



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 574 OF 2016**

**1. AHMED AHMED**

**2. SWALE MARE SERUNI.....APPLICANTS**

**VERSUS**

**TSUMA BUREHE.....RESPONDENT**

**R U L I N G**

1. There is before Court for determination a Notice of Motion dated 13/9/2016 and seeking Orders that:-

i. (Spent)

ii. **This Honourable Court be pleased to grant leave to file Appeal out of time against part of the Judgment delivered by Hon. Mr. L Shiundu, Senior Principal Magistrate at Mariakani on 29<sup>th</sup> June 2016, as per the attached Draft Memorandum of Appeal.**

iii. **This Honourable Court be pleased to order a stay of execution of the Judgment/Decree in CIVIL SUIT NO. 76 OF 2016 – MARIAKANI entered against the Appellants/applicants by the Hon. Mr. L Shiundu, Senior Principal Magistrate at Mariakani on 29<sup>th</sup> June 2016 pending the hearing and determination of the Application/the intended Appeal.**

iv. **In the alternative this Honourable Court do make such Orders as it may deem just and expedient pending the hearing and determination of this application.**

v. **The costs of this Application be in the cause.**

2. The Application is shown on its face to be premised on the facts that; the judgment was delivered on 29/6/2016 and the court granted to the Applicant/judgment debtor a period of 45 days stay of execution. Thereafter the applicant requested for copies of the proceeding and judgment and were issued with copies of the handwritten judgment which the applicant made efforts to type and that by the time instructions could be obtained from the Insurers, time of lodging the appeal had lapsed. It is equally contended that the delay between the date of judgment and the date of filling the application does not exhibit inordinate delay and that grant of leave will not prejudice the Respondent in anyway.

3. The application was supported by an affidavit sworn by one JOAN OBURU, a legal officer with

Directline Insurance Co. Ltd. She depones that the Company did insure the motor vehicle KBN 144V and defended the suit No. MARIAKANI RMCC No. 76 of 2016. The deponent repeats that the handwritten judgment was availed to the advocates for the applicant to enable them appreciate the reasoning of the trial court to enable a decision be made to appeal or not and that by the time the insurer issued instructions time to appeal had lapsed. The affidavit however does not disclose the date the handwritten proceedings were availed, when instructions to appeal were sought and when a decision to appeal was made. To this court those were important facts to be disclosed.

4. The application was opposed by the Respondent/decreed-holder on the grounds that; the successful litigant ought not be kept away from the fruits of litigation; that no evidence has been availed to show that the Respondent would be unable to effect a refund if stay is refused and payment ordered; that no memorandum of Appeal had been exhibited to show that the appeal was arguable and that if the court was to grant stay it should be for a limited period and on terms that the full decretal sum is deposited or availed at the Respondents' reach.

5. It is clear to me that the application is one seeking extension to file an appeal out of time pursuant to the provisions of section 79G Civil Procedure Act. When the parties appeared in court on the 15/3/2017, an impression was created to court that the parties had agreed on the need to extend time for lodging the appeal but could not agree on the terms of stay. The parties before the court clearly had not agreed on any aspect of the application hence it was ordered to proceed.

6. I would have been glad if the parties recorded such a consent and left it to court to set the time of stay. However, such a consent was not forthcoming hence the application was heard as fully resisted by the Respondent.

### **Submissions by the parties**

7. In his submissions before court offered orally, Mr. Monari Advocate for the Applicant told the court that after judgment, the applicant tasked themselves with the duty to type the proceedings and judgment, had in fact had the same typed and what remained was the certification by the court. To him the time of delay was not inordinately so long as to entitle the applicants to the leave so that they get their day in court. He then added that the Respondent did not deny that the applicant is entitled to an extension of time to lodge an appeal.

8. In opposition to the application the Respondent were represented by Ms. Ombat Advocate who took the view that the application doesn't lie for failure to explain the delay and want of specifics when the judgment was requested and obtained for and equally failure demonstrate an arguable appeal and to avail security for the due performance of the decree that may be ultimately binding upon the judgment debtor. The advocate then cited the decision in ***NBI HCC Appeal No. 48 of 2015 SELESTIKA LTD VS GOLD ROCK DEVELOPMENT LOTD [2015] eKLR*** for the proposition that delay in lodging an application for stay dis-entitles an applicant to the remedy.

9. To this court both counsel did not fully discharge their duty to court to assist with determination of the matter. As it were to this court both the application and the grounds of opposition were slovenly drafted and the oral submission did not do better.

10. That notwithstanding however, the court appreciate that the dispute belongs to the parties and the advocates were merely agents of the parties for purposes of presenting their respective stand points. Less application of the counsel aside, I will address the application for what it is - Extension of time to lodge an appeal out of time.

### **Analysis and determination**

11. Every court considering a request to lodge an appeal out of time asks itself the following questions:-

**i. Which explanation has been offered for the delay?**

ii. **How long is the delay?**

iii. **Is the delay so long as to be inordinate?**

iv. **What arguable points are raised in the proposed appeal that deserve not been locked out?**

12. In asking and seeking to answer those questions the court must always be aware that the discretion vested upon it is wide and unfettered but must be exercised upon reasons and grounded on established principles of law all targeting that a dispute ought always to be determined on the merits.

