



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.20 OF 2018**

**CONSOLIDATED WITH BOMET HIGH COURT CIVIL APPEALS NOS.21, 22, 23 AND 24**

***(Originating from the judgment and decree in Sotik CMCC No.106 of 2016 by Hon. B. Omwansa)***

**KIMBILIO DAIMA SACCO SOCIETY LIMITED.....APPELLANT**

**VERSUS**

**RICHARD BETT.....RESPONDENT**

**RULING**

1. Before me is an amended Notice of Motion dated 12<sup>th</sup> March 2019 brought under Order 50 Rule 6, Order 22 Rule 22 and 25 and Order 42 Rule 6 of the Civil Procedure Rules as well as section 1A, 1B, 3A, 79 (G) and 95 of the Civil Procedure Act (cap 21) and Article 159 of the Constitution of Kenya.

2. The application has 5 prayers, two of which have been spent as follows:

1 .....(spent)

2 .....(spent)

**3 That there be a stay of execution of the judgment and Decree of the subordinate court issued in Sotik PMCC No.106 of 2016; pending the hearing and determination of the appellant’s intended appeal.**

**4 That the Memorandum of Appeal dated 18<sup>th</sup> December 2018 filed on 20<sup>th</sup> December 2018 and served on 1<sup>st</sup> February 2019 be deemed as duly filed and properly on record.**

**5 That the necessary directions do issue.**

3. The application has grounds on the face of the Notice of Motion that the appeal is arguable, that the appeal was inadvertently filed on 20<sup>th</sup> December 2018 five (5) days outside the 30 days window for filing appeals, that this application was filed in the interests of justice, and that the applicant would suffer untold prejudice unless the application was heard on merits and determined.

4. The application was filed with a supporting affidavit sworn on 12<sup>th</sup> March 2018 (should be 2019) by Cheruiyot Arap Bii described as the Board Chair of the appellant duly authorized to swear the affidavit. It is deponed therein that the appeal herein was consolidated with Civil Appeal Nos.21, 22, 23 and 24 of 2018 against the judgment in Sotik PMCC No.106 of 2016, but that counsel lodged the appeal out of time, and that if the orders sought were not granted, the respondent may levy execution for recovery of the decretal sum rendering the appeal nugatory, and that the respondent being a person of low financial means may not be in a position to refund the amounts should the appeal be successful. Annexed is a copy of the subject judgment of the subordinate court.

5. The application was opposed through a replying affidavit sworn by Richard Bett the respondent on 26<sup>th</sup> March 2019 in which it was deponed that the application was a ploy to delay the enjoyment by the respondent of the fruits of his judgment, that there was no demonstration of substantial loss that would be suffered and that there was no threat to execution. It was lastly deponed that if stay of execution was granted then half of the decretal amount be ordered paid to the respondent, and the other half be deposited in a joint account of the advocates.

6. The application by consent of counsel proceeded by way of filing written submissions. The applicants counsel Bett & Company filed their written submissions on 24/04/2019, while the respondent’s counsel M/s E. M. Orina & Co. Advocates filed their submissions on 21<sup>st</sup> May

2019. Counsel opted not to highlight the written submissions. Several authorities were cited in the submissions.

7. I will first of all deal with the issue of leave to appeal out of time, which is prayer 4. It is admitted that the applicant's counsel came to court and filed the memo of appeal five (5) days outside the time allowed by law. The request for extension of time has been strongly opposed on the ground that sufficient cause for the delay in filing the appeal has not been demonstrated by the applicant.

8. As rightly pointed out by counsel for the respondent, section 79 (G) of the Civil Procedure Act (cap.21) governs the period within which filing appeals to this court from subordinate courts will be filed. It states as follows:-

*“79 (G) 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 required 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.”*

9. It follows therefore that an applicant for leave to appeal out of time has to show sufficient cause. The applicant has relied on inadvertence, but has not given particulars to explain that inadvertence. It was preferable for him to give the particulars. However, in view of the provisions of Article 159 of the Constitution which emphasizes the need for courts to learn more towards administering substantive rather than technical justice, I will give the applicant a chance to prosecute his appeal. I will thus grant prayer 4 of the application.

10. I now turn to the request for stay of execution of judgment or decree pending appeal. Such orders of stay of execution of decree or order are governed by Order 42 Rule 6 of the Civil Procedure Rules which provides that the application has to be made without unreasonable delay; that the applicant has to demonstrate that he will suffer substantial loss if stay is not granted, and lastly the applicant should offer security for the grant of such stay.

11. It is of note that the defendants in the case were two, and both were found liable. However, the other defendant Attorney General has not bothered to come to court for any orders so far, nor is there any indication that they will want to appeal. The applicant has said that they will suffer substantial loss if stay is not granted, because the respondent is not a person of means, and will not be able to repay the money if paid now, if ultimately the appeal succeeds. The applicant has not given any particulars about the respondent's inability to repay the amount of the award.

12. Though the applicant has not given a comprehensive explanation for the delay in filing the application from 15<sup>th</sup> November 2018 to 18<sup>th</sup> December 2018 when the initial application for stay was filed, and has also not offered security in support of the application as required by the rules, it is apparent that on the 20<sup>th</sup> December 2018 this court granted interim orders of stay, in which the applicant was to make two deposits for the decretal which they did as per the KCB bank slips stamped on 23<sup>rd</sup> January 2019 filed herein. It would thus be futile and in my view unjust, for this court now to vary that court order. I will thus allow the request for stay of execution on the same terms; except now it will be pending determination of the appeal.

13. To conclude, I allow the application and grant prayer (iv). As for prayer (iii) of the application, I grant the stay of execution on the terms ordered by this court on 20<sup>th</sup> December 2018, pending the hearing and determination of the appeal. Costs will follow the decisions in the appeal.

**Dated and delivered at Bomet this 6<sup>th</sup> November 2019.**

**George Dulu**

**JUDGE**