



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

**AT MACHAKOS**

**MISC. CIVIL APPLICATION NO. 71 OF 2013**

**BOLPAK TRADING COMPANY LIMITED**

**GEORGE MALONZA**

**NICHOLAS MUTINDA ..... APPLICANTS**

**VERSUS**

**BENSON MASILA MUTINDA .....RESPONDENT**

**RULING**

**THE APPLICATION**

[1] By a Notice of Motion dated 14<sup>th</sup> April 2013, the applicants sought principal orders as follows:

- (a) Leave to appeal out of time.
- (b) Stay of execution of the judgment/decree pending the hearing of the appeal.

[2] The application was based on grounds set out in the Notice of Motion, the primary ones of which are that:

- (a) Delay in filing the Memorandum of Appeal was due to inadvertent delay on the part of applicant counsel who failed to diligently file the appeal upon the applicant instructions to do so;
- (b) Decretal sum is substantial and the Appeal, if successful, may be rendered nugatory, if the sum is paid out to the respondent in the meantime.
- (c) Appellant is ready to deposit the decretal sum in an interest earning account in the joint names of the advocates for the parties or to give such security as court may order.

[3] The Respondent opposed the application for extension of time to file the appeal on the grounds that the application was an afterthought and applicant had delayed in the filing and prosecution of the application for extension since it enjoyed ex parte orders for stay; that there was no evidence to support the ground of mistake of counsel in not filing the appeal on time; and that there being no valid appeal, the

order for stay should not be granted.

[4] Counsel for the parties filed written submissions and ruling was reserved.

### **ISSUES BEFORE THE COURT**

[5] The issues before the court are whether leave to appeal out of time may be granted in the circumstances of the delay and whether stay of execution pending appeal will be granted.

### **DETERMINATION**

#### **Leave to appeal out of time**

[6] The Court has power to enlarge time under Order 50 rule 6 of the Civil Procedure Rules which is in the following terms:

*“6. 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:*

*Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”*

[7] The Judgment in Tawa PMCC NO. 162 of 2010, which is sought to be appealed from was delivered on the 28<sup>th</sup> February 2013 with an order for stay of execution for 30 days. The application for leave to appeal out of time was filed on 18<sup>th</sup> April 2013, attaching thereto by the supporting affidavit a draft memorandum of appeal.

[8] The appellant sought leave of court to appeal only about one and half months after delivery of Judgment. Section 79G of the Civil Procedure Act requires that appeals shall be filed within 30 days as follows:

#### ***“79G. Time for filing appeals from subordinate courts***

*Every appeal from a subordinate court to the High Court shall be filed within a period of **thirty days from the date of the decree or order appealed against**, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:*

***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”***

[9] It may be convenient for an applicant who is late in filing an appeal to file the Memorandum of Appeal and subsequently seek an order for admission of the appeal out of time in terms of the Proviso to section 79G of the Civil Procedure Act, but I do not agree that an enlargement of time to file an appeal cannot be granted where the applicant seeks leave without having filed the Memorandum of appeal in advance. The provision that ‘**appeal may be admitted out of time**’ must include an appeal which is filed after a successful application for leave to appeal out of time.

[10] The applicant was required to file an appeal within 30 days from the date of judgment on the 28<sup>th</sup> February 2013. In seeking extension of time to file an appeal less than 20 days from the expiry of period of 30 days, the applicant cannot be taken to have been guilty of inordinate delay and the explanation that the delay was occasioned by the inadvertent delay by Counsel is not inconceivable. The want of proof of instructions to appeal allegedly given by the applicant to Counsel is not fatal as not every instruction

between counsel and a party is given in writing; suffice that it is deponed to by a representative of the applicant in the supporting affidavit. The applicant is not to blame for the delayed hearing of the application by the Court. The Court record indicates that the court itself was unable to grant adjourned hearing dates sometimes for up to 4 months as follows: the record shows that the matter came up before the court on diverse dates on 19/6/13, 7/5/14, 22/7/14, 11/11/14, 23/2/15, 25/5/15 and 12/10/15 when the ruling date for 3/12/15 was given.

### **Stay of execution/proceedings**

[11] The principles for the grant by the High Court of stay of execution and or proceedings are well known. Order 42 rule 6 of the Civil Procedure Rules requires that -

- (a) The application be brought without undue delay;**
- (b) Substantial loss be shown, if stay is not granted; and**
- (c) Security for due performance be provided.**

In addition, courts have sought to see that the intended appeal has an arguable case for presentation to the appellate court and that, if the stay is not granted, the appeal would be rendered nugatory.

[12] In seeking to show arguability of the appeal, or as it sometimes called chances of success, the applicant by its Memorandum of Appeal attached to the application for extension of time to appeal avers that

*“The Learned Magistrate erred in law and in fact by holding that the driver of the suit motor vehicle was to blame on the ground that the suit motor vehicle was reversing contrary to the evidence of DW2 PC Ngano illustrating the circumstances leading to the accident.”*

[13] The appellate court has jurisdiction to review the evidence of the trial court and make its own conclusion on the facts of the case. See the Court of Appeal for Eastern Africa in ***Peters v. Sunday Post Limited*** (1958) EA 424, that –

*“Whilst an appellate court **has jurisdiction to review the evidence** and to determine the whether conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or **if it shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved**, or has plainly gone wrong, the appellate court will not hesitate so to decide.”*

Without prejudging the matter, I do not consider that the point taken in the Memorandum of appeal is without merit.

[14] The applicant has offered to provide security and to deposit the decretal amount in an interest earning joint account in the names of counsel for the parties.

### **CONCLUSION**

[15] Having found that the applications for leave to file appeal out of time and for stay of execution pending appeal were made without inordinate delay and that the applicant has an arguable case on the facts of the case and the applicant will provide security for the due performance of the decree of the court as may eventually become binding on the applicant, the court will grant the application for leave of court to appeal out of time and for an order of stay pending hearing and determination of the appeal.

[16] In exercise of discretion under section 27 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules, the court will award costs of the application to the respondent.

## **ORDERS**

[17] Accordingly, for reasons set out above, the Court makes the following Orders on the Notice of Motion dated 14<sup>th</sup> April 2013:

- (a) Orders in terms of Prayers Nos. 2, 3 and 5 of the Notice of Motion are granted.
- (b) The Memorandum of Appeal shall be filed and served within the next 14 days.
- (c) The applicants shall deposit the decretal sum in an interest earning bank account in the joint names of the counsel for the applicant and the respondent within 14 days.
- (d) In default of (c) above, the grant of stay of execution pending appeal will lapse.

[18] In accordance with the Proviso to Rule 6 of Order 50 set out above, the costs of this application will be paid by the applicant to the respondent.

**DATED AND DELIVERED THIS 3<sup>RD</sup> DAY OF DECEMBER 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

Mrs. Omulupi for Ms. Kavita for the Applicants

Miss Ombega for Wambua Kilonzo for the Respondent

Ms. Doreen- Court Assistant.