



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CIVIL APPEAL NO.9 OF 2016

BETWEEN

ISAAC MASONI MAKOKHA APPLICANT

AND

MARY AKOTH ONYANGO. RESPONDENT

Being an appeal from the Judgment and decree of Hon. J. Wesonga (RM) in Oyugis PM CC No.113 of 2013 dated 24th March, 2016)

RULING

1. The application dated 03/02/2017 seeks orders for stay of execution of the decree in **OYUGIS PMCC NO.113 of 2013** dated 24/03/2016 pending filing, hearing and determination of the intended appeal.
2. The applicant also urges the court to enlarge time within which the notice of appeal should be lodged as against the judgment and decree delivered on 21st December 2016. Further that the notice of appeal filed on 30/01/2017 be deemed as properly filed and served.
3. The basis for this application is that the applicant was dissatisfied with the judgment delivered on 21/01/2017 and applied for typed copies of proceedings as it wished to file an appeal. Notice of Appeal was also filed albeit out of time owing to an inadvertent omission on the part of the clerk of the applicant's counsel.
4. Apparently a conditional stay had been granted to the applicant but this has now lapsed. The applicant is apprehensive that unless such stay is granted, the appeal will be rendered nugatory yet the intended appeal raises pertinent issues of law.
5. Applicant is also apprehensive about suffering irreparable loss if the respondent proceeds with execution of the decree as they are not of mean and will not refund the decretal sum in the event that the appeal succeeds.
6. In the supporting affidavit sworn by the applicant's counsel he deposes that judgment was delivered on 27/12/2016 when their offices had closed and only re-opened on 9th January 2017, so he only got to advise the applicant about the judgment on 12/01/2017.
7. By a letter dated 24/01/2017 the applicants instructed counsel to file an appeal herein that latter was received on 27/01/2017 which was also the last day within which to file the notice of appeal.

8. Counsel immediately prepared a notice of appeal and a letter requesting for typed proceedings, and dispatched his clerk to Homa Bay Law Courts to file the same. However, the clerk who was a new recruit on arrival at the courts at 3.30 p.m. only made payment towards deposit for typed proceedings but failed to pay for the Notice of Appeal. It was only upon presenting the documents at the High Court registry for filing that it was drawn to his attention that he had failed to pay for the notice of appeal. He rushed back to the court revenue/cashier's office but the officer manning the section had closed office and left for the weekend. Payment could therefore be made only on Monday i.e. 3 days outside the statutory time for filing notice of appeal.

9. The application is opposed in the grounds of opposition which state that it lacks merit as fatally defective, and the applicant is guilty of laches, so it should be dismissed.

10. The matter proceeded ex-parte on 17/02/2016 as the respondent failed to attend court. Counsel reiterated the contents of the supporting affidavit and urged the court not to punish the applicant for mistakes of counsel.

11. The scenario as described by the applicant is believable. I take judicial notice that most counsel within the region had closed office for the Christmas festivities by 15/02/2017.

12. The applicant exercised due diligence and tried to file the notice within the statutory period, unfortunately the clerk making the payments made an error in the payments. I confirm that on Fridays all courts within the Republic close at 4.30 p.m. The physical location of the cash office is far from the High Court registry – about 1 km away and I believe the explanation that a trip to the High Court registry and back to the revenue office would find the officer manning it gone. I hold the view that a lapse of three days is not inordinate delay – given that the intervening period fell over a weekend when courts don't work.

13. Consequently the application for leave to enlarge time is allowed. The Notice of Appeal filed out of time be and is hereby deemed as properly filed and served. To avoid a situation where the appeal is rendered nugatory as a result of execution of the decree, I will grant temporary stay of execution pending hearing and determination of the appeal on condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of their respective counsel within 14 days from today.

14. This ruling herein applies mutatis mutandis to **HOMA BAY HCCA NO.8 OF 2016 – ISAAC MASONI MAKOKHA –VS- WYCLIFFE OTIENO ABWOR.**

15. The costs of this application shall be borne by the respondent.

Delivered and dated this 20th day of March, 2017 at Homa Bay

H.A. OMONDI

JUDGE