



**REPUBLIC OF KENYA**

**High Court at Garissa**

**Civil Appeal 4 of 2012**

MOHAMED MOHAMUD KASSIM.....APPLICANT

VERSUS

MOHAMED ADEN ALI.....1<sup>ST</sup> RESPONDENT

IBRAHIM ADON DIIS.....2<sup>ND</sup> REPENDENT

ABDULLAHI KHALIF.....3<sup>RD</sup> RESPONDENT

**RULING**

1. This ruling is in respect of two applications. The first application was filed on 27<sup>th</sup> June 2012 and is dated the same date. It is brought by Mohamed Mohamud Kassim under certificate of urgency and it seeks leave to file notice of appeal out of time and stay of execution of the judgement and decree of the court pending hearing and determination of the application and subsequently pending hearing and determination of appeal. It brought under Order 40 Rules 1, 2 and 3, Order 50 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The grounds in support are found on the face of the application and in the supporting affidavit. Briefly the applicant is saying that the 30 day period within which to file petition of appeal expired on 5<sup>th</sup> July 2012 and the applicant fears that the respondents are likely to withdraw and spend the decretal sum currently being held in an interest earning account in Kenya Commercial Bank, Garissa; that the delay in getting proceedings from the court; that the court has not issued decree to enable the applicant to file the notice of appeal and that the respondents will not suffer any prejudice.

2. Further grounds in support are that the applicant applied for proceedings and paid for them which he needed to study before lodging the appeal but there was delay in supplying the proceedings and that there was no delay in filing the application; that the applicant was not able to get a date for hearing immediately the application was filed.

3. In response the respondents state that there is nothing capable of being stayed since there is no taxed bill of costs; that the grounds relied on are not sound in law since section 74 (5) of the Appellate Jurisdiction Act allows filing of notice of appeal within 14 days while waiting for the decree which was not done; that no security of costs have been furnished; that the respondents are entitled to security of costs.

4. The applicant seems to blame the court as having contributed to the delay in getting the proceedings and in getting an early hearing date for this application. The record shows that on 5<sup>th</sup> June 2012 when the judgement was read, the applicant applied for proceedings and stay of execution for a period of 30 days which was granted by the court. The record further shows that the application under certificate of urgency

was filed on 27<sup>th</sup> June 2012. Upon directions by the judge on 2<sup>nd</sup> July 2012 to give the applicant a hearing date on a convenient day no date seems to have been taken by the applicant until 19<sup>th</sup> July 2012 and the date taken was 8<sup>th</sup> October 2012. On that date these two applications were heard.

5. Without wasting much time the law is clear on issues of filing notices of appeal. Section 74 (5) of the Appellant Jurisdiction Act provides that it shall not be necessary that a decree or order be extracted before lodging the notice of appeal. The applicant decided to wait for proceedings and as a result time lapsed. I wish to state that the court allowed the applicant to get proceedings and for the information of the applicant the Judgement of the court was already typed and the proceedings are typed every time the file goes back to the registry. If there were proceedings that were not typed by the date of judgement it would not have taken a day to finalize them. The delay therefore cannot be attributed to delay in getting typed proceedings. There was nothing to stop the applicant in lodging the notice of appeal as per section 74 (5) above. While this court is of the view that the applicant has a right of appeal, it is my finding that the applicant delayed filing the notice of appeal unnecessarily when the law allows him to lodge it even before the decree has been drawn. However this court will exercise its discretion and allow the applicant to file the notice of appeal out of time.

6. On the issue of stay of execution pending appeal the law is settled that an applicant must establish that

- i. Substantial loss may result to him unless the order is made
- ii. That the application has been made without unreasonable delay and
- iii. The applicant must furnish security of costs

The applicant has not demonstrated that he will suffer substantial loss if the order for stay is not granted. There has also been some delay in bringing this application which the applicant seems to blame on the court but which in my view is attributable to him in not pursuing an early date as directed by the court. It is not explained why it took him from 2<sup>nd</sup> July 2012 when the court directed that his matter be given a date to 19<sup>th</sup> July when the date was taken at the Registry, was it a case of waiting for the proceedings? Lastly the applicant has not furnished security of costs. In view of this I decline to allow stay of execution pending hearing and determination of the intended appeal.

