



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPLICATION NO. 51 OF 2018

SALIM MOHAMED.....APPELLANT

VERSUS

FATUMA HAMISI BILALI (Suing representative of the

estate of AsinaTwalib(deceased).....1STRESPONDENT

LAMECK OMINDE.....2ND RESPONDENT

RULING

1. By a notice of motion dated 21.3.18 brought under Sections 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 50 Rule 5 of the Civil Procedure Rules and; the applicants appellant pray for orders that

1. Spent.....

2. Spent.....

3. The applicant be granted leave to appeal out of time against the whole judgment dated and delivered on 7.12.17 in Tamu Resident Magistrate's Court Civil Suit No. 12 of 2014

4. Pending the hearing of the intended appeal, there be a stay of execution of the decree in Tamu Resident Magistrate's Court Civil Suit No. 12 of 2014 on such terms as the court shall deem just and expedient

The application is based on the grounds that among others that Fidelity Insurance, the applicant's insurer was informed about the judgment but it took time to receive the Risk Assessor's Report by which time the time for filing the appeal had elapsed.

2. The application is supported by the affidavit of Richard B. O. Onsongo, advocate for the Applicant sworn on 21.3.18 in which he reiterates the grounds on the face of the application. Annexed to the supporting affidavit is a copy of email dated 9.1.18, marked **BOO1**, instructing the advocate to file an appeal and copy of draft Memorandum of Appeal marked **BOO 2**.

3. The application is opposed on the grounds set out in an undated replying affidavit sworn by Hellen Adoyo Kuke, advocate for the 1st respondent, which was filed on 4.4.18. She avers that applicant has not tendered any plausible explanation for the delay and urges the court to grant the orders on condition that ½ of the decretal sum is paid to the 1st respondent and the other ½ be deposited in an interest earning account in the names of both advocates.

4. I have considered the provisions of Order 50 of the Civil Procedure Rules which states: -

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed”

5. Section 95 of the Act on the other hand states as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have

expired.”

6. There is no dispute that the impugned judgment was delivered on 7.12.17. The explanation that the insurer had not made up its mind on whether to appeal the judgment cannot be factual because it on 9.1.18 instructed Mr. Onsongo, advocate to file an appeal. Counsel has not offered any explanation why he did not file the appeal as instructed.

7. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court (See CITY CHEMIST (NBI) & ANOTHER V. ORIENTAL BANK LIMITED Civil Application No. Nai 302 of 2008 (UR 199/2008). This application was filed about 3 months after the impugned judgment was delivered. Though the delay is not inordinate it has not been explained to the satisfaction of the court.

8. The foregoing notwithstanding, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya gives this court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I find that it would be in the interest of justice for the applicant to ventilate his intended appeal.

9. In the end, the notice of motion dated 21.3.18 is allowed on the following terms:

a. The Honourable Court hereby extends time to file the Appeal within 14 days from today's date

b. There be a stay of execution of the decree in Tamu Resident Magistrate's Court Civil Suit No. 12 of 2014 pending the hearing of the intended appeal on condition that the total decretal sum is deposited in an interest earning account in the names of both advocates within 30 days from today's date

c. The costs of this application shall abide the costs of the appeal

DATED, DELIVERED AND SIGNED THIS 19th DAY OF July, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Applicant - Ms. Bagwasi/Mr. Onsongo

For the 1st Respondent - Ms. Julu/Ms. Kuke

For the 2nd Respondent - N/A