



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Civil Appeal 140 of 2008

TELKOM KENYA LTD ----- APPELLANT

-VERSUS-

HUDSON KELLY AGALO ----- RESPONDENT

Coram:

Mwera, Judge,

Siganga for applicant/appellant,

P. J. Otieno for the respondent,

Raymond CC.

RULING

By a notice of motion brought under SS. 3A, 79G CPA and O41 r 4 CPR, the applicant corporation prayed:

- a) that this court admit its appeal out of time and
- b) that there be a stay of execution of the decree following judgment in KSU CMCC 490/03 delivered on 21/3/2007 pending the final determination of appeal.

Mr. Siganga submitted that judgment in the lower court was delivered on 21.3.2007. In his computing the 30 – days within which to appeal, he filed KSU HCCA 25/07 on 23.4.2007. That appeal went through the motions until the hearing date. After his submission, Mr. P. J. Otieno, for the respondent, pointed out that that appeal had actually been filed one day late. As a result Mr. Siganga withdrew that appeal on 17.12.2008 and 14 days later filed this application. The appeal was in respect of a sum that has grown to Ksh 913,820/= following the lower court award. The applicant challenges it. The court heard that the applicant had moved with speed to file this application. Mr. Siganga acknowledged that it was his error in computing the 30 – day period to appeal, that led to filing HCCA 25/08 one day late. This court should not visit that error on the applicant.

If this point be determined first, Mr. Otieno’s response was about the 2-week delay between the withdrawal of HCCA 25/07 on 17.12.08 and filing the present application on 31.12.2008. To him Mr. Siganga had not given an explanation as to why it took him that long to move. To this Mr. Siganga answered that in fact he had prepared the application by 23.12.2008 i.e some 6 days after 17.12.2008. Then there was the Christmas period and all was done and filing was on 31.12.2008.

S. 79G gives 30 days to a party desiring to appeal from a decision of the lower court to do so. It adds in a proviso:

“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.”

In these proceedings it was heard that the initial HCCA no. 25/07 was filed one day late due error in computation of time by the applicant's lawyer. However it went through all the steps until the day of its hearing when the respondent's side pointed out that single day default. That appeal was withdrawn and some 6 days latter the present application had been prepared and signed. Then Christmas holidays intervened and it was filed on 31.12.2008. In the circumstances of these proceedings, this court is satisfied that the prayer to enlarge time within which to file the appeal ought to be granted. The applicant has shown desire to be heard on appeal and the error of its lawyer to compute time has been covered by his efforts to come back to court as soon as it was possible to seek leave to appeal out of time. That time is granted and the applicant is given 30 days to file its appeal.

The next prayer was for stay pending appeal. Mr. Siganga said that the decretal sum (above) is so large that if paid out and in the end their appeal succeeds, it may not be easy to recover it from the respondent. There was no affidavit of means filed by the applicant about the respondent, save to claim that in the lower court, he had said that he was jobless. In essence this court was not addressed on the substantial loss the applicant would suffer if the stay order did not issue. Mr. Siganga however offered to deposit the decretal sum in a joint income-earning of both counsel as security for due performance.

On his part Mr. Otieno did not see the prayer for stay as grounded anywhere. There was no appeal pending. Substantial loss had not been demonstrated and on his own, the respondent had deponed that he had a beneficial interest in a certain parcel of land, from whose tea crop he earned income. He would pay up in the event an appeal succeeded. He asked that a portion of the decretal sum be paid to the respondent, if a stay is granted.

In this court's view the prayer to appeal out of time was followed with one of stay. That means that had the first prayer failed, there would be nothing to base on the second one. But that the first prayer has been granted, then the second one falls to be considered. There was basically no demonstration that the applicant would suffer substantial loss in the event the stay order is not given. So one would justifiably say that that fundamental condition on which stay pending appeal is based, is wanting on the part of the applicant. However, on his own, the respondent placed before the court his interest (beneficial, according to Report of M/s Chrisca Real Estates, Valuers) that he had means to repay the decretal sum in case the appeal against him succeeded. The proper position actually should be that where one claims that the other is not endowed with means, that one should establish/prove that claim. Here such duty fell on the applicant. It did not discharge it. Nonetheless, in the nature of these proceedings and that for about 2 years the successful respondent has not enjoyed benefits of his litigation, a sum of Ksh 200,000/= shall be paid to him while the balance of the decretal sum is lodged into a joint income – earning account of both counsel as security for due performance, until the appeal to be lodged is finally determined or other court orders issue. Half the costs of this application go to the respondent.

Orders accordingly.

Delivered on 19.6.2009.

J. W. MWERA

JUDGE

JWM/hao