



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

MISC NO 14 OF 2017

DONALD MWACHOFI.....APPLICANT/INTENDED APPELLANT

RUTH SAMBO SHUMA

(Suing as the administrator of the estate of

ELIAS SHUMA MWAKIRETI)(DECEASED).....RESPONDENT

RULING

1. By a Notice of Motion application dated 23rd February 2017 and brought under Section 79G, 95 and 3A of the Civil Procedure Act, Order 50 Rule 6 and Order 22 Rule 25 of the Civil Procedure Rules, the Applicant is seeking for orders:

- 1) **THAT this application be certified urgent and be heard in the first instance in view of its urgent nature.**
- 2) **THAT the Applicant be given leave to file his appeal out of time.**
- 3) **THAT the Honourable Court do enlarge time within which the Appeal is filed and served on the Respondent.**
- 4) **THAT in the event the leave is granted and time enlarged as prayed hereinabove, the Memorandum of Appeal annexed herein be deemed as having been properly filed and served on the Respondent.**
- 5) **THAT the Honourable Court be pleased to order stay of execution of the whole of the judgment of Honourable S. M. Wahome, Senior Principal Magistrate made on the 22/4/2015 in Voi Civil case No.80 of 2015.**
- 6) **THAT the costs of this application be provided for.**

2. The Application is based on the grounds on the face of the Notice of Motion and is supported by the Affidavit of Donald Maganga Mwachofi, the Applicant sworn on 23rd February 2017 and a further Affidavit sworn on 17th March 2017. Briefly, the Applicant's Advocate then on record sought for an adjournment through another Advocate when the case came up for further defence hearing on 30th March 2015 on the ground that the Advocate was expectant and could not travel for the case. The Court declined to grant the Application for adjournment and directed parties to file their submissions by 13th April, 2015 and fixed the matter for delivery of judgment on 20th April 2015. The Applicant then filed **Mombasa High Court Civil Appeal No.6 of 2015** and sought and was granted, by the Court (Mureithi J) an order of stay of execution of the judgment in **Voi SRMCC No.80 of 2015** on terms pending hearing and determination of the Appeal. The Applicant was directed to file an Appeal against the refusal for adjournment as **Civil Appeal No.6A of 2015** and the Appeal against the judgment as **Civil Appeal No.6B of 2015**. It is the Applicant's contention that his Advocate misunderstood the ruling by Mureithi, J to file a Memorandum of Appeal as against the whole judgment to mean leave to appeal out of time had been allowed. The two appeals were set down for hearing wherein it was given a new number, being **Mombasa ELC Appeal no.277 of 2016** which was however struck out by Omollo, J on 21st February 2017 as it was filed out of time. The Applicant then filed this Application. The Applicant has deposed that he has meritorious appeal with high chances of success and the mistake of Counsel not to file the appeal in time should not be visited on him.

3. The Application is opposed by the Respondent who filed a Replying Affidavit sworn by herself on 7th March 2017 in which it is deponed *inter alia* that the Application lacks merit as no explanation has been given for the delay from 20th April 2015 when judgment was delivered to 23rd February 2017 when this Application was filed. The Respondent deposed that the Application is incompetent and gross abuse of the process of Court and should be dismissed with costs.

4. I have duly considered the Application, the Affidavits on record, and the submissions by both Counsels for the Applicant and the Respondent. Section 79G of the Civil Procedure Act provides as follows:

“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.”

Section 95 of the same Act provides that *“where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”*

5. The relief sought is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, leave should only be granted where sufficient cause has been shown by the Applicant to the satisfaction of the Court.

6. From the record, the orders the Applicant seeks leave to appeal against were made on 30th March 2015 and 22nd April 2015. The record also shows that the Applicant filed **Mombasa High Court Civil Appeal No.6 Of 2015** and vide a Notice of Motion Application dated 7th April 2015 and filed in Court on 8th April 2015, the Applicant sought, *inter alia*, to be granted leave to appeal against the whole of the proceedings/rulings/orders of Hon. S. M. Wahome – SPM made on 30th March 2015 in **Voi SPMCC No.80 of 2013**. The Applicant also wanted the Memorandum of Appeal annexed to the said application to be deemed filed and served. In its ruling dated 31st July 2015, the Court (Mureithi, J) stated from paragraph 3 thereof as follows:

“(3) The application for stay of proceedings which also sought leave to appeal was argued and ruling reserved. However, before the ruling was delivered by this Court, Counsel for the Respondent informed the Court that the trial Court had gone ahead and delivered its judgment in the matter on 22nd April 2015 in the absence of the parties and it was therefore contended that the Application for stay of proceedings pending appeal from the refusal of the adjournment had been overtaken by events.

