REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Misc Civ Appli 57 of 2006

SAMWEL MATOLO NGUTA …… 1ST APPLICANT

AKAMBA BUS SERVICES LIMITED ……..…… 2ND APPLICANT

VERSUS

NDUNGU MWANGI NJUGUNA ……..…… RESPONDENT

R U L I N G

NDUNGU MWANGI NJUGUNA's case against SAMWEL MATOLO NGUTA and AKAMBA BUS SERVICES LIMITED (CMCC No. 1463 of 2004), was determined on 16/1/2006 when the Senior Resident Magistrate delivered her judgment on the matter.

Being dissatisfied by the said judgment, Samwel Matolo Nguta and Akamba Bus Services Limited, who were the 1st and 2nd defendants in the aforementioned case, now wish to appeal against it, but they realise that they are late in doing so and they have now moved this Court in an application in which they seek an order inter alia for the enlargement of the time within which to file their appeal.

The two who I shall now refer to as "the applicants" also seek an order for stay of execution pending the hearing and determination of this application.

Among the Orders of the Civil Procedure Rules which these two applicants have moved the court is Order XXI rule 22 which stipulates that:

"(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit."

It is important that I point out from the outset that Order XXI rule 22 can only apply where the execution process is being carried out by a court other than the one which issued the decree, which is not the position here. In the circumstances, the said rule cannot apply in this type of an application nor can it aid these applicants.

Be that as it may, the two also rely on Order XLI rule 4 of the Civil Procedure Rules which stipulates that:

"*(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

(2) No order for stay of execution shall be made under subrule (1) unless-

(a) the court is satisfied that substantial loss

may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it things just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

In my humble opinion, the above provisions of the law are clear in that an applicant who wishes to benefit from the court's discretion must show that he already has an appeal on the records, yet these applicants have yet to file their appeal. In any event, it is my view that having failed to obtain the order for stay at the exparte stage, the prayer for an order for stay has already been overtaken by events, and it cannot be granted at this stage as my decision will determine the application fully. I shall therefore deal with the other aspects of this application.

It is clear that this Court has the power to enlarge the time within which a party is required to comply with time limits as set out by the Rules of this court. Indeed, this is the gust of Order XLIX rule 5 of the Civil Procedure Rules which stipulates that:

"*(5) Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the*

application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

In exercising the above power, the court is called upon to exercise its discretion and it is for the applicant to satisfy the court that he has good enough reasons for the delay.

These two applicants urge the court to find in their favour because they have a good appeal with very high chances of success. It is also their ground that the trial court did not notify them of the date when judgment would be delivered. They also feel that they have moved the court without unreasonably delay.

The respondent however feels that they do not deserve the orders which they seek for though they knew that they were required to file their written submissions in the subordinate court by 13/12/2005, they did not do so and that in any event his counsel notified their counsel of the fact that judgment was delivered on 16/1/2006 after which his party and party bill of costs was assessed by consent of both counsel on 13/2/2006, at Shs. 35,000/-. Though these facts are contained in the respondents replying affidavit, the same have not been controverted by the applicants at all, in view of which I am convinced that the applicants were duly notified of the fact, and that they were fully aware that judgment had been delivered otherwise, they would not have been represented during the taxation, when the aforementioned consent order was recorded.

Having been fully aware in January 2006 that judgment had been entered and having participated in the taxation on 13/2/2006, is a clear indication that they were all along aware of the sequence of events, and that they had sufficient time to file within which to file their appeal had they desired to, and on the same vein I find that they have not have not given valid reasons for the delay in bringing this application either.

The upshot of all this is that this application which lacks in merit is dismissed with costs.

Dated and delivered at Eldoret this 24th day of May 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

No appearance for the applicants

No appearance for the respondent