



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

**AT MOMBASA**

**CIVIL APPEAL NO. 75 OF 2014**

**ASMA ALI MOHAMED ..... APPELLANT/APPLICANT**

**V E R S U S**

**FATIME MWINYI JUMA .....RESPONDENT**

*(Being an appeal from the Judgment of the Hon. V. Kachuodho "C RM at Mombasa in Chief Magistrate Civil Suit No. 1171 of 2012 delivered on 12th May 2014)*

**RULING**

1. Before me for consideration is Notice of Motion dated 3rd July 2013. The same is filed by the Appellant. Appellant seeks the following prayers-

- **Leave be granted to the Appellant to file the appeal out of time.**
- **In the alternative, the Memorandum of Appeal filed on 12th**

**June 2014 be deemed to have been filed within time.**

- **There be a stay of the judgment and or orders of the Court**

**made on 12th May 2014 pending the hearing and**

**determination of the appeal.**

2. Appellant relies on the grounds that judgment was entered against her before the Magistrate Court in **CMCC NO. 1171 of 2012; that she** was not informed of the entry of that judgment on 12th May 2014 by his former Advocate; that she became aware of that judgment when she went to make inquiries from her former Advocate and she was handed a demand letter dated 27th May 2014 which had been sent by the Respondent's Counsel; that her appeal has high chances of success, and it is fair and just in the circumstances to grant her leave to file her appeal out of time; and that if stay of execution is not granted she will suffer substantial loss because she is not in a position to settle the money decree of the Magistrate's Court.

3. Respondent opposed the application by relying on one basic ground of opposition that the Application is defective. In respect to that ground Respondent submitted that the application was incurably defective and an abuse of Court process because the prayers thereof could not be granted simultaneously. That for there to be a stay of execution there had to be a valid appeal which was

not the case here because Appellants Memorandum was filed one day out of time. Respondent also submitted that stay cannot be granted without Appellant offering security for the due performance of the decree.

4. Section 79G of the Civil Procedure Act Cap 21 provides-

**“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.”**

5. It is clear Appellant's appeal was filed one day late of the thirty (30) days provided in that Section. Respondent did not oppose the prayer for leave to file the appeal out of time. However, Respondent's stand was that leave could not be granted simultaneously with order for stay of execution pending appeal.
6. Justice M. J. Anyara Emukule in the case GERALD M'LIMBINE -Vs- JOSEPH KANGANGI [2009]eKLR was confronted with an application for leave to file an appeal out of time. His holding which I wholly adopt was as follows-

**“My understanding of the proviso to Section 79G is that an Applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek the Court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the Court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the Court's process which under Section 79B says ....”**

7. That holding which I wholly adopt was to the effect that when a

party wishes to obtain leave to file an appeal out of time such a party must file the appeal and as provided in the proviso of Section 79G, then must seek leave to admit that appeal out of time. Appellant here has done that. She filed her appeal and seeks leave for it to be admitted out of time. She gives credible and sufficient reason why she delayed with one day in filing her appeal. The reason she gave was that her former Advocate failed to inform her of the entry of the Magistrate's judgment. She is to be credited with being a diligent Litigant because she did not just wait for her former Advocate to inform her, she went to that Advocates office and that was when she was given the letter of demand of the decretal sum. It is for that reason that this Court, shall, in exercise of its discretion grant her leave to file her appeal out of time.

8. In my view Appellant did not err in seeking prayer for leave to file appeal out of time in conjunction with prayer for stay of execution pending appeal bearing in mind the holding in GERALD M'LIMBINE -Vs- JOSEPH KANGANGI (supra). Respondent failed to file a Replying Affidavit and therefore did not respond to the factual statement Appellant relied upon in support of her prayers. Appellant in support of her prayers stated that she will suffer substantial loss if execution is not stayed since she was not in a position to pay the decretal sum of Kshs. 590,925.00. That statement not being responded to by facts by Respondent will be accepted by this Court as being sufficient for stay of execution to be granted. I am aware Respondent relied on Rules of Procedure in opposition, but in this case I wish to state that the Court will look and see where the justice lies. In that regard I am guided by the Court of Appeal decision in the case NICHOLAS KIPTOO ARAP KORIR SALAT -Vs- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013]eKLR where it was stated-

**“Deviations from and lapses in form and procedures which do not go to the jurisdiction**

of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

9. In conclusion therefore I grant the following orders-

a. Appellant is granted leave to file an appeal against the decision of Mbsa CMCC No. 1171 of 2012 of 12th May 2014. To that end the Memorandum filed by Appellant on 3rd June 2014 is deemed as though filed with the leave of the Court.

b. Appellant is granted stay of execution of the judgment in

Mbsa CMCC No. 1171 of 2012 pending the hearing and determination of this appeal.

c. The costs of Notice of Motion dated 3rd July 2014 shall abide the outcome of this appeal.

DATED and DELIVERED at MOMBASA this 6<sup>TH</sup> day of NOVEMBER, 2014.

MARY KASANGO

JUDGE