7. The second application under consideration is the one by the three respondents now turned into applicants against the respondent and interested party. It is dated 20<sup>th</sup> September 2012 and is brought under Order 51 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. It seeks release of Kshs 554,419 held in Account No. 099150130679 at Kenya Commercial Bank, Garissa Branch together with interest thereon to the applicants and closure of that account. It also seeks orders to have the respondent and the interested party to execute withdrawal forms to facilitate release of the said money within seven days of this order and in default the Deputy Registrar be ordered to execute the same in lieu of the respondent and interested party; further orders as the court may deem fit and costs of the application.

8. The grounds in support of the application are contained on the face of the application and in the supporting affidavit that the decretal amount in the sum of Kshs 554,419 was deposited in an interest earning joint account between the firms of Ibrahim, Issack & Co. Advocates and Odero Osiemo & Co. Advocates to await the outcome of the appellant's application to appeal out of time; that the application was allowed and the appeal was allowed; that the applicants wrote to the respondent's counsel on 3<sup>rd</sup> August 2012 seeking to know whether their client was willing and ready to execute the requisite withdrawal forms to have the money released but the respondent has failed, neglected and/or refused to respond to the request; that one of the signatories Mr. Ahmed Issack has confirmed his willingness to execute the necessary documents to have the money released; that the applicants will not be required to deposit any money in the event of an appeal but instead it will be the respondent who will be required to deposit security for costs.

9. In opposing the application for release of funds, learned counsel for the respondent relied on the grounds contained in the replying affidavit sworn by the respondent on 4<sup>th</sup> October 2012 and on oral submissions that he is not the signatory to the account in question; that the respondent will be greatly prejudiced if this application is allowed; that the applicants will not suffer any prejudice pending the finalization of the appeal; that the issue of security for costs is a matter for the court's discretion; that the applicants never furnished security for costs but were paying the decretal sum after the court ordered them to pay.

10. I have considered the application, the rival grounds and submissions of both sides. It is not in dispute that there exists an interest earning account No. 099150130679 with Kenya Commercial Bank Garissa with Kshs 554,419. The issue of signatories to that account seems to be disputed. This court takes judicial notice of the fact banks hold documents showing signatories to accounts and in this case there no exception. The money was deposited as decretal sum in respect of the case in the lower court. However the applicants have appealed and the appeal has been allowed. The automatic consequence of allowing the appeal is that the funds be released to the applicants. The funds were not deposited by order of this court and in my view it would be baseless to decline to order for the release of the funds once the appeal has been successful. After due consideration of the issues before me it is my finding that I am not persuaded by the respondent to decline to allow this application. I therefore allow the application dated 20<sup>th</sup> September 2012 specifically prayers 1, 2 and 4. I wish to clarify that the signatories to that account are ordered to execute all the necessary documents to facilitate release of Kshs 554,419 with interest there on. This should be done within 14 days of today's date and in default the Deputy Registrar of this court is ordered to execute such documents as prayed in prayer 2 of this application.

11. The upshot of the applications under consideration is that leave is granted to file notice of appeal out of time; that stay of execution of the judgement of this court delivered on 5<sup>th</sup> June 2012 and the decree of the same judgement pending hearing and determination of the intended appeal is denied and the application dated 20<sup>th</sup> September 2012 is allowed in terms specified in this ruling above. Each party will bear its own costs in the two applications under consideration. Those are the orders of this court.

**Stella N. Mutuku, Judge**

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Dated, signed and delivered this 5<sup>th</sup> November 2012.