



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 413 OF 2007**

**BARTHOLOMEW BERNARD OSODO and JACOB OTIENO**

**(suing As The Administrators of the Estate of**

**RICHARD OMONDI ODHIAMBO.....PLAINTIFF**

**-VERSUS-**

**JIMCAB SERVICES LIMITED .....DEFENDANT**

**RULING**

1. The Applicant Jim Cab Services Limited, took out a motion dated 16<sup>th</sup>, March, 2016, where it prayed for orders to wit:

1. "**THAT** this Honourable Court be pleased to certify this matter as urgent and service of the same be dispensed with the first instance.

2. **THAT** this Honourable Court be pleased to enlarge and extend the time within which the Defendant may file a Notice of Appeal against the Judgment of this Honourable Court delivered on 26<sup>th</sup> April, 2012.

3. **THAT** the Notice of Appeal dated 10<sup>th</sup> March, 2016 and filed in Court on the same day be deemed properly filed and served.

4. **THAT** there be interim Stay of Execution of this Honourable Court's Judgment delivered on 19<sup>th</sup> February, 2016 and all consequential Orders pending inter partes hearing and determination of this Application.

5. **THAT** the Honourable Court issues a Stay of Execution of this Honourable Court's Judgment delivered on 19<sup>th</sup> February, 2016 pending Appeal.

6. **THAT** cost of this Application be provided for."

2. When the matter came up for interparties hearing on 30<sup>th</sup> May, 2016, I directed that the application be disposed of by way of written submissions. Only the Applicant put in its submissions which I have considered. I have also perused the facts as deponed in the affidavit filed in support of application and those presented as the ground of opposition.

3. The Applicant averred that it is praying for the enlargement and/or extension of time within which it

may file a notice of appeal against the judgment of this court that was delivered on 19<sup>th</sup> February, 2016 and for interim orders staying the execution of the said judgment pending Appeal.

It claimed that after the delivery of the judgment the file was misplaced in its advocate's registry and tracing it wasted time that resulted in the filing of the Notice of Appeal out of time. The Applicant further asserted that it is apprehensive that the Respondent will execute the degree against it. It prayed that it be granted leave to file the Notice of Appeal dated 10<sup>th</sup> March, 2016 out of time and that the same be deemed as properly filed and served and further that orders of stay of execution to issue pending Appeal.

It argued further that should the Court allow it to file the Appeal out of time, the Respondent will not be prejudiced. It contended that on the issue of Stay of Execution, if the Court fails to issue orders of Stay of Execution, then the Appeal will be rendered nugatory. It further argued that if the decretal sum is paid to the Plaintiff/Respondent then he would not refund since he is not in a position to reimburse the same.

4. The Respondent filed its grounds of opposition opposing the Applicant's Application on the grounds that:

**1) "The applicant is guilty of laches.**

**2) The applicant has failed to disclose any valid reason for the delay in filing the notice of appeal.**

**3) In any event the applicant has filed a notice of appeal albeit, out of time.**

**4) Grounds of the intended appeal have not been stated.**

**5) The Respondents will be prejudiced if the application is granted.**

**6) The Court cannot grant a Stay of Execution at this stage.**

**7) The interest of justice will best be served by denying the application."**

5. The Application, the subject of this Ruling has been brought under Section 7 of the Appellate Jurisdiction Act, Order 22 Rule 22, Order 42, and 51 Rule 1 of the Civil Procedure Rules.

6. Section 7 of the Appellate Jurisdiction Act provides that: The High Court may extend the time for giving notice for intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.

Order 22 Rule 22 and Order 42 of the Civil Procedure Rules empower this Court to issue Orders of Stay of Execution pending Appeal. Under Order 42 Rule 6, the Applicant is required to demonstrate that he will suffer substantial loss if the order for stay is denied. The applicant must show that the application has been brought without undue delay and that he is willing to offer security that the Court deems fit."

7. Firstly, on the issue of extending time for filing an appeal out of time. It is noted that judgment was delivered on 19<sup>th</sup> February, 2016 and the Applicant filed the Notice of Appeal on 10<sup>th</sup> March, 2016 which was eighteen (18) days later. The delay of 3 days in my view is not inordinate. The Applicant has offered an explanation which I find plausible. I hereby allow the Notice of Appeal to be filed out of time.

8. Secondly, on the prayer for Stay of Execution, the Applicant avers that the Respondent may not be in a position to refund the decretal sum. The respondent did not deem it fit to respond to this assertion. I find no reason to make me disbelieve the assertion.

The Applicant in my considered view has demonstrated that he will suffer substantial loss if the order is

denied.

9. In the premises, I hereby only allow prayers 2, 3 and 5 of the Application. Costs to await the outcome of the appeal.

Dated, Signed and Delivered in open court this 9<sup>th</sup> day of September, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant.

..... for the Respondents.