



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 546 of 2008

SARAH REDEMPTA NTHAMBI.....APPELLANT

VERSUS

EPHANTUS KARANJA MAINA.....RESPONDENT

RULING

1. By a notice of motion dated 16th March, 2009, Sarah Redempta Nthambi, (hereinafter referred to as the applicant), seeks an order of this court to enlarge time by a further 90 days to enable her file her record of appeal. On 1st December, 2008, the applicant who had filed a memorandum of appeal on 14th October, 2008 was granted a conditional order for stay of execution pending the hearing and determination of the appeal. One of the conditions upon which the order was granted, was that the appellant was to file and serve a record of appeal within 30 days.
2. The applicant explains through an affidavit sworn by her counsel, Mrs. Grace Mandela, that the record of appeal could not be filed within the 30 days as efforts to obtain typed copies of the proceedings from the lower court were not fruitful. The applicant's counsel explains that she only received a letter from the lower court on 13th February, 2009 informing her that the proceedings were ready.
3. Relying on *Egerton University vs Republic* [2004] 2KLR 132 and *Pothiwalla vs Kidogo Basi Housing Cooperative Society Ltd & 31 others* [2003] KLR 733, Mrs. Mandela urged the court to exercise its discretion in the applicant's favour as no prejudice will result to the respondent if the application is allowed.
4. The application was opposed through an affidavit sworn by the respondent, Ephantus Karanja Maina. Mr. Kamunde who appeared for the respondent maintained that the application is misconceived and untenable in law, as the applicant is seeking extension of time within which to file the record of appeal which has already been filed. It was further maintained that the application is contemptuous, and an abuse of the court process, as it is brought by a party who is in violation of court orders. It was argued that the respondent will be prejudiced if the application is granted as the money which was deposited in court has not been released.
5. Having considered this application, it is evident that the applicant has failed to comply with one of the conditions

upon which the order for stay of execution was granted. This is the condition with regard to filing the record of appeal within 30 days from 1st December, 2008. Although the applicant explains that the delay was as a result of the delay in obtaining typed copies of the proceedings, it is apparent that the proceedings were ready for collection on 11th February, 2009, and even allowing for the time for preparing for the certificate of delay, which was issued on 23rd February, 2009, the applicant has not given any good explanation for the delay in filing the motion for extension of time, which was filed 3 weeks later on 16th March, 2009.

6. It is true that the court has unlimited powers under Order XLIX Rule 5 of the Civil Procedure Rules, to extend time for the doing of any act or taking any proceedings ordered by the court. I therefore find it necessary in the interest of justice to exercise this unlimited discretion in the applicant's favour by extending time to enable the applicant file the record of appeal. Nevertheless, I do note that in addition to failing to file the record of appeal within the 30 days, the decretal sum which was deposited in court has not been deposited into an interest earning account. I find that the applicant has not exhibited zealotry in the pursuit of his appeal by complying with the conditions imposed by this court. This will obviously be prejudicial to the respondent who has a judgment in his favour.
7. For the above reasons, I will extend time and deem the record of appeal which was filed on 18th April, 2009 as properly filed. I will however, set aside the order for stay of execution pending appeal. The respondent is therefore at liberty to execute the decree.

Those shall be the orders of this court.

Dated and delivered this 8th day of June, 2009

H. M. OKWENGU
JUDGE

In the presence of: -

Advocate for the applicant absent

Mwaura H/B for Kamunde for the respondent

Erick – Court clerk