dismissed with costs.
Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF AUGUST 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Hamza holding brief for Mr. Mokaya for the Applicant.

F. AZANGALALA

JUDGE

23RD AUGUST 2010