



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KITALE**

**Misc Civ Appli 6 of 2007**

**KAUMNJE FARM LIMITED =====APPLICANT**

**VERSUS**

**ANDREW MUSHOME LIKOBELO===== RESPONDENT**

**RULING**

This is an application of extension of time within which the defendant can lodged its appeal against the ruling delivered on 26/10/2006.

It is the defendant's case that its advocate, Mr. Samba was unavailable on 26<sup>th</sup> October 2006, for purposes of taking the ruling. He therefore asked his colleague, Mr. Nyakundi, to attend court and take the ruling on his behalf.

After Mr. Nyakundi had taken the said ruling, he endorsed the material parts thereof on the file of Mr. Samba. The said endorsement was in the following words;

“ **RULING**

- ***Def raises Triable Issues.***
- ***1. Ex-parte Judge set aside.***
- ***2. Defendant to deposit KShs.460, 000/=***
- ***in court.***
- ***3. The earlier (Sic!)***
- ***4. The suit be fixed for Defence hearing.***
- ***5. Throw away costs to be agreed or taxed.***

- **6. Failure to comply the earlier orders to revert.”**

When Mr. Samba received his file, bearing that endorsement, he wrote to his client, advising them to deposit K.Shs.460, 000/= in court. That letter was written on 30/10/2006.

A week after writing that letter, Mr. Samba spoke to Mrs. Alice Njeri Kamau, who is one of the directors of the defendant. She expressed concern that although the defendant had previously deposited K.Shs.150, 000/= in court, there could be another order requiring them to deposit much more money within 14 days of the order.

Following that inquiry, Mr. Samba advocate wrote to the court on 7/1/2007 asking for a copy of the court’s ruling. When he got it, Mr. Samba noted that the endorsement made by Mr. Nyakundi had not indicated that the sum of KShs.460, 000/=, which the defendant was to deposit in court, would be released to the plaintiff.

After consultations with the defendant, Mr. Samba was instructed to appeal against the ruling. In pursuance of the instructions, Mr. Samba wrote to the court on 8/1/2007, applying for the proceedings, for purposes of lodging the appeal.

The defendant believes that its intended appeal has arguable points of law and fact, as shown on the draft Memorandum of Appeal attached to the affidavit in support of this application. It is the defendant’s view that upon setting aside the ex-parte judgment, the court had no legal basis for ordering that the defendant should deposit K.Shs.460, 000/= in court.

In answer to the application the plaintiff expressed the view that the application was nothing more than a calculated attempt to deny him the fruits of a valid judgment.

In that respect, I am not sure that I did understand the parties herein correctly. I say so because on the one hand, the defendant says that the judgment was set aside, whilst the plaintiff is making reference to a valid judgment. If, as the defendant said, the court did set aside the judgment which had been in place upto 26/10/2006, there would then be no valid judgment on record after that date.

But then again, if the order was only to take effect if and when the defendant had deposited K.Shs.460, 000/= in court within 14 days of 26/10/2006, there may very well be a judgment in place, as the defendant has not met the pre-conditions for setting aside the judgment.

The full picture can only become clear once the record of the proceedings, or at least the ruling in issue is placed before this court. For now, I would only be making presumptions if I were to find either that the judgment was set aside or that it was not set aside.

There is no doubt that on 26/10/2006, the defendant was represented in court by Mr. Nyakundi advocate, who held brief for Mr. Samba Advocate. As Miss Kendagor, advocate for the plaintiff pointed out, Mr. Nyakundi must be deemed to have had the defendant’s full instructions on that date. Therefore, he did owe a duty to the defendant to listen carefully to the ruling, and to thereafter report correctly to the defendant.

I do share those sentiments of the plaintiff’s counsel. I also do not recall the defendant suggesting that they were not represented at the ruling on 26/10/06. The defendant’s explanation is that Mr. Nyakundi failed to relay the complete picture. As a result, when the defendant asked Mr. Samba for the reason why the court could have ordered them to deposit more funds in court, even though the court had set aside the ex parte judgment, for the reason that the defence raises triable issues, Mr. Samba had to apply for a copy of the ruling itself.

According to the plaintiff, the endorsement by

Mr. Nyakundi was not incomplete, as it clearly indicated that KShs.460, 000/= was to be deposited in

court. However, what the plaintiff did not tell this court is whether the court had (on 26/10/2006) directed that the sum so deposited, was to be paid over to the plaintiff.

It is in that respect that I understood the defendant to be saying that the endorsement by Mr. Nyakundi was incomplete.

The plaintiff also submitted that if Mr. Samba had felt that the message relayed by Mr. Nyakundi was incomplete, Mr. Samba should have immediately thereafter, perused the court records.

As the plaintiff had submitted that Mr. Nyakundi must be deemed to have had full instructions from Mr. Samba, to take the ruling on behalf the defendant, that is the very reason why Mr. Samba need not have taken steps to peruse the court file, after he had received the note endorsed on his file by Mr. Nyakundi. He had every justification for relaying the message received from Mr. Nyakundi, to the defendant, as if he (Mr. Samba) had been present when the ruling was delivered.

Whilst the plaintiff contends that the court had ordered the defendant to deposit the sum of KShs.460,000/= in court, the defendant insists that the court had further ordered that that sum be paid over to the plaintiff.

