



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISC. APPLI . 181 OF 2008
DOLPHIN COACHES LTDAPPLICANT

V E R S U S

1. BENSON KAMAU MIGWI (suing as the legal

representative of the estate of

JUDY KAMAU, Deceased)

2. JOHN KURIA KINUTHIARESPONDENTS

R U L I N G

The outstanding substantive prayers in the notice of motion dated 10th March, 2008 are Nos. 3, 4 and 5. Those prayers seek, respectively, stay of execution of decree of the lower court in **Limuru SRMCC No. 225 of 2005** pending disposal of an intended appeal against the said decree; leave to so appeal out of time; and that the decretal sum deposited by the Applicant in a joint account pursuant to an order of the lower court be the necessary security herein pending disposal of the intended appeal. The application is opposed by the Respondents.

I have read the supporting and supplementary affidavits as well as the grounds of opposition dated 3rd April, 2008. The Respondents did not file any replying affidavit. I have also given due consideration to the submissions of the learned counsels appearing, including the cases cited.

The application is essentially brought under **section 79G** of the **Civil Procedure Act, Cap 21** (the Act) in respect of leave to appeal out of time and under **section 3A** of the Act in respect of stay of execution of decree pending intended appeal; Order 41, rule 4 of the **Civil Procedure Rules** (the Rules) would have no direct application here as there is no appeal lodged yet. I will first deal with leave to appeal.

The decree of the lower court sought to be appealed against was passed on 4th July, 2006. The Applicant made the false start of first seeking and obtaining leave to appeal out of time from the lower court. The lower court had no jurisdiction to grant such leave, and the resulting appeal, **Nairobi HC Civil Appeal NO. 736”A” of 2006** was struck out by this court on 14th December, 2007. This was clearly the mistake of the Applicant’s then counsels who made a grave error of law in seeking and obtaining leave to appeal from a court that had no jurisdiction to grant it. It is an error that ought not to be visited upon a client who was entirely blameless.

But having said so, it is to be noted that the present application was filed on 10th March, 2008, that is, nearly three (3) months after the incompetent appeal was struck out on 14th December, 2007. I have closely read both the supporting and supplementary affidavits. There is not any attempt at all to explain this further delay which is obviously inordinate. Whereas the court would not punish the Applicant for the first delay occasioned by the advocates’ error of law, the court will certainly not excuse this further delay, especially when there is no attempt at all to explain it. Having already been bitten once, as it were, the Applicant ought to have been doubly vigilant.

Under the **proviso to section 79G** of the Act, this court has power to admit an appeal out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. Because of the unexplained and inordinate delay already pointed out, I find that the Appellant herein has not satisfied the court that it had good and sufficient cause for not filing the appeal in time.

I therefore refuse the leave to appeal out of time sought in prayer No. 4 of the application. Having refused leave to appeal out of time, I need not consider the prayer for stay of execution of decree as such stay would not serve any purpose.

In the event, the application by notice of motion dated 10th March, 2008 is hereby dismissed with costs to the Respondents. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF JULY, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 18TH DAY OF JULY, 2008