(4) The matter was adjourned for Counsel for the Appellant to confirm the delivery of the judgment to take further steps as she may be instructed by the Appellant.

(5) The Appellant subsequently filed the Notice of Motion of 29th April 2015 to which the Counsel for the Respondent filed grounds of opposition dated 3rd June 2015. Upon it being pointed out by the Court that there was no appeal from the judgment but only from the refusal of adjournment before judgment was delivered, the Appellant filed a Memorandum of Appeal dated 9th July 2015.”

7. After hearing both the Counsel for the Applicant and the Respondent, the

Court made the following orders:

“21 The Court having found that the Appellant’s appeal has an arguable case or serious questions to be put before the Appellate Court, the Memorandum of Appeal may in the interests of justice that a meritorious appeal be heard notwithstanding an irregularity as to its registration in the Court register, properly be filed as Civil Appeal No..6B of 2015, with earlier appeal against the refusal for adjournment becoming Civil Appeal No.6A of 2015, and it is so ordered.

22. There shall be a stay of execution of the judgment of the senior Principal Magistrate’s Court at Voi in Civil Case No.80 of 2015 pending the hearing and determination of the Appeal herein.

23. The stay of execution pending appeal is granted on condition that the Appellant gives security for the due performance of such decree as may ultimately be binding on him by giving to Court within the next seven (7) days an undertaking in writing and on oath made by the Appellant to vacate the suit property within 30 days of an order for possession that may be made by the Appellate Court or by the trial Court upon dismissal of the appeal.

24. The prayers in the Notice of Motion for the setting aside of the judgment of the trial Court will be determined upon hearing of the Appeal and the costs of the Application will costs in the appeal.”

8. The appeal, which was subsequently given a new number as **Mombasa ELC Appeal no.277 of 2016** was heard by the Court (Omollo, J) and the Respondent submitted that the appeal was incompetent. In its judgment dated 21st February 2017, the Court noted at page 8 that the judgment in the subordinate Court was delivered on 22nd April 2015 and the Memorandum of Appeal was filed in Court on 10th July 2015. The Court observed that there was nothing on the record filed seeking for extension of time to file the appeal out of time. The Court further stated that in the record of appeal, it had not seen a certificate issued by the Lower Court to say there was delay in preparing the decree or order and added that the Appellant did not render submissions about this probably assuming the appeal was regularly before the Court. The Court found that the Appeal was incompetent as it was filed more than two months after the judgment was read and without leave of the Court and went ahead and struck out the appeal on that account. The Applicant then filed the present application.

9. I have considered that the present application does not seek review or setting aside of the decision to strike out the appeal but to restart the appeal process all over again. I would wish to borrow and rephrase the words of the Court of Appeal (Otieno-Odiek JA) in the case of **George Wachira Kirira –v- Joe Maina Ruthuti (2013)eKLR** and pose the question that if I were to grant leave in the present application, would I be overturning the decision of my learned sister (Omollo, J) who by her *“judicious decision ended the litigation in this matter? Is the applicant using the present application asking the Court to review or sit on appeal against the orders of the Court in ELC Appeal*

No.277 of 2016? It is my considered view that there is no provision in law granting me jurisdiction to overturn or set aside orders made by another judge of concurrent jurisdiction. As already stated, this application does not seek review or setting aside of the decision to strike out the appeal in ELC Appeal 277 of 2016 but to restart the appeal process all over again. As was stated in the said Court of Appeal decision, "it is trite law that a party whose appeal has been struck out as incompetent has the liberty and right to restart the appellate process. It is however also true that he is obliged to explain his failure to take certain essential steps in the struck out appeal, if only to enable the Court assess his general conduct."

10. In the present application, the applicant is inviting the Court to exercise its judicial discretion in his favour and he is obliged to demonstrate utmost candor and good faith. The Applicant explained that leave to appeal out of time was not filed in time because his Advocate believed the appeal was properly on record. It is the applicant's contention that he should not be blamed for the mistake of his erstwhile Counsel. The Applicant has not demonstrated when the mistake was occasioned and taking into account that this application is being made after the appeal has been argued and struck out.

11. In my view, no satisfactory explanation has been given for the delay from April 2015 up to February 2017, a period of over 22 months. The Application in my view is an afterthought the same having been filed only after the Applicant's appeal was struck out. In the final analysis, I am inclined to find that the Notice of Motion dated 23rd February 2017 has no merit and it is therefore dismissed with costs.

Ruling dated, signed and delivered at Mombasa this 16th day of November 2017

C. YANO

JUDGE