As can be seen from the draft Memorandum of Appeal, the defendant's main complaint relates to its understanding that the money would not remain in court, but would be paid over to the plaintiff.

In my considered opinion, once the learned magistrate had made a finding that the defence raised triable issues, it became arguable whether he could nonetheless order that such a substantial sum be paid over to the plaintiff whilst the substantive suit was still pending. I find that that issue raises an arguable appeal against the ruling in issue.

It is the plaintiff's submission that the defendant has always been keen to delay the finalization of the suit. Meanwhile, the plaintiff, who lost an arm in the industrial accident which gave rise to this suit, says that he has continued to suffer. For that reason, the plaintiff feels that the grant of the orders sought herein would be prejudicial to him.

Furthermore, the plaintiff feels that the only reason why this application was brought was with a view to subverting the execution process which he had instituted against the defendant.

From the documents available to me, it is clear that this application was instituted on 9<sup>th</sup> February 2007. On the other hand, the proclamation for the attachment of the defendant's property is dated 9/5/2007. In effect, the execution process was commenced some 3 months after this application had been filed. Therefore, the plaintiff cannot be right to submit, as he did, that this application was only a reaction to the process of execution.

In ***GITHERE V KIMUNGU [1984] KLR 387***, the Court of Appeal held that pursuant to Rule 4 of the Court of Appeal Rules, that court had an unfettered discretion in dealing with applications for extension of time which came before it, and should not therefore be too rigidly bound by its previous decisions.

The Court also held that in exercising its discretion it would do so judicially, considering that it should not be so far bound by rules of procedure as to do that which may cause injustice. However, it was also emphasized that it was incumbent on a party who was out of time to make an application for extension of time within a reasonable time.

In that case, the application for extension of time was made some 10½ months after the decision, and over 10 months after the prescribed period had expired. The court therefore declined to exercise its discretion favourably.

In ***MURAI V WAINAINA (NO.4) [1982] KLR 38***, the Court of Appeal held, inter alia, that an application for extension of time could be allowed if the appeal was of public importance and had a

probability of success.

As the appeal in that case touched on land rights that would effect not only the parties to the appeal but also a large number of original land owners who would be dethroned, causing them an economic and social upheaval, the court granted an extension of time.

In **FRANCIS ORIGO & ANOTHER V JACOB KUMALI MUNG'ALA, CIVIL APPLICATION NO. NAI.292/04**, the Court of Appeal stated that that court's discretion, under Rule 4 was unfettered. It then expressed itself thus;

***"It should nevertheless be exercised judicially or in other words on sound reason rather than whim, caprice or sympathy. The objective of the Court is to do justice between the parties.***

***In weighing the scales of justice, the Court will, amongst other things, consider the length of delay, the explanation for the delay, whether or not the appeal is arguable, whether the grant of the application would prejudice the respondent, the public importance of the matter, if any, and generally the requirements of the interests of justice."***

After applying those principles, the Hon. Waki JA. extended time for the filing of the appeal. It is noteworthy that he delivered his decision on 18/2/2005 in relation to a land case which had commenced in 1979!

In the case before me, the plaintiff says that he had not been compensated for a total of 17 years, as he had lost his arm in 1990. Obviously, that is a long period of time.

However, even though that period of time is relevant to this application, the period which must first be considered is between 26/10/2006 and 9/2/2007 when the application was filed. That is a period of three months.

Pursuant to Section 79G of the Civil Procedure Act, an appeal from a subordinate court to the High Court shall be filed within 30 days of the decree or order appealed against. Therefore, the defendant had 30 days from 26/10/2006 to appeal. It is only after the lapse of those 30 days that it needed leave to appeal out of time. In effect, the delay in this case is of about 2 months.

In my considered view that is not an inordinately long period of time.

Secondly, the defendant's counsel has explained the circumstances which led to his getting incomplete information about the ruling. I find the said explanation to be reasonable in the circumstances.

Therefore, the application is granted. However, as I do appreciate the difficulties which the plaintiff says he is going through, I do hereby direct, with the concurrence of the defendant, that the sum of KShs.150, 000/= which had already been deposited in court as security, be released to the plaintiff.

The defendant will have fifteen (15) days from today to file its intended appeal. Meanwhile, after the plaintiff receives the sum of KShs.150, 000/=, there shall be a stay of execution until the hearing and determination of the defendant's appeal.

As regards costs of this application, the defendant shall bear them in any event. I so hold because the defendant and its advocates cannot have any reason for asking the plaintiff to pay costs which have arisen because the counsel they had instructed did not deliver all the details about the ruling.

Before concluding this ruling, I feel obliged to explain that the orders for stay have been granted, although not expressly sought in the application before me, but because I hold the considered view that the said orders are necessary in the interests of justice.

The process of execution was commenced after this application was already filed. I do not blame the

plaintiff for making that application then, as there was no order for stay. However, it has now been agreed between the parties that the sum of KShs.150, 000/= be paid over to the plaintiff, even though there is a pending appeal and an outstanding suit. Following that agreement, I hold that the interest of justice dictate that a consequential order be granted staying execution, hence the orders to that effect.

Dated and Delivered at Kitale, this 15<sup>th</sup> day of October, 2007.

***FRED A. OCHIENG***

JUDGE