



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 123 OF 2018**

**TELKOM KENYA LIMITED .....APPLICANT**

**VERSUS**

**EDWARD KINOTI .....RESPONDENT**

**R U L I N G**

1. Before me is a Motion on notice dated 10<sup>th</sup> September 2018 brought pursuant to **Section 3, 3a and 83 of the Civil Procedure Act, Order 46 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules**. The applicant seeks among other orders, leave to appeal out of time against the judgment in **Meru Chief Magistrates Court No. 372 of 2014** and a stay of execution pending the hearing and determination of the intended appeal.

2. The grounds upon which the application is grounded are set out in the body of the motion and the supporting affidavit of Betty Isoe sworn on 10<sup>th</sup> September 2018. It is contended that the said judgment was delivered without the knowledge of the applicant as they were never served with a judgment notice. By the time its advocate became aware of the judgment on 25<sup>th</sup> July, 2018, the time allowed for filing of an appeal had run out. The applicant has already applied for certified copies of the judgment and proceedings of which are yet to be supplied. That the intended appeal is arguable and the respondent will suffer no prejudice.

3. The application was opposed vide the replying affidavit of Edward Kinoti sworn on 21<sup>st</sup> September, 2018. He deposed that the applicant is merely buying time. That the applicant was served with the notice of entry of judgment but did not act on the same until execution had commenced. That he will suffer prejudice if the application is allowed.

4. I have considered the affidavits on record as well as the submissions of learned Counsel. This is an application for leave to appeal out of time and for stay of execution pending an intended appeal.

5. **Section 79G of the Civil Procedure Act** provides that an appeal from a subordinate court to the High Court ought to be filed within 30 days but it may be admitted out of time if a party satisfies the court that there is a good and sufficient reason for the delay.

6. The principles applicable in an application for leave to appeal out of time could be discerned from the case of **Annah Mwihaki Wairuru v Hannah Wanja Wairuru [2017] eKLR** where the Court of Appeal held:-

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.***

7. The orders sought in the present application are in the discretion of the court which is however, to be exercised within the known principles. The applicant contended that the failure to appeal within time was caused by the court's failure to give notice of judgment. **Order 21 (1) of the Civil Procedure Rules** requires that notice for delivery of judgment be given. This contention was not denied by the respondent. All that was given according to the respondent on 25<sup>th</sup> July, 2018 was, notice of entry of judgment.

8. By the time the notice of entry of judgment was being given to the applicant, the 30 days allowed for appealing had already expired. The respondent's advocates took 57 days to notify the applicant's advocates of the judgment. I am satisfied that there was a plausible reason for the delay.

9. The next issue to consider is the length of the delay. The applicant's advocates received the notice of entry of judgment on 27<sup>th</sup> July, 2018. The present application was filed on 11<sup>th</sup> September, 2018. That was a period of 45 days. That delay in my view is inordinate. However, I have considered that the respondent's advocates had taken 57 days to communicate the entry of judgment. The applicant contended that it took sometime to internalize the effect of the judgment and give its advocates the requisite instructions.

10. Considering the hefty amount of the judgment of KShs. 7,960,350/-, I am satisfied that if the applicant is not given a chance of filing its appeal, it may suffer prejudice. In this regard, I am satisfied that the applicant has satisfied this court that it deserves a chance of being heard on appeal. I will grant the leave sought.

11. The applicant also sought an order for stay of execution pending the hearing and determination of the intended appeal. When it comes to stay of execution, **Order 42 Rule 6 of the Civil Procedure Rules** is clear. The application must be made timeously, it must be demonstrated that there would be substantial loss to be suffered if the stay sought is not granted and the giving of any such security as the court may order.

12. Although the application was made after 3 months, I have already found that there was good reason advanced for the delay. That settles the first principles of timeous application.

13. As regards substantial loss, the applicant contended that if stay is not granted, it will suffer substantial loss as it might not recover the decretal sum. On his part, the respondent did not state whether he is capable of refunding the money if the appeal ultimately succeeds.

14. In an application for stay, once an applicant positively alleges that if the decretal amount is paid over and the appeal succeeds, the same might be irrecoverable, the evidentiary burden of proof shifts to the respondent to show that he is not a man of straw. That he is capable of refunding the money if it is paid over to him and the appeal ultimately succeeds.

15. In this case, the respondent did not demonstrate that he can refund the money if it is paid over to him. In this regard, I am satisfied that the applicant will suffer substantial loss if the stay sought is not granted.

16. The applicant did not offer to give security. However, security is in the discretion of the court. Accordingly, I allow the application on the following terms:-

**a) The applicant is granted leave to appeal against the judgment of the Honorable Chief Magistrate H. N. Ndungu delivered on 30<sup>th</sup> May, 2018 in Meru CMCC No. 372 of 2014.**

**b) The said appeal be filed and served within 14 days of this ruling.**

**c) The applicant do deposit the sum of Kshs. 7,960,350/- within 30 days of the date of this ruling in a joint interest earning account in the names of the advocates on record for the parties.**

**d) The applicant do pay the auctioneer's costs to be agreed upon, and if not be taxed and paid within 30 days.**

**e) The applicant to bear the costs of the application.**

**f) In default of any of the foregoing orders, execution to issue.**

**SIGNED at Meru**

**A. MABEYA**

**JUDGE**

**DATED and DELIVERED at Meru this 15 day of November, 2018.**

**F. GIKONYO**

**JUDGE**