



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MISC. CIVIL CASE NO. 175 OF 2020**

**RUSH HEMA DIPAK.....1<sup>ST</sup> APPLICANT**

**AL HUSNAIN MOTORS LTD.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**DOMNIC OBONDI APPIDAH.....RESPONDENT**

**RULING**

The application before me is dated 17<sup>th</sup> August 2020, which was filed in court on 19<sup>th</sup> August 2020.

1. The first prayer in the said application is for leave to be heard during the Court Recess which was ongoing at the time when it was filed.
2. The Applicants, **RUSH HEMA DIPAK** and **AL HUSNAIN MOTORS LTD.**, have asked the court to stay execution of the judgment rendered by the trial court, until the Applicants' intended appeal is heard and determined.
3. The Applicants also asked the court to enlarge the time for the filing of their intended appeal.
4. The judgment which is the subject-matter of the intended appeal was delivered on 25<sup>th</sup> June 2020.
5. According to the Applicants,

*“... the failure to file the appeal on time was not as a result of indolence but rather, the delay in obtaining a copy of the judgment of the trial court, which was twenty days after delivery of the same, and upon transmitting it to the 1<sup>st</sup> Applicant's instructing client on 17<sup>th</sup> July 2020, they instructed us to appeal on 3<sup>rd</sup> August 2020.”*

6. The Applicant's advocates attributed the delay in their client giving them instructions, to what was described as the current working environment of skeleton staff and working from home due to the Covid-19 pandemic.
7. By the supporting affidavit sworn by Advocate **EVERLINE NYANCHAMA OGATO**, the Applicants stated that the Respondent's financial means are un-ascertainable. Therefore, the Applicants expressed the view that the Respondent, **DOMINIC OBONDI APPIDAH**, may not be in a position to make good any loss or damage if the decretal amount had been paid to him, and thereafter the appeal was successful.
8. The Applicants' further opinion was that the grant of stay of execution would not prejudice the Respondent in any way. Therefore, it was the Applicants' contention that Justice and Equity would be best served if the orders they had sought were granted.
9. The Respondent, **DOMNIC OBONDI APPIDAH**, swore a replying affidavit, stating that the application was merely intended to frustrate him from enjoying the fruits of his judgment.
10. He pointed out that the Applicants' advocate was present in court when the trial court delivered the judgment on 25<sup>th</sup> June 2020.
11. It was therefore submitted that the Applicants could have obtained the hand-written copy of the judgment on the very same day when the judgment was delivered.
12. Secondly, the Applicants are said to have failed to make an application for the typed copy of the judgment.

13. Those two factors were said to be a reflection of the indolence on the part of the Applicants.

14. It is common ground that on 15<sup>th</sup> July 2020, the trial court emailed the typed judgment to the parties.

15. Pursuant to the provisions of **Section 79G** of the **Civil Procedure Act**;

***“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.”***

16. As the statute allows an appeal to be filed within 30 days from the date of the decree or order appealed against, it follows that by 15<sup>th</sup> July 2020, when the Applicants received the typed proceedings, there was still time to lodge their intended appeal.

17. However, as the Applicants’ counsel has said, he could not file an appeal before the Applicants had given him the requisite instructions.

18. The judgment was dispatched to the Applicants on 17<sup>th</sup> July 2020. Thereafter, the Applicants gave instructions to their advocates, on 3<sup>rd</sup> August 2020.

19. Considering that the Applicants had given instructions to their advocates on 3<sup>rd</sup> August 2020, there was a delay of 2 weeks before the current application was lodged in court.

20. And considering that the judgment was delivered to the Applicants’ advocates on 15<sup>th</sup> July 2020, it shows that a period of over one month had lapsed from the date, before the Applicants moved the court to seek extension of time for the filing of their intended appeal.

21. The Respondent submitted that the delay herein has not been explained; and that therefore the application should be dismissed.

22. On their part, the Applicants have attributed the delay to the Covid-19 pandemic, which was said to have given rise to an environment in which skeleton staff have been compelled to work from home.

23. As the Respondent has pointed out, the Applicants were not specific about the institution about which they were making reference to, as being impacted by the covid-19 pandemic.

