

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISCELLANEOUS CIVIL CASE NO. 250 OF 2018

DOMM STUDIOS LIMITED.....APPLICANT

VERSUS

GEORGE GITONGA MUCHIRI T/A FANTASY AUCTIONEERS 1ST RESPONDENT

MRS DAN KAROBIA.....2ND RESPONDENT

R U L I N G

1. The motion filed on 14th December 2018 was seeking to enlarge time to allow the Applicant herein file an appeal in respect of the judgment of the lower court in **Thika CMCC No. 468 of 2013** delivered on 14th November 2018. The judgment, which dismissed the Applicant's suit allowed the 2nd Respondents counterclaim for rent arrears and eviction of the Applicant from the suit premises. By his affidavit Dominic Musyimi Kioko described as a director of the Applicant company expressed apprehension that the Respondents were getting ready to execute the decree and stated that despite his request dated 14th November 2018 to be supplied with copies of proceedings and judgment the same had delayed. He asserts that the Applicant has an arguable appeal and prayed that execution be stayed. Although the Applicant's affidavit and submissions are primarily concerned with the prayer to stay execution, prayer (2) of the motion is already spent as correctly pointed out, ironically, by the Applicant.

2. The 2nd Respondent swore an affidavit opposing the application asserting that she will be prejudiced if the motion is allowed as the Applicant is in arrears of rent. She deposes to other matters which properly belong to the appeal. She views the Applicant's proposed appeal as merely intended to delay her enjoyment of the fruits of her judgment. Submissions of the parties by and large took cue from the affidavits on record. While the Applicant confirmed in submissions that the prayer for stay of execution was spent, his submissions nevertheless were primarily concerned with the issue of stay of execution. Ditto for the Respondents who in addition indicated no opposition to the prayer (3) of the motion which is for leave to appeal out of time.

3. There being no live prayer for stay of execution, this court will not consider the submissions on that account. Save to point out that pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the existence of an appeal is a condition precedent to the granting of an order of stay of execution under that provision. It is not clear to me why the Applicant did not file the memorandum of appeal in this matter rather than this motion, as he was still within time. There can be no justification for delay in so filing merely because proceedings of the lower court were not ready. At the time the application was filed the Applicants were in possession of the judgment of the lower Court which is annexed to the Applicant's affidavit as annexure "DMK"

4. Concerning the prayer for enlargement of time to file appeal, the court has considered the application and respective affidavits. Section 79G of the Civil Procedure Act provides that:

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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."

5. The successful applicant must demonstrate **"good and sufficient cause for not filing the appeal in time."** In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari material* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."

6. It is now almost 2 years since the judgment intended to be appealed from was delivered. However, the Applicant had approached the court with dispatch, but as observed, the time for filing appeal lapsed on the day of filing and hence the application was made in anticipation. Since the Respondents conceded prayer (3) being one for leave, this Court will allow it. The application has succeeded to that extent only. The appeal is to be filed within 14 days of today's date. Costs are awarded to the Respondents.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 16TH DAY OF JULY 2020.

C.MEOLI

JUDGE