



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 128 OF 2002

DELMONTE LIMITEDAPPELLANT

VERSUS

EDWARD JUMBARESPONDENT

R U L I N G

The most important issue in this application is the delay occasioned in filing this appeal. In deciding this issue it is now settled law that the court considers the following: firstly the length of the delay; secondly the reason for the delay and thirdly (perhaps) chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.

And in all these considerations and ultimate decision, it is the court's discretion which plays a central role.

In this application, it is revealed that the applicant had been granted leave to file the intended appeal within 30 days from 21st February 2002 by Honourable Mr. Justice Mbito.

No such intended appeal was filed and the reason given was that there was an application by the respondent in the lower court to set aside an order of stay of execution made in that court and which was only determined on 12th July 2002.

The question I ask is this: was it necessary for the appellant to wait for the respondent to have the application for setting aside an order of stay of execution finalized before filing the intended appeal?

Whether or not there is or not a stay of execution, a determined and intending appellant proceeds with the appeal and if the appeal succeeds, even if the execution had been carried out, he is entitled to recovery by way of damages.

Here the appellant (applicant) should have given a satisfactory explanation why he did not comply with the court order of 21st February 2002 and file the appeal within 30 days or else what connection the order of stay of execution had with filing of the intended appeal within 30 days as per the order of Judge Mbito before convincing this court to exercise its discretion in favour of the applicant in its second application for leave filed herein on 15th July 2002 nearly 4 months after the first order.

No such satisfactory reason has been given for this delay.

Moreover, the lower court judgment was delivered on 27th September 1999 and the applicants took no action after being granted stay of execution on 15.11.99 pending the filing and determination of the intended appeal.

And it is after the respondent applied for setting aside the order of stay on 27.9.2001 that the applicant came up with the application for the first leave to file appeal out of time on 8th October 2001. This is the leave granted on 21st February 2002 and which the applicants did not utilize.

They took another 4 months before filing the appeal which was out of time without the requisite leave on 27th March 2002 only to come to this court in the present application for what I consider to be a validation order. This is just not good enough and this delay of about 4 weeks was certainly not explained either in the supporting affidavit or in the submissions before this court.

To my mind the application for stay of execution in the lower court had no bearing at all on the application for leave to appeal out of time which was granted on 21st February 2002; and I am satisfied the applicants have not given a satisfactory explanation why the leave granted on 21.2.2002 was not utilized or explained why the appeal was filed after 4 weeks of the date given in that order.

If that be so then no cause has been shown why this court should exercise its discretion in favour of such applicants for leave to file the appeal out of time – see **LEO SILE MUTISO V ROSE HELLEN WANGARI MWANGI; CIVIL APPLICATION NO. NAI 255 OF 1997; SAMKAN LIMITED AND ANOTHER V MERCEDES SANKEN RAU TUSSEL AND ANOTHER, CIVIL APPLICATION NO. NAI. 21 OF 1999 and RAVASHADE V LANE [1988]40 EG 100.** As the application is being disposed of on ground of delay, it is not necessary to go into the other grounds.

I dismiss this application with costs.

Delivered and dated this 26th day of September, 2002.

D.K.S. AGANYANYA

JUDGE