



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL APP NO. 75 OF 2018

PHIDES MBURA NYAGAH (Suing as the administrator of the

estate of FAUSTINO NYAGAH MUKU).....APPLICANT

VERSUS

SILOAM HIDE AND SKIN CO LTD.....1ST RESPONDENT

ALOICE NGUGI.....2ND RESPONDENT

RULING

A. Introduction

1. This is a ruling for the application dated 3/12/2018 in which the applicant seeks release of the decretal sum of Kshs. 1,817,450/= the decretal sum in Embu CMCC No. 180 of 2015, deposited in court as security for stay of execution pending appeal.
2. It is the applicant's case that a year and half after obtaining stay of execution orders over the judgement in Embu CMCC No. 180 of 2015 and after directions to file and serve the appeal upon the applicant within 7 days, the respondents are yet to comply despite constant request by the applicant.
3. It is the applicants case that after getting leave to file the memorandum of appeal out of time, vide the court orders in Misc. Application No. 82 of 2017, the respondents are yet to meet the requirements of Section 79B of the Civil Procedure Act that requires an appeal enlisted for directions 30 days upon filing of appeal and as such the applicant is prejudiced by being denied her right to enjoy the fruits of her judgement.
4. In response, the respondents through their advocate Mr. Nyabuti deposed that they had filed their Memorandum of Appeal dated 14/08/2017 and written to the Executive Officer for copy of proceedings to enable them file their record of appeal but had not received any response.
5. Mr. Nyabuti for the respondents further deposed that the appeal ought not be dismissed as it has not been admitted in accordance with Section 79B of the Civil Procedure Act and as such no action can be undertaken by the appellant and as such they should be allowed to prosecute their appeal.
6. In a further affidavit, the applicant deposed that the memorandum of appeal relied on by the respondents relates to a different party and looks like a fraudulent attempt by the respondents to deceive the court and as such there is no appeal against the orders granted by court in the judgement in Embu CMCC No. 180 of 2015 this justifying the release of the decretal sum to the applicant.
7. The parties filed submissions to dispose of the matter.

B. Applicant's Submissions.

8. The applicant submits that there is no appeal by the respondent on record and that the respondents failed to comply with the orders of the honourable court issued on 3/8/2017 ordering the respondent to file the appeal within 7 days and as such the court had no option but to discharge the stay. The applicant relies on the case of **Martha Wambui v Irene Wanjiru Mwangi [2015] eKLR** where the court held that in the absence of an appeal there was nothing upon which the stay sought under order 42 of the Civil Procedure Rules could be anchored.
9. The applicant further submitted that the respondents had failed to comply with the provisions of Order 42 Rule 42, 35 (2) of the Civil Procedure Rules that require the appeal be set down for hearing one year after service to the respondent failure to which the appeal is

dismissed.

10. The applicant further submits that the delay by the respondents to set down their appeal for hearing is prolonged and inexcusable even despite numerous reminders from the applicant and as such the appeal ought to be dismissed.

C. Respondents' Submissions

11. The respondents' submitted that they duly filed their memorandum of appeal as directed by the order by the court allowing their application to appeal out of time and that any allegations of fraud should be strictly proven.

12. The respondents further submit that they did their part by requesting for the proceedings and they ought not be punished for lack of typed proceedings. They relied on the cases of **Njai Stephen v Christine Khatiala Andika [2019] eKLR**, **Jurgen Paul Flach v Jane Akoth Flach, Nakuru Civil Appeal No. 119 of 2012** where the court took the view that an appeal cannot be dismissed before directions are given.

13. The respondents also submitted that the hardships and prejudice they were likely to be occasioned by dismissal of the appeal was greater than that faced by the applicant if the appeal was not allowed to proceed. They relied on the case of **Allan Otieno Osula v Gurdev Engineering & Construction Ltd [2015] eKLR** where the court employed the principle of the constitutional right to appeal in as much as there had been delay which had not been satisfactorily explained.

D. Analysis and Determination

14. The Applicant submitted that the respondent had failed to comply with section Order 42 of the Civil Procedure Rules requires that an appellant, within thirty (30) days of filing the appeal, cause the matter to be listed for directions under Section 79B of Civil Procedure Act. She added that it was the duty of an appellant to cause the appeal to be placed before the judge for directions. She stated that since there was no appeal the court ought to discharge the stay secured by the respondent. In this regard, she placed reliance on the case of **Martha Wambui v Irene Wanjiru Mwangi [2015] eKLR**

15. The applicant further states that the appellant was granted leave to file an appeal out of time over a year and a half ago and had since that time not taken any steps to prosecute the appeal herein.

