



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**CIVIL SUIT NO. 29 OF 2011**

**JAMES CHUMO .....PLAINTIFF/RESPONDENT**

**VERSUS**

**ZABLON KIPLANGAT CHUMO .....DEFENDANT/APPLICANT**

**RULING**

**Introduction**

1. This Ruling is in respect of the Defendant/Applicant's application dated 6<sup>th</sup> July 2018. The said application which is brought pursuant to Order 50 rule 6 of the Civil Procedure Rules, section 3A and section 95 of the Civil Procedure Act seeks that the applicant be granted leave to file an appeal out of time against the judgment delivered on 26.5.2014 and that there be a stay of the decree issued on 26.5. 2014.
2. The application is premised on the grounds that the applicant is dissatisfied with the judgment delivered on 26.5.2014. The applicant further states that he instructed his former advocate to appeal against the said judgment but instead the said advocate applied for review of the judgment. The application for review was dismissed on 3.5.2018. The application is based on the defendant's affidavit sworn on the 6.7.18 in which he restates the reasons for the delay in filing the appeal stated in his grounds.
3. The application is opposed by the Plaintiff/Respondent through his Replying Affidavit sworn on the 16.7.2018.
4. The application was canvassed by way of written submissions and counsel for both parties filed their submissions.

**Issues for Determination**

5. I have carefully considered the application, rival affidavits and submissions and the following issues arise for determination;
  - i) Whether the applicant ought to be granted leave to file an appeal out of time.
  - ii) Whether the applicant ought to be granted a stay of execution of the decree dated 26.5.2014.
  - iii) Who should bear the costs of this application?

**Analysis and Determination**

6. The court has a wide discretion to extend time as long as such power is exercised judicially.
7. In the case of **Aviation Cargo Support Limited V St. Mark Freight Services Limited (2014) eKLR** the Court of Appeal in determining an application for leave to file and serve a record of appeal out of time stated as follows:

*“The order whether or not to grant extension of time to file and serve the record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merits. For the court to exercise its discretion in favour of an applicant the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate, the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable.*

*In the normal vicissitudes of life deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to these facts. When this happens, the reasons why this occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time”*

8. The principles that the court must consider in order to grant an application for stay of execution pending appeal are set out in the case of **Global Tours and Travels Limited Nairobi Winding Up Cause No. 43 of 2000** cited in **Kenya Power & Lighting Company Ltd V Esther Wanjiru Wokabi 2014 eKLR** where Ringera J (as he then was) stated as follows:

*“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.*

9. The court must therefore consider the following principles

- a) Whether the application was filed without undue delay
- b) Whether the applicant has established that he has an arguable appeal
- c) Whether the applicant has established sufficient cause that it is in the interest of justice to grant the orders sought.
- d) Whether the applicant is willing to furnish security for costs.

10. In the instant case the applicant’s failure to promptly file the appeal has been attributed to the fact that he instructed his former advocate to file an appeal but instead the said advocate filed an application for review of the judgment. I note from the record that the said application was only filed on 18<sup>th</sup> December 2017 which is more than three years from the time the judgment was delivered. If it is true that the applicant had instructed his former advocate to file an appeal, when were these instructions given? Three years after the judgment? I am not convinced that this reason is genuine.

11. The applicant has also stated in his affidavit that he could not file the appeal after he realized that his advocate had applied for review and he had to wait for the ruling on the said application. This argument is also not plausible as nothing stopped him from withdrawing the application for review in order to file an appeal, if that was his original intention. In any event, the ruling on the application for review was delivered on 3.5.2018. Why did the applicant not file the application for leave to appeal out of time immediately?

12. I am not at all persuaded by the explanation given by the applicant for the inordinate delay in filing the present application. Even though he has tried to blame his former advocate, I find his own conduct inexcusable.

13. Be that as it may, the applicant has not demonstrated that he has made any attempt to apply for a certified copy of the proceedings; a critical step in preparing for an appeal. He has also not filed a Memorandum of Appeal and sought that it be admitted out of time to demonstrate his seriousness in appealing. See the case of **Kulwant Singh Roopra v James NziliMaswili (2014)eKLR**.

14. I agree with counsel for the Respondent that that the application is an abuse the process of the court as no sufficient cause has been shown for the failure to file the appeal in time.

15. Based on my finding above, there would be no reason to grant a stay of execution. In any event this request is coming rather late in the day, four years after the decree was issued, without demonstrating sufficient cause.

16. The upshot is that I am disinclined to exercise my discretion in favour of the applicant as I find no merit in his application. The same is therefore dismissed with costs to the applicant.

Dated, signed and delivered at Kericho this 24<sup>th</sup> day of October 2018.

J.M ONYANGO

JUDGE.

**In the presence of;**

Mr. Omao for the Applicant

Miss Sitati for the Respondent

Court Assistant: Mr. Rotich