



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Appli. 605 of 2006

MOHAMED ADEN ALI.....1ST PROPOSED APPELLANT/APPLICANT

IBRAHIM ADON DIS.....2ND PROPOSED APPELLANT/APPLICANT

ABDULLAHI KHALIF.....3RD PROPOSED APPELLANT/APPLICANT

VERSUS

MOHAMED MOHAMUD KASSIM.....RESPONDENT

R U L I N G

1. The application before me is the Notice of Motion dated 2/08/2006 and filed in court on 3/082006. The application is brought under Order 49 Rule 5, Order 41 Rule 4(1), Order 3 Rule 9A and Order 50 Rule 1 of the Civil Procedure Rules, Sections 3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law seeking ORDERS:-

1. *THAT this application be certified urgent and heard iex-parte in the first instance on the grounds, inter alia, that execution of the decision of the Principal Magistrate's Court (Honourable D. Orimba (RM) dated 17th May 2006 entered against the Proposed Appellants in Garissa PMCC No. 6 of 2005 is imminent and unless the Orders sought herein are granted the Proposed Appellants will suffer substantial loss and damage.*

2. *THAT leave be granted to the firm of Ibrahim, Issack & Company Advocates to come on record on behalf of the 1st, 2nd and 3rd proposed Appellants herein.*

3. *THAT the proposed Appellants be granted leave to appeal out of time against the whole of the said Judgment of the Honourable D. Orimba, Resident Magistrate, delivered on 17th May 2006 in PMCC No. 6 of 2005 at Garissa.*

4. *THAT pending the lodging, hearing and determination of the proposed Appellants' intended Appeal, there be a Stay of Execution of the said decision of the Principal Magistrate's Court dated 17th May 2006 in Garissa PMCC No. 6 of 2005.*

5. *THAT the Memorandum of Appeal annexed hereto be deemed as duly filed and served.*

6. *THAT the Notice of Change of Advocates annexed hereto be deemed as duly filed and served.*

7. *THAT the cost of this application be provided for.*

2. The application is supported by seven grounds on the face thereof as follows:-

(a) *The proposed Appellants are dissatisfied with and wish to appeal against the Judgment entered against them on 17th May 2006 by the Hon. D. Orimba, Resident Magistrate, in PMCC No. 6 of 2005 at Garissa.*

(b) *The time prescribed in law for appealing against the said Judgment expired sometime in 17th June 2006. (sic)*

(c) *The execution of the said Judgment of the Subordinate Court against the proposed Appellants is imminent since the said proposed Appellants have already been served with a Notice to Show Case, which is scheduled for hearing on 2nd August 2006 in Garissa.*

(d) *The proposed Appellants have an arguable and serious appeal with overwhelming prospects of success.*

(e) *The delay occasioned herein is not so inordinate as to be inexcusable.*

(f) *Unless the orders sought herein are granted, the proposed appellants will suffer irreparable damage.*

(g) *No prejudice will befall the Respondent if the orders sought herein are granted.*

3. The application is also supported by the sworn affidavit of IBRAHIM ADON DIS, the 2nd proposed Appellant/Applicant. He depones that on 17/05/2006, the Hon. D. Orimba RM at Garisa entered judgment in favour of the Respondent in Garissa PMCC No. 6 of 2005, being a judgment for the liquidated sum of Kshs.350,000/= and interest thereon. The amount represented the purchase price in respect of plot No.GSA/B/1785B, a plot that allegedly belonged to the Defendants in that suit. The deponent says that the intended appellants are dissatisfied with the said judgment; that the delay in filing appeal against the said judgment was caused by a delay in obtaining the certified copies of the proceedings and judgment. It is instructive however that there is no certificate of delay, though there is evidence to show that on the 15/06/2006, the Applicant's obtained an order staying execution for three weeks. The deponent has annexed to his affidavit the following documents among others:-

- *Notice to show cause – Exhibit “1AD- 3*

- *Proposed appellants Memorandum of Appeal*

4. The deponent also says that the delay in not filing the appeal on time is excusable and that the Applicants are ready to abide by any conditions that may be imposed upon them, including security or otherwise as the court may deem necessary.

5. The application is opposed. The Replying Affidavit is sworn by Mohamed Mohamud Kassim who says that the Applicants failed to use the opportunity they had to file their appeal within time and that they (Applicants) have not shown cause why they used the time extended for them. The deponent says that the instant application by the Applicants is an extension of the Applicants attempt to deceive this court as they did in the lower court. The deponent says that the Applicants entered into a consent judgment in the lower court and gave proposals on how to settle the decretal sum. From the record of the lower court, on the 2/08/2006, the following record appears:-

“MR. ONYANCHA.

We have reached a consent with my colleague. We have agreed that the judgment Debtor do pay

Kshs.100,000 on 30/8/06 and thereafter to be paying Kshs.50,000 at the end of the month till the balance is cleared.

In default of the payment, the normal court process be taken.

