



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 305 OF 2018**

**BADAR HARDWARE LIMITED.....APPLICANT**

**VERSUS**

**CHRISTOPHER OKUMU OMBADO.....RESPONDENT**

**R U L I N G**

1. In this ruling the court is called upon to grant to the Applicant order for extension of time to file an appeal out of time and an order for stay pending the intended appeal.
2. The reasons advanced by the Applicant in the Notice of Motion dated 15/11/2018 are that the judgment was delivered in the absence of the parties and on a date not notified to the said parties hence it was not deliberate that the appeal was never filed in time. For that reason and the need to preserve the basis of the appeal, a stay of execution of the decree is to be challenged on appeal is sought.
3. The application was supported by the Affidavit of the Fredrick Makhokha, the Human Resources Manager of the Applicant, which repeats the assertions in the grounds of application with a clarification that the judgment having been delivered on 19/9/2018, their advocates were not notified of the same till 8/10/2018 but that notification adverted to delivery to have been on 3/9/2018 and that by the time the application was filed the Respondent had commence execution process. It was then urged that the proposed appeal is arguable because the decision was rendered without jurisdiction.
3. In opposition the Respondent filed a Replying Affidavit sworn by the Respondent on 30/11/2018 in which the main contention is that the judgment was due for delivery on the 18/7/2018 but was not ready hence was reserved to be delivered on notice. According to the Respondent a notice was issued and posted on the courts notice board for delivery of judgment on 03/9/2018 when the same was delivered in the absence of the Applicant and the Respondents advocate notified the Applicants' advocate by a letter of the same day with a reminder of 5/10/2018. Nothing was however said of the date 19/9/2018 appearing in the notes of the court exhibited to this court.
4. It is then asserted that the issue of jurisdiction cannot be raised of this time because it was never raised in the court below but was rather conceded in the defence filed.
5. However a major and very critical concession was made by the respondent that drastically reduces the dispute and point of determination in this appeal. That concession is at paragraphs 8 and 9 of the Replying Affidavit where the Respondent says:-

**“Paragraph 8: THAT I am NOT opposed to the**

**Defendant/Applicant exercising their undoubted right of Appeal only on quantum as I would also wish to cross Appeal on quantum as the award by the trial court was inordinately low and fell afoul of the jurisprudence set out on the grounds of upsetting the award of damages.**

**Paragraph 9: THAT the issue that can be litigated on**

**Appeal before this court being only on quantum, I would urge the court to make the following Orders:-**

- a) Three quarters ( $\frac{3}{4}$ ) of the decretal sum be released to me and a quarter ( $\frac{1}{4}$ ) of the same be placed in a joint interest earning account in the name of the parties pending the hearing and determination of the intended appeal and cross appeal.
- b) The Defendant/Applicant be granted leave to Appeal out of time on quantum with the concurrent leave to the Plaintiff/Respondent to file and serve a cross appeal on quantum within 30 days of service of the Record of Appeal and that

**the Appeal and Cross-Appeal be mentioned within 120 days of the court's Order to take directions as to the hearing of the Appeal and Cross-Appeal.**

**c) That costs of this application be in the cause”.**

6. It is to me clear that the Respondent does **NOT** object to time being extended and stay being granted provided its proposed terms are considered. The proposals are that he be paid atleast  $\frac{3}{4}$  of the sums awarded with  $\frac{1}{4}$  being deposited into an escrow account and that parties be granted leave to file and serve memoranda of appeal and to compile Records thereof within limited time with costs being costs in the appeal.

7. Parties seem not to have given due premium and consideration to this concession by their submissions that should have saved a lot of court's time. In both submissions the concession is treated as an alternative when the affidavit is affirmative that leave should be granted as the Respondent himself intends to appeal. I chose to follow the Affidavit which is on oath rather than submission and find that on its basis, leave is granted to both parties to file and serve memoranda of appeal out of time but within 14 days from today's date. I do so noting that the litigation belong to parties and a court of law need not purport to render a decision where concessions are made.

8. There being a further concession on how to deal with security and it being noted that at trial liability was apportioned by consent and noting further the extent of injuries as disclosed in the judgment exhibited in the further affidavit, I impose the following conditions for grant of stay pending the appeal to be filed:-

**a) The sum of Kshs.400,000 be paid to the Respondent within 30 days for today.**

**b) The balance of the decretal be deposited in a joint interest bearing account in the names of the advocates for the parties within 30 days from today.**

10. Having so said, and to fast track the matter, let the appeal once filed be placed together with this file and mentioned before court on the 8/7/2019 for further orders.

11. The costs of this application shall be costs in the Appeal.

**Dated and delivered at Mombasa this 13th day of May 2019.**

**P.J.O. OTIENO**

**JUDGE**