16. On their part, the respondents argued that they duly filed their memorandum of appeal, that they did their part in requesting for the proceedings and they ought not be punished for lack of typed proceedings and that the applicant had not demonstrated the prejudice she would suffer if they were given more time to prosecute their appeal. It was their argument that the application herein was premature and grossly misconceived.

17. I note that apart from the first letter the respondent wrote to court requesting for proceedings, which he did not attach, there is no evidence of follow up by way of a reminder. A memorandum of appeal was annexed to the replying affidavit which the applicant says it is not genuine. From the faint image of the official court stamp, it indicates that the appeal was filed on 16/08/2017.

18. The applicant further expresses doubt that any appeal was filed after the orders for extension of time were issued. In order to clear the doubts, this court called for HC Miscellaneous Application No. 82 of 2017 and noted that the orders for extension of time were given on 3/08/2017 directing that the appeal was to be filed within seven (7) days. I further looked at the Appeals register and noted that some documents were presented for filing on 7/08/2017 and fees assessed at Kshs. 1550/= but there is no evidence of payment in that the column for "fees collected" remains blank to date.

19. Considering the practice of court registries, it may be correct to conclude that someone presented documents for assessment of fees but never paid for the documents. The most probable thing is that the person may have taken away the documents. On my request the registry went through the physical appeal files for August 2017 and no file with the names of the parties herein was traced. Consequently, I find that no appeal was filed by the respondent's counsel against the judgment in CMCC No. 180 of 2015 "B".

20. I have perused another HC Miscellaneous File No. 84 of 2017 bearing the names of the parties in this matter. It shows that the respondents counsel had appeared earlier before Hon. Ndengeri on 31/07/2017 seeking orders for stay pending appeal and obtained orders which were to be set aside later when the magistrate discovered that no appeal had been filed. the magistrate's letter addressed to the presiding judge reads in part: -

"I perused the file and I am now aware that the appeal is yet to be filed".

This is the reason why the orders were later set aside.

21. Judgment in this case was delivered on 12/06/2017 and an application for stay of execution pending appeal filed in the lower court on 1/08/2017. The existence of the HC Miscellaneous Application No. 82 of 2017 seeking for orders for extension of the time for filing the appeal was no doubt meant to hoodwink the magistrate's court that there was an appeal to be filed in the High Court within seven (7) days as per the orders issued by the High Court.

22. At the time the respondent filed his submissions for the application for stay on 4/09/2017 he still presented the falsity that the miscellaneous application was still pending in the High Court. Yet the court had already given orders for extension of time, that is on 3/08/2017. The seven days given to file the intended appeal expired on 10/08/2017 without the appeal being filed.

23. On perusal of the application presented before the Chief Magistrate seeking orders for stay, prayer 3 indicated that the miscellaneous application was still pending which was not true. From the application for stay, Miscellaneous Application No. 82 of 2017 was filed in Kerugoya. The name Kerugoya was later cancelled and overwritten in blue ink as Embu. The magistrate seems not to have noticed this anomaly and proceeded to grant orders for stay on 30/11/2017.

24. The funds deposited as security in court by the respondent was Kshs. 1,817,450/= which is the full decretal amount awarded in the judgment. The funds have been held in court for more than two years on the basis that an appeal against judgment in CMCC No. 180 of 2015 was filed and is pending hearing. I do not understand what this game was meant to achieve because the respondent had funds to satisfy the decree after the judgment which became a purported security for judgment in an appeal that never was.

25. I find the conduct of the firm of Kairu & McCourt quite unbecoming and dishonest in obtaining a court order that has prevented the applicant from enjoying the fruits of his judgment. An advocate is an officer of the court and has an obligation to assist the court under the overriding objective to reach a just and fair decision but this was not the case herein.

26. It cannot be gainsaid that the respondent had no intention to file an appeal against the judgment of the Chief Magistrate but only needed a court order for stay.

27. I come to a conclusion that in the absence of any appeal as this court has established, this court has no business holding onto security for judgment that has no basis.

28. I find the application merited and I allow it to the extent that the amount deposited in court in CMCC No. 180 of 2015 being Kshs. 1,817,450/= be and is hereby released to the Applicant's advocates for the satisfaction of the decree or part of it as the case may be.

29. The orders for stay pending appeal granted on 30/11/2017 in CMCC No. 180 of 2015 are hereby vacated.

30. The respondent will meet the costs of the suit.

31. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF SEPTEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Gathua for Ms. Muragwa for Respondent