



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO NAI 163 OF 2015

BETWEEN

THE ATTORNEY GENERAL.....1ST APPLICANT

THE CHIEF LANDS REGISTRAR.....2ND APPLICANT

AND

KONGOACHEKE ENTERPRISES LIMITED.....1ST RESPONDENT

JOSEPH TOMATE MAINOYA ALIAS JOSEPH TUMATE MAINOYA.....2ND RESPONDENT

(an application to extend time to file and serve a notice of appeal out of time in an intended appeal from the judgment of the High Court of Kenya at Machakos (Kariuki, J.)

in

Civil Case No 245 of 2012)

RULING

The decision subject of this application was delivered on 8th May 2015. The applicants are aggrieved by that decision and now intend to appeal against it. Rule 75(2) of this Court’s rules requires that any party aggrieved with the decision of a superior court must lodge a notice of appeal against that decision within fourteen days. That was not done here as the notice of appeal was eventually filed and served on 15th June 2015.

The applicants have now approached this Court for an order to enlarge time under rule 75(2) of the Court of Appeal Rules, so that that notice of appeal be deemed duly filed and properly on record. The main ground upon which this application is predicated is that the applicants did not have sufficient notice of delivery of the judgment as they were served with the notice on 7th May 2015.

The applicants also seek an order of stay of execution against the judgment of the High Court on the grounds that it has an arguable appeal, that the orders given in favour of the respondent were undeserved, and that the High Court ignored crucial information in making its decision.

Mr. Mugambi, learned counsel for the 1st respondent, opposed this application. He urged that the award given by the trial court had already been implemented and therefore urged me to dismiss the application.

From the outset, it must be stated that Rule 53 of this Court's rules is clear that this Court as presently constituted does not have jurisdiction to entertain an application for an order of stay of execution. That rule provides as follows:

“53. (1) Every application, other than an application included in sub-rule (2), shall be heard by a single judge:

Provided that any such application may be adjourned by the judge for determination by the Court.

(2) This rule shall not apply to—

- a. ***an application for leave to appeal;***
- b. ***an application for a stay of execution, injunction, or stay of further proceedings;***
- c. ***an application to strike out a notice of appeal or an appeal; or***
- d. ***an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of a hearing.”***

I cannot therefore entertain the prayer for an order of stay of execution for I have no such power or jurisdiction to do so.

The second issue for my determination is whether or not I should exercise my discretion in favour of the applicants. Time and again, it has been stated that the discretion of single judge can only be exercised judicially and on cogent grounds. I do not intend to go outside the sphere and parameters of the well-trodden path of judicial precedent. The notice of appeal was lodged and filed over one month after the decision of the High Court. In order to benefit from the discretion of this Court to enlarge time within which the notice of appeal can be filed, the applicant must place material before the Court upon it can exercise its discretion in its favour. In ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. Nai. 255 of 1997 (unreported)*** the factors that the Court will take into consideration were stated as follows:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well-settled that in general, the matters which this Court takes into account on deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly, (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

I have noted that Mr. Terrell, learned counsel for the applicants, contended that the applicants did not have sufficient notice of the judgment as he received it only one day before delivery. However, learned counsel did not explain what steps he took after delivery of the judgment to ensure that he complied with rule 75 to lodge the notice of appeal within time. It is not clear to me why the applicants failed to take remedial measures to salvage the alleged misdirection committed by the trial court. The applicants do not deny having notice of delivery of the judgment. Clearly, the applicants had knowledge and notice of the delivery of the judgment. To my mind, the period between the time after delivery of the judgment and the time the notice of appeal was filed ought to be expressly and clearly accounted for. If a party decides to sleep on its rights, it cannot expect the Court to aid it after waking from a deep slumber. It must be allowed to continue to be in that state of affairs. What transpired here is nothing but a dereliction of duty on the part of the applicants' counsel. The law and equity cannot aid an indolent party.

In the absence of an explanation as to why there was such a delay, this Court cannot exercise its discretion to the benefit of the applicants. For this reasons, this application is without merit and it is hereby dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 4th day of December, 2015

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

/mwk