



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 35 OF 2019

JAMES ITHALE AKOTHE.....APPELLANT

-VERSUS-

ABDIWELE ALI ABDI.....1ST RESPONDENT

EDWIN SUYA BUSOLO.....2ND RESPONDENT

Coram: Hon. Justice Reuben Nyakundi

Mr. Onyango Advocate for the Appellant

Mr. Siminyu Advocate for the 1st Respondent

N/A for the 2nd Respondent

RULING

The question for resolution by the Court in this instance revolves around whether or not the failure by the Appellant to deposit the decretal sum of Ksh. 6,431,833.00/- into a joint interest earning account within the time limit set out renders the current appeal nugatory.

Mr. Siminyu makes submissions to the effect that on 11th June, 2019 vide an application by way of Notice of Motion dated 10th June, 2019 the Appellant sought orders from this Honourable court among them leave to file appeal out of time and stay of execution pending appeal. On the 20th June, 2019 and subsequently on 15th July 2019, both parties compromised the above stated application on condition that the Appellant deposits the entire decretal sum in a joint interest earning account of both counsel failure to which execution was to issue.

Counsel takes the view that for the appeal to be filed out of time, it was contingent on the Appellant depositing the entire decretal sum. He submits therefore that as the orders of the court recorded by consent still subsist and no appeal has been proffered against them, the Appellant cannot not turn around and submit that execution may proceed on the one hand as the appeal proceeds on the other. For the Applicant, such a supposition is tantamount to contempt of the court as the court does not make orders in vain.

Secondly, he submits that the failure to deposit the decretal sum nullifies the arrangements to which time to the appeal filed out of time was to be extended and heard. He proclaims that while the right to be heard under Article 25 of the Constitution is one of the non derogable rights, the court of appeal in **A.B & Another vs R.B [2016] eKLR** said that there may be instances where due to the risk of the rule of law being deliberately undermined, such right may be denied and the hearing of an application for stay denied until there is full compliance with the orders of the High Court. In Mr. Siminyu's view, the appeal has been overtaken by events due to the Appellants failure to deposit the entire decretal sum. He submits that the 1st Respondent in any case already filed a declaratory suit being **Mombasa Civil Suit No. 1871 of 2019 (Abdiwelle Ali Abdi vs A.P.A Insurance Company Limited)** to which the Appellant has already entered appearance therefore any issues the Appellant may have ought to be ventilated in that forum.

For his arguments, reliance is placed on **Dr. Fred Matiang'i Cabinet Secretary, Ministry of Interior and Co-ordination of National Government vs Miguna Miguna and 4 Other Civil Application No. 1 of 2017** and **Hadkinson vs Hadkinson (1952) ALLR VOL 2**.

In sum, it is **Mr. Siminyu's** submission that the appeal has been overtaken by events and there is no surviving appeal. Hence he urges the Court to reach such a determination.

The position articulated and maintained by the Appellant through his advocate is that the failure to pay the decretal sum is not fatal and the

1st Respondent is open to execute the decretal sum.

Analysis and Determination

The purpose for depositing the decretal sum in this particular instance is to provide security in an application for leave to appeal out of time and stay of execution pending appeal. **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010** empowers this court to stay the execution, in this case, of the lower court’s judgement. **Order 42 Rule 6(2)(b) of the Civil Procedure Rules, 2010** provides that ‘*no order for stay of execution shall be made under sub rule (1)...unless 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.*

The operative provision as regards extension of time to file an appeal is **Section 79G of the Civil Procedure Act** and it provides:

Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

In the instant suit, this court made a determination on the application dated 10th June 2019 allowing the appeal to be filed out of time. While one of the conditions was that the Appellant deposit the entire decretal sum in court, the same has not been done. The Appellant intimates that in the circumstances, the stay may be vacated and execution commence even as the Appeal is heard. The 1st Respondent would not have it. In his view, the order for stay of execution goes hand in hand with the appeal and that the appeal being admitted was contingent upon payment of the decretal sum.

The condition for depositing the decretal sum is for the purposes of the stay of execution, to assure the court that should the appeal proceed, it would not be rendered nugatory by reason of unavailability of the sum required to satisfy a decree. No such requirement is required for the extension of time, which, courts have held to be a discretionary remedy. In this matter, the court has already exercised its discretion by admitting the appeal. As such for the 1st Respondent to contend that the admission is contingent on payment of the decretal sum is fallacious. The right of appeal is a cherished right that is core to the right to a fair hearing enshrined under **Article 50** of the Constitution of Kenya, 2010. Going further, to deny the Appellant this right on the basis that he has failed to deposit the decretal amount whilst the law provides that upon such failure the stay order lapses and the 1st Respondent is at liberty to execute would only serve to deny the Appellant the right of access to justice protected under **Article 48**.

In the circumstances therefore, it is my finding that the 1st Respondent’s prayer is without merit and the same is dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF JANUARY 2020

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R NYAKUNDI

JUDGE.

In the presence of:

1. Mr. Katete holding brief for Mr. Onyango for the appellant