



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KITALE**

**Civil Case 53 of 2001**

**SAMSON EMMANUEL KIBET.....APPLICANT**

**V E R S U S**

**CHEBASWONY CHEPKIYENY.....RESPONDENT**

**R U L I N G**

On 8/5/2006, this court issued an order staying execution of the decree until the hearing and determination of the appeal that was to be lodged by the defendant, against the judgment dated 30/11/2005.

The Plaintiff has now moved this court for an order to vacate that order of stay, as it is stopping him from enjoying the fruits of the judgment.

It is the plaintiff's case that apart from lodging a Notice of Appeal on 14/12/2005, the defendant had failed to take appropriate action to pursue his intended appeal.

Then, when the plaintiff brought the present application, the defendant is said to have woken up, by filing an application for extension of time to file his intended appeal. Because that application for extension of time was only filed on 12/7/2007, the plaintiff views it as nothing more than an attempt to derail his present application.

The plaintiff also pointed out that whilst the letter by which the defendant applied to the court, for the proceedings leading up to the judgment which he wishes to appeal against, was dated 21.12.2005, the defendant has now placed before the court a certificate of delay which states that his application for proceedings was dated 8/12/2005.

The discrepancy in those dates is seen by the plaintiff as a demonstration of the fact that the documents being relied upon by the defendant were merely an afterthought.

Thirdly, whilst the defendant is said to have collected the proceedings and judgment on 16/5/2007, the plaintiff asserts that that cannot be true because the judgment was ready for collection from the date when it was delivered, on 30/11/2005. Therefore, as far as the plaintiff was concerned, if indeed the defendant only collected the judgment on 16/5/2007, that reflects the lack of seriousness on the part of the defendant, in pursuing his intended appeal.

Another issue that was raised by the plaintiff was that the defendant had failed to demonstrate the efforts he made in following-up the proceedings, if he was serious about the appeal.

The plaintiff acknowledged that the defendant filed an application before the Court of Appeal, on

23/8/2007, seeking an extension of time to file his intended appeal. However, the plaintiff finds fault with the defendant for not having explained the delay in bringing that application, as the proceedings which he had been waiting for, were provided to him on 29/5/2007.

It is the plaintiff's position that even that application which is before the Court of Appeal was an afterthought.

For all those reasons, this court was asked to vacate the order of stay, so that the plaintiff could thereafter take steps to execute the decree.

In answer to the application, the defendant denies ever having slept on his intended appeal. His main explanation for the delay in filing the appeal was that he had been waiting for the proceedings. By the time the court notified him that the proceedings were ready for collection, the defendant says that it was too late to file the intended appeal, unless he first obtained leave of the court to file the appeal out of time.

In principle, the defendant is correct to say that without the proceedings, he could not lodge his intended appeal.

He also said that when this court granted the order of stay, it was satisfied that the order was necessary, pending the appeal. If the order were to be vacated, the defendant says that that would render his intended appeal nugatory.

And as regards the discrepancy between the date of his letter applying for the proceedings, and the date cited in the certificate of delay, the defendant offered no explanation before me. His position is that that is an issue which ought to be taken up before the Court of Appeal, where the application for extension of time is still pending.

Finally, the defendant submitted that the period between 29/5/2007, when he collected the proceedings, and 23/8/2007 when he applied to the Court of Appeal for extension of time was not so long as to constitute undue delay.

In giving consideration to the issues before me, in this application, I am alert to the fact that there is a pending application before the Court of Appeal, for an extension of time to file the defendant's intended appeal. I therefore consider it inappropriate to make any comments on the question as to whether or not the period between 29/5/2007 and 23/8/2007 constituted undue delay. I believe that that issue is best left to the Court of Appeal to adjudicate upon.

To my mind, a party who is desirous to lodge an appeal should not just file an application for the proceedings giving rise to the judgment, ruling or order against which he wishes to appeal, and then sit back to wait for such proceedings. It would definitely be prudent to demonstrate the desire to get on with the intended appeal, by making a follow-up to the initial written application for the proceedings.

However, I am alive to the fact that the need to send reminders is not a strict or absolute requirement.

And again, as the said issue may form part of the grounds upon which the Court of Appeal may or may not grant an extension of time to lodge the intended appeal, I decline to make a definite finding in that regard, as concerns the case before me.

It is true that the application for extension of time was filed on 21/3/2007 whilst this application was filed on 24/7/2007. Therefore, in all probability, the defendant was woken to action by the threat of having the stay vacated, if the plaintiff's application herein were to succeed. However, that alone would not be sufficient reason to conclude that the defendant would therefore not be granted leave to appeal out of time.

This court has no way of knowing or of making any intelligent assessment on the manner in which the Court of Appeal will determine the application for extension of time. Any views which I may have in

that respect would not have any bearing on that matter.

In the circumstances, if I were to grant the reliefs sought, and if thereafter the Court of Appeal were to grant leave to the defendant to appeal out of time, such an appeal as the defendant would file may be rendered nugatory, if the decree had been executed in the intervening period. If that were to happen, this court would not have assisted the course of justice.

If, on the other hand, the Court of Appeal rejected the defendant's application, that would imply that the defendant's appeal would not see the light of day. In effect, the plaintiff would then be in a position to execute the decree, without having to get this court to vacate the order for stay of execution.

In the circumstances of this case, I decline to vacate the orders dated 8<sup>th</sup> May 2006.

However, notwithstanding the rejection of the plaintiff's application, I do order that the costs thereof be paid by the defendant in any event. I so order because it was by bringing this application that the plaintiff has awoken the defendant, to take some steps in the matter, ever since he obtained the stay.

It is so ordered.

Dated and Delivered at Kitale, this 20<sup>th</sup> day of November, 2007.

**FRED A. OCHIENG**

**JUDGE**