



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 15 OF 2014

J.B. MAINA & COMPANY LTD ..... APPLICANT

VERSUS

PETER M. MUOKI ..... RESPONDENT

**R U L I N G**

**INTRODUCTION**

1. The applicant has brought a Notice of Motion dated 16.9.2014 seeking leave to file appeal out of time and stay of execution of the judgment of the subordinate court delivered on 7.11.2013. The motion is supported by the affidavit sworn by Mustafa M. Dodh on 16.9.2014. The basis of the intended appeal is that there are weighty issues of law and facts which render the appeal to have high chances of success. In addition the delay in making this application was due to oversight on the part of the applicant's counsel and due to the loss of the court file. According to the applicant, the decretal sum has already been deposited in a joint account between her advocates and the respondent.
2. The Respondent has opposed the motion vide his Replying Affidavit sworn on 8.10.2014. He has averred that the Applicant was fully aware of the impugned judgment because on the day it was delivered she secured a stay of execution for 45 days followed by further stay of 28 days upon condition that no decretal sum being deposited in a joint account which was not complied with. The Respondent has denied that the lower court file got lost after judgment and maintained that the file was readily available in the registry. According to the respondent the applicant has no good reason for not filing his appeal in time and accused her of filing the present motion with the purpose of delaying justice.
3. The motion was disposed of by way of written submission of which the court has carefully considered in this ruling.

**ANALYSIS AND DETERMINATION**

4. There is no dispute that the subordinate court entered judgment against the applicant on 7.11.2013 when the applicant sought certified copy of the judgment and proceedings. There is also no dispute that the said proceedings and judgment were never supplied to the applicant in time to enable her file appeal. There is also no dispute that the parties recorded consent order of stay on condition that the applicant was to deposit all the decretal sum in a joint account within 14 days which was later vacated for non-compliance with the with the agreed conditions. There is also no

dispute that after the execution was commenced, the parties opened a joint account wherein all the decretal sum was deposited on 12.9.2014.

5. The issues for determination are whether the motion has merits and whether the orders sought should be granted.

### **Merits**

6. The applicant has raised weighty issues of both law and facts in the motion and her written submissions including the jurisdiction of the trial court, loss of the original court file, limitations of actions and default by the court to supply certified copies of the judgment and proceedings in time. Although the applicant has not explained the failure to filing appeal within the statutory period, the court is persuaded by certified copy of judgment and proceedings annexed to the Respondent's replying affidavit that the applicant was not supplied with the copy thereof in time to file appeal within the statutory period. The said copy of proceedings and judgment were certified on 7.10.2014 almost a year after the judgment. Consequently the court find that delay to be a good ground upon which the court can grant leave to file appeal out of time as prayed. In addition, the issues raised in the Motion are weighty and warrant to be resolved because the purpose of the court is to do justice.

### **RELIEFS**

In view of the foregoing finding that the delay in filing appeal is excusable, the court grants leave to the applicant to file and serve a complete record of appeal within 28 days of this ruling. In addition the court grants stay of execution of the impugned judgment on condition that the decretal sums deposited in the Bank of Baroda (Kenya) Limited Digo Road branch continues to be so deposited for a further 6 months after the lapse of the existing fixed deposit receipt. The reason for the stay order is because, failure to stop execution could render the intended appeal nugatory. The stay order shall lapse automatically if the applicant fails to file and serve a complete record of appeal within 28 days as directed above.

### **DISPOSITION**

10. For the reason stated above, the Notice of Motion dated 8.10.2014 is allowed only to the extent and upon the conditions stated above. The applicant will however pay to the respondent costs of this motion to be agreed or taxed.

Orders accordingly.

**Dated and delivered at Mombasa this 13th day of February 2015.**

**O.N. Makau**

**Judge**