### **Explanation for delay**

13. For the court to meet its mandate as a delegate of the sovereign in dispute resolution under article 159(1) of the Constitution of Kenya, 2010 the court appreciates that expeditious disposal of disputes is core hence statutory set timelines are not in vain to be taken for granted.

14. It is therefore behoves every litigant who has fallen a foul with timelines to made an explanation why the particular act was never taken within the legally set timelines. The discharge of that onus helps the court to render a decision grounded on reason for a decision based on no reasons, insufficient or imagined reasons cannot be termed judicious but may as well be seen a whimsical or just capricious.

14. In this matter the applicant says that upon the judgment being delivered it sought and was given handwritten judgment which it tasked itself to type. The purpose of the request is disclosed to have been the need to discern the reasons for the decision reached. It is not alleged nor asserted anywhere that the handwriting is illegible. There is equally no candor on when those copies were obtained, read instructions sought and given. To make the matter worse the affidavit in support is sworn by the person who was expected to give the institution and even she has made no attempt to give exactitudes in terms of dates and why it was not possible to issue the instructions in time.

16. It is now settled that without an explanation for delay the court has no basis to exercise its otherwise wide and unfettered discretion. In *Trade Bank (in liquidation) vs L.Z. Engineering Construction Ltd & Another, Nairobi Civil Appeal No. 282 of 1998*, the Court of Appeal No. 282 of 1998, the court of Appeal said:

**“We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge exercise the discretion given by Rule 4. As we have said the discretion can only be exercised upon reason not sympathy. The Applicant placed before the learned single Judge no material upon which to he could exercise his discretion”.**

17. These words apply very aptly to the matter before me here. In this matter it would appear that the counsel were more concerned with the application for stay rather than extension of time. I find that there is no explanation and therefore no pedestal upon which I may rest my exercise of discretion without being seen to act with caprice.

18. I say there is no reason for delay because what is put forth as the need to get typed proceedings is to this court no reason. An appeal to the High Court only require general grounds which if found to be insufficient upon studying the judgment may be amended with or without leave. Order 42 Rule 3. I take the view that the reason there is a leeway to amend the memorandum of appeal is to save on time known to be necessary for typing and certification of the proceedings and judgment. This may also explain the liberal approach courts take on applications to amend.

19. In any event, in the circumstances of this case, the handwritten judgment was availed and the applicant had all the time and pleasure to discern and decipher the reasons for judgment and therefore grounds of appeal. The applicant opted not to be concerned with timelines set and therefore the obligation of the court to Kenyans and hoped that leave to appeal will always be given freely. If any such

impression has been created, it must be disabused. It is the court to grant extension of time even where the Respondent offers no resistance.

**Was the delay inordinate or reasonable?**

20. There is no yard stick for establishing what amounts to inordinate delay. The test must therefore be an objective test regard being had to the circumstances of each case. The applicants herein had upto the 29/7/2016 to file the appeal. They did not. They then took upto the 13/9/2016 to draft the application and have it filed the next day. That is a period of some 44 days of inaction. No account has been offered as said before. Applying an objective mind with regard to the some five (5) handwritten pages of foolscap and the industry reasonably expected to extract the now exhibited grounds of appeal, it can only be said that the delay was unreasonable and inordinate.

**How arguable is the proposed appeal?**

21. From the memorandum of appeal exhibited, it clear that the appellants only complaint is solely on the quantum of damages assessed and awarded. That to the court would be an appeal against the exercise of discretion by the trial court an area an appellate court would sparingly venture into unless established principles are disclosed. Having taken my time to read that judgment, and even before going to the merits, I have not identified any point that present itself as arguable and that would demonstrate a denial of justice if extension is refused. No purpose would therefore be served by giving the orders sought.

22. This far I have answered the three issues in the negative with the obvious pointer that the application for extension of time lacks merit and cannot succeed.

23. There was also a prayer for stay *pending the hearing and determination of the application/intended appeal*. If the applicant intended to get stay pending the outcome of this application then the same was spent and overtaken by event the moment I heard the parties and reserved my ruling in the matter.

24. However, even if the prayer was for stay pending the intended appeal, the same would also not be sustainable now that the leave to appeal out of time has been declined.

25. For reinstatement of the law however, I may add that there is no provision known to law for granting stay of execution pending an intended appeal. Execution can only be granted pending a pending appeal and not otherwise. That is the view I took when the matter was placed before me as the duty judge and under a Certificate of Urgency when I declined to grant stay at that juncture. I wish to reiterate that there is no jurisdiction in this court to grant stay pending nothing, prior to an appeal bring filed. I have had to make this clear due to the fact that there is a prevalent practice where parties take their time and only came to court too late in the day with an omnibus application seeking extension of time and stay based on whipped emotions grounded on demonstrated imminent attachment. A Court gives orders of stay which then last for months or years and thereby keeping a decree-holder from its property in the decree. That is a practice that ought to be discouraged if it has taken any root. It is not just not fair. It delays just and thus totally undesirable.

26. In conclusion the application by Notice of Motion dated 13/9/2016 lacks merits, the same is dismissed and costs awarded for the Respondent.

**Dated** and delivered at **Mombasa** this **02nd** day of **May 2017**.

**HON. P.J.O. OTIENO**

**JUDGE**