



MASENO UNIVERSITY.....1ST APPELLANT/APPLICANT

RIZIKI ELISHA.....2ND APPELLANT/APPLICANT

VERSUS

REUBEN OTSEMBO OTELA..... RESPONDENT

RULING

1. By a Memorandum of Appeal filed on 10th September, 2007, Maseno University, hereinafter referred to as the appellant, lodged its appeal against the judgment of the Senior Resident Magistrate delivered on 29th August, 2007 in Milimani CMCC No.7056 of 2001. On the 29th of November, 2007, the appellant was granted a temporary order of stay of execution for two months, on condition that the decretal amount is deposited in Court within 10 days. The appellant deposited the decretal sum on the 7th December, 2007. On the 14th February 2008, the Court granted an order for stay of execution pending the hearing and determination of the appeal.
2. By a Notice of Motion dated 28th May, 2009, Reuben Otsembo Otela, who is the respondent to the appeal, moved the Court under Order XVI Rule 5 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act for an order dismissing the appeal for want of prosecution. The respondent maintained that the appellant had not taken any action to prosecute the appeal since it obtained the orders for stay of execution.
3. The appellant objected to the application contending that the lower Court file had not been forwarded. On the 7th July, 2009, the Court having heard the respondent's application issued an order giving the appellant 21 days within which to file a record of appeal in default the order of stay of execution which was issued on 14th February, 2008, to stand discharged, and the respondent to be at liberty to execute the decree.
4. By an application dated 29th July, 2009 filed on 31st July, 2009, the appellant moved the Court under Order XLIX Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, for an order that time within which the applicant to file and lodge its record of appeal to be extended. The applicant maintained that it had been unable to file the record of appeal within the 21 days, because the lower Court file could not be traced. Counsel for the applicant swore an affidavit to which was annexed a letter dated 17th July, 2009 requesting for copies of proceedings and a letter dated 29th July, 2009 from the lower Court, explaining that the lower Court file was not readily available.
5. The application dated 29th July, 2009, was brought under certificate of urgency on the 21st July, 2009.

It was not however, certified as urgent as it was not brought under the High Court Vacation Rules.

6. By a Notice of Motion dated 10th August, 2009, the appellant moved the Court under the High Court Practice Vacation Rules, Section 3A and 80 of the Civil Procedure Act, Order XLIV Rule 1(1), order XLIX Rule 5, Order XLI Rule 4 and 6 of the Civil Procedure Rules, seeking orders *inter alia*, that the order of 7th July, 2009 be reviewed, varied or set aside. In the alternative, that the applicant be given time to file his record of appeal within 21 days of notification by lower Court that the proceedings and judgments are ready.

7. The application was based on the grounds that the applicant has been unable to obtain certified copies of proceedings and judgments, as the lower Court file could not be traced. The applicant's efforts to prosecute the appeal, were therefore being frustrated despite the exercise of due diligence on its part. The application was supported by affidavit sworn by appellant's counsel to which was annexed the same letter dated 17th July, 2009 requesting for the lower Court file and the response from the Court dated 29th July, 2009.

8. During the hearing of the application, counsel for the appellant informed the Court that she had information that the lower Court file was now available. She therefore urged the Court to grant the order sought. Mrs. Gulenywa who appeared for the respondent maintained that the lower Court file was available and had come up for mention on several occasions. She submitted that the applicant had only applied for proceedings in July, 2009 and did not make any follow up. She urged the Court to dismiss the application as there was no appeal pending before the Court.

9. I have carefully considered this application, the affidavit in support and the annexures thereto. It is evident from Order XLIX Rule 5 of the Civil Procedure Rules, that this Court has the discretion to extend any time limited, either by the rules, or by an order of this Court for the doing of any act. However, for this Court to exercise its discretion, the applicant must have brought his application without undue delay and also satisfy the Court that the failure to do the required act within the limited time, was due to a reasonable cause.

10. It is clear from the above mentioned background to this application, that the applicant has not exercised due diligence in pursuing its appeal. Although judgment was delivered on 29th August, 2007, the only evidence of the applicant having applied for copies of proceedings and judgment is the letter dated 17th July, 2009. There is no explanation given as to why no application was made for the proceedings prior to that date. Indeed, it would appear that the applicant having obtained an order for stay of execution pending the hearing and determination of his appeal, went to sleep and was only woken up by the respondent's attempts to have the appeal dismissed for want of prosecution. Notwithstanding the fact that this Court gave the appellant a lifeline on 7th July, 2009 by granting it 21 days within which to file a record of appeal, the applicant apparently still did not make any application for certified copies of proceedings and judgment which were a mandatory requirement in the preparation of the record of appeal until 10 days later on 17th July, 2009.

11. The delay of the 10 days has not been explained nor has the applicant shown any efforts in following up the matter with the lower Court after receipt of the letter dated 29th July, 2009 explaining that the lower Court file was unavailable. **I find that the applicant has not exercised due diligence nor has it demonstrated that it exhausted all efforts in obtaining the required proceedings. The applicant has not demonstrated its goodwill in pursuing his appeal.**

12. **For the above reasons, I find no just or sufficient cause to extend time for the applicant to file the record of appeal. Nor do I find any new or important matter or any other sufficient cause to justify the setting aside of the orders which were issued on the 7th July, 2009. Accordingly, the application dated 10th August, 2009 is dismissed with costs.**

Dated and delivered this 29th day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant, absent

Mrs. Gulenywa for the respondent

Eric, court clerk