24. However, this court takes Judicial Notice about the Covid-19 pandemic, which is affecting almost all countries in the world, today. There is not a single aspect of the society that has been spared from the catastrophic effects of the pandemic.

25. I therefore find that although the Applicants did not specify the particular institution that had been negatively impacted by the pandemic, that cannot in any way diminish the reality of the scourge in our lives and work-places.

26. In this case, the trial court expressly ordered thus;

***“32. Right of Appeal accorded to both parties within fourteen days.”***

27. Clearly, that express order is inconsistent with the provisions of **Section 79G** of the **Civil Procedure Act**.

28. Nonetheless, it is arguable that because it was an express order of the court, the parties could not choose to simply ignore it.

29. It is well settled that when a court of law makes Orders, the same are supposed to be complied with, regardless of whether we agree or disagree with them. It is only when court orders are complied with that there will be law and order in any community that upholds democratic tenets.

30. In the circumstances, if the Applicants complied with the court order, it would imply that before the typed copy of the judgment was made available, the time for the filing of the appeal had already lapsed. In other words, even as early as 15<sup>th</sup> July 2020, the Applicants would have been required to seek an extension of time to appeal.

31. As regards the issue as to whether or not this court has jurisdiction to entertain the application for stay of execution, the Respondent submitted that the Applicants ought to have first lodged their application before the trial court.

32. In the case of **JOHN MUSERA KILINGA Vs NIC BANK LIMITED HCCC NO. 280 OF 2015** this court expressed itself as follows;

***“There is no doubt that in an ideal scenario, an appellant from a decision of the magistrate’s court should, ordinarily first seek stay of execution from that court. If the application was granted or rejected by the magistrate’s court, the appellant could lodge another application for stay of execution, at the High Court.”***

33. The said holding is premised on the provisions of **Order 42 Rule 6 (1)** of the **Civil Procedure Rules**.

34. In the case of **JOHN MUSERE KILINGA** (above-cited) I further pronounced myself thus;

***“In my considered view, an application to the High Court could be made even when the magistrate’s court had allowed the initial application for stay, because the applicant may be unsatisfied by the terms which the magistrate’s court had imposed.”***

35. In that case, the Appellant had lodged his first application at the magistrate’s court. However, the application was still pending by the time he filed the application at the High Court.

36. Notwithstanding the fact that the application at the magistrate’s court had not yet been determined, the High Court gave due consideration to the application before it.

37. That application had been brought after the lapse of over one year from the date when the trial court delivered its Ruling. However, after taking into account the circumstances prevailing, the court granted the orders for stay of execution pending the hearing and determination of the appeal.

38. In the current case, I find that the delay is for a period of less than 2 months. In computing the period of delay, I have excluded the period which the law stipulates as being available for the lodging of an appeal.

39. I find that the delay in this instance is not inordinate.

40. I also note that the Respondent failed to provide information that would answer to the Applicants’ concerns about his financial ability to make good the money, if the decree was executed, and if thereafter the appeal was successful.

41. By choosing not to provide information which the Applicants cannot have been expected to have, the Respondent is deemed to have conceded the concerns raised about his financial status. In other words, there is a legitimate fear that the Respondent may not be in a position to make good any loss which the Applicants could suffer if their intended appeal was successful, after the decretal sum had already been paid to the Respondent.

42. I further find that that intended appeal was arguable.

43. In the circumstances, I now extend the time for the filing of the appeal, by a period of **TEN (10) DAYS**.

44. I also order that there shall be a stay of execution pending the hearing and determination of the appeal.

45. However, the Applicants are required to deposit the decretal amount of Kshs 700,000/= in an Interest Earning Account in the joint names of the advocates of the parties herein. The said deposit is to be made within the next 30 days, failing which the order for stay of execution shall stand vacated.

46. Finally, although the application dated 17<sup>th</sup> August 2020 is successful, the Applicants are not awarded the costs thereof, because there is no basis upon which the court could hold the Respondent liable for costs of an application which was necessitated by a delay on the part of the Applicants.

47. I therefore order that each party will meet their own costs of the said application.

**DATED, SIGNED and DELIVERED at KISUMU This 9<sup>th</sup> day of November 2020**

**FRED A. OCHIENG**

**JUDGE**