



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
MISC. APPL. NO.122 OF 2011

LEORNARD OCHANA1ST RESPONDENT

MOSES OPILI2ND RESPONDENT

VRS

CORNEL OBARA.....APPLICANT

RULING

1. Before me is a Motion on Notice dated 15th September, 2011. It is brought under Sections 79 G and 95 of the Civil Procedure Act and Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. The Applicant seeks extension of time within which to file and serve an appeal against the Judgment and decree issued in BGM CMCC NO.137 of 2009 on 28th July, 2011. He also seeks that the Memorandum of Appeal annexed to the application be deemed properly filed and served. In addition, there is a prayer for stay of execution of that judgment pending the hearing and determination of the intended appeal.

2. The application was supported by the Affidavit of Cornel Obara, the Applicant sworn on 28th September, 2011. It was contended that the judgment sought to be appealed against was initially fixed for delivery on 30th June, 2011 but was not delivered; that it was then delivered on 28th July, 2011 without notice to either the Applicant or his Advocates; that he only discovered that delivery quite late and that the last date for lodging the appeal against that judgment was 28th August, 2011. It was further contended that the appeal has high chances of succeeding and a Memorandum of Appeal was annexed to the Affidavit to support that fact. Finally the Applicant contended that he should be granted a stay as he might suffer irreparable harm if the stay is not granted.

3. Counsel for the Applicant filed written submissions. It was submitted that the Applicant had satisfied the four principles applicable for extension of time; that is, that the Respondent will not suffer any prejudice if the orders sought were granted. That the Applicant would suffer irreparably if the stay was not granted and that the Applicant was willing to abide by any condition that may be set for the due performance of the decree. Counsel urged that the application be allowed.

4. The application was opposed through a Replying Affidavit sworn by Leonard Ochana on 13th October, 2011. He contended that the Applicant's Advocate knew of the date of delivery of the judgment; that the Applicant had not demonstrated the effort he had made to find out if the judgment had been delivered; that the application did not satisfy the provisions of Order 42 Rule 6 of the Civil Procedure

Rules. Finally, it was contended that the appeal did not have any chances of success. No submissions were filed on behalf of the Respondent. It was urged that the application be dismissed.

5. The principles applicable for an application for extension of time are, the length of the delay, the chances of success of the pleading sought to be introduced in this case, the appeal and the prejudice to be suffered by the other party. On the length of delay, judgment was delivered on 28/7/2011. The last day for filing the appeal was 27/8/2011. The present application was made on 29th September, 2011, approximately 30 days later. Thirty (30) days delay to file an appeal is in my view is in-ordinate having in mind that 30 days are already allowed by law from the date of judgment. In this regard, there was inordinate delay in bring the application.

6. Has the delay been explained? The Applicant has stated that the judgment was originally meant to be delivered on 30th June, 2011 but was not delivered. That it was delivered on a different date without notice to either the Applicant or his Advocate.

7. Order 21 Rule 1 of the Civil Procedure Rules provides that:-

*“1) In suits where a hearing is necessary the Court, after, the case has been heard, shall pronounce judgment in court, either at once or within sixty days from the conclusion of the trial **notice of which shall be given to the parties or their Advocates.**”*

There is no evidence that any such notice was given to the Appellant or his Advocates. The contention by the Respondent that the Appellant's Advocates were aware of the Judgment dated of 28/07/2011 is without basis as there was nothing that was produced to show that fact. Accordingly, I am of the view that the delay had been explained as instructions had to be taken and the preparation for the application.

8. As regards the Appeal having chances of success, I would rather not comment on the same as I am not hearing the same. But a cursory look at the grounds set out in the Memorandum of Appeal reveals that there may be serious issues to be canvassed on appeal.

9. As to prejudice, I do not see any prejudice that may be suffered by the Respondent if the orders sought were granted. If there was any such prejudice, the same was not disclosed by the Respondent. In any event, I believe that an order for costs will be adequate to compensate the Respondent.

10. As regards the prayer for stay of execution pending appeal, the principles for granting such an order are well settled in Order 42 Rule 6 (1) and (2). These are that; the application must be made timeously; the Applicant must show that he will suffer substantial loss if a stay is not granted, and that, security for the due performance of the order or decree should be given by the Applicant.

11. In the instant case, the Applicant has not shown what substantial loss he will suffer if the stay is not granted. This is a money decree. The decree is for Kshs.30,000/= only. It was not alleged or shown by the Applicant that the Respondent is a man of straw who cannot refund the same if the appeal succeeds. Consequently, I do not think the appeal, if successful, will be rendered nugatory.

12. Although the application was brought without unreasonable delay, the Applicant did not give any security for the due performance of the decree. The readiness to give security was only mentioned in the submissions of counsel and not in the affidavit of the Applicant. I believe that such a statement should fall from the lips of an Applicant by way of an averment in the affidavit and must show what constitutes such security and not from his Advocate. That being the case, I hold that no security was given by the Applicant in terms of Order 42 Rule 6 (2) of the Civil Procedure Rules..

13. In this regard, I do not think the Applicant has satisfied this Court that he is deserving an order for stay.

14. Accordingly, I allow the application on the following terms:-

a) The time for filing an appeal against the Judgment made on 28/7/2011 in BGM CM CC NO.137 of 2009 is extended for 30 days from today.

b) The Applicant to file and serve a Memorandum of Appeal within 30 days of today.

c) The prayer for stay of execution is hereby disallowed.

d) Each party is to bear his own costs considering the circumstances under which the application was made.

It is so ordered.

DATED and DELIVERED at Bungoma this 12th day of May, 2014.

A. MABEYA

JUDGE