D.A. ORIMBA R.M.

2.8.06

MR. OTIENO

That is the position.

COURT

Mention 30.8.06”

6. It is clear from the above that though the proposals were made, the court did not enter a formal consent order in terms of the proposed consent, and when the matter came up for mention on 30/08/06. Mr. Otieno for the Respondents informed the court that he had not received the payment of the sum of Kshs.100,000/=. Mr. Onyancha then informed the court that he had not been able to discuss the proposals with his client and that he did not know whether his client had paid the money. Mr. Otieno then concluded that the Defendants were in contempt and accordingly applied for warrant of arrest against the Defendants. The order for the warrant of arrest was made by the court and the case set for mention on 6/09/2006.

7. On the 6/09/2006, the court was informed that since the issuing of the warrant of arrest, the Judgment Debtor had paid Kshs.100,000/= to the Decree Holders advocate and had undertaken to pay the balance by instalments of Kshs.50,000/=. On that same 6/09/2006, the warrant of arrest was lifted and the case set down for further mention on 4/10/06.

8. The deponent of the Replying Affidavit therefore says that there is no merit in the Applicant's application for reasons that the Applicants entered into the consent and made partial payment of the decretal sum even after the period for the appeal had run out by a month. In the deponents view, the Applicant's application is an abuse of the process of the court.

9. Counsel made their submissions to me at the hearing hereof. Mr. Isaack for the Applicants cited a number of authorities in support of their application. In *Mwangi –vs- Joshi* [1988] KLR 618, there was delay of seven days in filing the appeal. The court held; inter alia-

(1) *In applications for leave to appeal out of time, the court is guided by the approach that in cases where the delay is say short and there is an acceptable excuse for the delay, as a general rule the appellants should not be deprived of his right of appeal and so no question of the merits of the appeal would arise.*

(2) *If the appeal has absolutely no chance of success that would of course be a factor to be borne in mind.*

10. In *Butt –vs- Rent Restriction Tribunal – Civil Application No. NAI 6 of 1979*, the issue that arose was one of stay of execution and the court held inter alia that –

(i) *The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

(ii) *The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal*

court reverse the judge's discretion.

(iii) *The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.*

11. Counsel for the Respondent contended that the Applicants herein have not met the requirements either for granting leave to appeal out of time or for stay of execution, that counsel for the Respondents have not availed a Certificate of Delay in support of their application for leave to appeal out of time, and further that the delay in bringing the instant application has been inordinate.

12. I have considered the application together with the affidavits for and against the application. I have also considered the submissions of the learned counsel appearing; I have also considered the law cited to me concerning the issues that are before me for determination. Having done so, I find that the order sought under Order 41 Rule 4(1) of the Civil Procedure Rules is subject to the conditions set out in subrule (2) of Rule 4. I do not think that the Applicants have satisfied these conditions. In any event, the Applicants conceded the Judgment and have even made a part payment of the decretal sum. They have not explained why the court should alter the consent that they themselves entered into with the Respondents. They have not shown what substantial loss they are likely to suffer if the stay order is not granted. It would seem to me from the records that this application was filed on the same day that the Applicants were entering into the consent to liquidate the decretal sum in the lower court. In my view, this application is an abuse of the due process of the court which disentitles the Applicants from having the discretion of this honourable court exercised in their favour. The action of filing this application can only be described as an afterthought.

13. As regards security, the Applicants allege that the sum of Kshs.300,000/= has been deposited in court, but according to the records, and as rightly pointed out by counsel for the Respondents only Ksh.100,000/= has been so deposited and without leave of this Honourable Court. The court finds that whatever amount may have been deposited in court by the Applicants is not security for the stay; that amount was and is still meant for the Respondents. In the circumstances, I decline to grant the Applicant's prayer for stay of execution.

14. As for the prayer for leave to appeal out of time, I am satisfied that the Applicants have the right to appeal. The leave to appeal out of time against the whole of the judgment of Honourable D. Orimba Resident Magistrate delivered on 17/05/2006 in PMCC No. 6 of 2005 at Garissa be and is hereby granted. In this regard, the Memorandum of Appeal annexed to the Applicants' application shall be deemed as duly filed and served on payment of require court fees. I also grant leave to the firm of Ibrahim Issack & Company Advocates to come on record on behalf of the 1st, 2nd and 3rd proposed appellants herein and accordingly the change of Advocates annexed to the application be deemed as duly filed and served, on payment of requisite court fees.

15. Costs of this application shall go to the Respondents.

It is so ordered.

Dated and delivered at Nairobi this 17th day of November 2008.

R.N. SITATI

JUDGE

Delivered in the presence of

Miss Karumba holding brief for the 1st Proposed Appellant/Applicant

Miss Karumba holding brief for the 2nd Proposed Appellant/Applicant

Mr. Ahmed (present) for the 3rd Proposed Appellant/Applicant

Mr. Otieno (present) for the Respondent