



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CIVIL APPEAL NO. 20 OF 2006**

**MALINDI MANAGEMENT STRATEGY T/A MALINDI  
CASINO.....PLAINTIFF**

**-VERSUS-**

**STEFANO SCHIAPPACASE.....DEFENDANT**

**RULING**

The application dated 16<sup>th</sup> September 2010 is a Notice of Motion made under section 3A of the Civil Procedure Act and Order L Rule 1 of the Civil Procedure Rule – seeking that the appeal herein be dismissed for failing to comply with the order of this court made on 17<sup>th</sup> June 2010.

Further that the order obtained on 29<sup>th</sup> June 2007, staying execution of the decree consequential to the judgement entered in favour of the Respondent on 5<sup>th</sup> July 2009 be vacated and Respondent be at liberty to execute and costs of this application be awarded to the Respondent/Applicant. It is premised on grounds on 17<sup>th</sup> June 2010, this court delivered on ruling directing that appellant not take steps towards having the file placed before the Deputy Registrar and follow up in all the appropriate steps to ensure the path to prosecuting the appeal within 7 days from the date of the ruling.

Three months later, appellant has done nothing to comply with the said order and the delay is prejudicial to Respondent who cannot enjoy the fruits of his judgement and continues to suffer unnecessary prejudice for as long as the appeal remains pending.

The affidavit in support of the application reiterates the contents of the application and adds that it is clear the appellant has not shown any interest, incentive or vigilance at all in prosecuting the appeal expeditiously and/or diligently.

The application is opposed, and in a replying affidavit shown by the appellant`s counsel Mr Mabeya, he depones that on 17<sup>th</sup> June 2010, he did not attend court because his clerk attended court and informed him that the Ruling was not delivered because the court was not sitting and ruling would be delivered on notice. He later got to learn that the information given to him by his clerk was erroneous and that ruling had actually been delivered.

On 25/08/10, his firm was served with a mention notice of the matter for 9<sup>th</sup> September 2010 and he

instructed the firm of Richard O. and Company to take directions of the court. He was thus shocked when on 30/9/10, he was served with an application seeking to dismiss the appeal for failing to comply with orders of 17<sup>th</sup> June – that was the first time his firm was getting to learn about the directions. So he decided to file application for extension of time, which he still urges this court to do. He urges this court not to visit his mistake on his client whom he describes as innocent and totally unaware of the orders of 17<sup>th</sup> June, pointing out that there has been no delay in coming to court from the date the orders came to his knowledge and that of appeal.

At the hearing of the application, Miss Chepkwony for the applicant submitted that since the orders dated 17<sup>th</sup> June 2010 had not been obeyed, the appeal ought to be dismissed as the delay was causing a lot of prejudice to the Respondent. She pointed out that judgement was entered in Respondent`s favour four years ago, yet Respondent cannot enjoy the fruits of that judgement. I will not delve deep into the arguments, I will take full responsibility for the mix up created. I confirm that on 17<sup>th</sup> June 2010, I did not sit and a notice had been posted on the court`s notice board two weeks earlier informing counsel that I would be away attending a school activity for my children in Nairobi. I then directed the Registry to send out notices to parties whose judgment and rulings were scheduled for that date, to attend court on 22/06/10 when all the delayed judgement and rulings would be delivered. This can be confirmed from the court file record which reads that on the 22<sup>nd</sup> of June 2010, the ruling was delivered in open court in the presence of Miss Chepkwony.

The confusion is because prior to 17<sup>th</sup> June 2000, I had already written the ruling and when my secretary typed the proceedings she inserted the date which was scheduled in anticipation that ruling would actually be delivered on the set date. My mistake is that I did not then endorse on the ruling itself that it was actually read on 22/06/10. That was entirely my mistake. I have perused the court file – I do not see a copy of notices sent to the parties to attend court, I am aware that often times when I would instruct for counsel to be informed of a rescheduling of matters, the registry would simply make phone calls – so I have no way of confirming that if the notice was by phone, the firm of Mr Mabeya was actually informed of the date rescheduled for ruling. His clerk did not mislead him, he actually gave him the correct information and I sincerely apologise.

There is therefore no need to delve deeper into this matter. I will direct that the orders dated 17/06/10 but read on 22/06/10, do take effect as at 14/12/10. I also recognize that due to the many activities and holidays in this month, and that time stops running for 21<sup>st</sup> December -6<sup>th</sup> January. Under order XLIX rule 3A then I vary these orders by expanding the time to read 21(Twenty – one) days instead of 7 days, as authorized under Order XLIX rule 5.

***Delivered and dated this 13<sup>th</sup> day of December 2010 at Malindi.***

**H A OMONDI**  
**JUDGE**

Mr Mabeya for appellant/respondent  
Miss Chepkwony for Respondent applicant  
Read in open court.