REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.E372 OF 2020

DUNCAN CHENGO alias DR. DUNCAN CHENGO alias

DUNCAN MWANIE KYENGO t/a THE ABILITY THERAPY PLACE CLINICS.....APPELLANT

VERSUS

CHARLES KIBANGI KAGUOYA.....RESPONDENT

RULING

The application dated 8th January, 2021 seeks the following orders:-

1. The time to file the appellant's Memorandum of Appeal be extended to 18th December, 2020 and the Memorandum of Appeal dated 16th December, 2020 and filed on 18th December, 2020 be deemed to be properly on record.

2. The cost of this application be provided for.

The affidavit of Duncan Chengo of even date supports the application. The respondent filed a replying affidavit sworn on 10th June, 2021. The application was determined by way of written submissions.

Counsel for the applicant submitted that the application seeks to enlarge time for the filing of the Memorandum of Appeal. The trial court had scheduled to deliver its ruling on 9th April, 2020. Due to Covid-19 pandemic, the courts operations were affected and no notice was issued on the next date for the delivery of the ruling. The applicant came to know about the ruling on 27th November, 2020 when police officers in the company of other people went to his place with the intention of enforcing the ruling. Counsel for the applicant managed to get a copy of the ruling on 14th December, 2020 and filed the Memorandum of Appeal on 18th December, 2020. Counsel later realized that the ruling had been delivered on 29th May, 2020.

It was further submitted that counsel for the respondent wrote a letter dated 17th June 2020 requesting the court to issue a decree but the said letter was not copied to the applicant's advocates. Counsel referred to the case of **MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY –V- ALFATECH CONTRACTORS LIMITED; KENYA COMMERCIAL BANK & ANOTHER (GARNISHEE) (2021) eKLR** where the court held:-

"On the process of the extraction of the decree, and the subsequent application for execution, Order 21 Rule 8 of the Civil Procedure Rules is relevant. Rule 8 is about preparation of decrees and orders. For ease of reference, let me reproduce the relevant parts of it, which say…… My understanding of the provisions that I have cited above, is that the draft decree may be generated by either party. The provisions do not make it mandatory for the draft to come from the parties. A decree is an

instrument that issues from the court, duly executed by the registrar and bearing the seal of the court. It is, therefore, a court instrument, issued at the instance of the court, as a purport of the outcome of court proceedings as set out in the judgment of the court. In an ideal situation, the decree should be generated by the court, but Rule 8 gives the parties an opportunity to initiate the process. Where they choose to initiate it, it becomes mandatory that the draft be placed before the other party for approval.

Counsel for the applicant further argued that had the letter from the respondent's counsel been copied to them, they would have become aware of the ruling and would have taken action. No e-mail was received from the court notifying them about the delivery of the ruling. Counsel relies on the case of **TRAPEZE ASSOCIATES LIMITED –V- LUKAS ODHIAMBO ODODO & 3 OTHERS (2021) eKLR** where it was held:-

"The first issue to determine is whether the application has been filed within a reasonable time. The applicant has given several reasons why it was unable to access the ruling of the trial court. To the applicant the trial court was to blame as it did not email the same to the email it had provided. In the absence of any evidence of email, the court is inclined to believe the applicant. It is true that they had provided their email addresses and if for any reason they did not then it should be accorded a benefit of doubt. This position is buttressed by the fact that the application was made within a reasonable time in the circumstances which was about three weeks after the ruling was delivered. The court also takes judicial notice of the fact that most of our courts scaled down operations because of the Covid 19 pandemic."

Counsel for the applicant also referred to the case of **EQUITY BANK LIMITED –V- RICHARD KEROCHI AYIERA (2020) eKLR** where the court held:-

"It is now well 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 in deciding whether to grant an extension of time are first the length of the 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.

On the reasons behind the delay, I considered the material availed to show that the impugned judgment was originally listed for delivery on 16th March, 2020 and yet it was delivered one (1) month later, and the explanation by the applicant that no judgment notice was served upon its advocate. I also considered the averment by the respondent that his advocate had served upon the applicant's advocate a copy of the judgment soon thereafter and I looked at a copy of the correspondence dated 28th April, 2020 to that effect; however, I note that the said correspondence does not bear any indication that service was effected upon the applicant's advocate. In the premises and upon further considering the prevailing circumstances resulting from the Covid-19 pandemic, I find the explanation of the applicant to be reasonable."

According to the applicant, the application was filed without unreasonable delay. The applicant became aware of the ruling on 27th November, 2020, obtained a copy thereof on 4th December, 2020 and filed the Memorandum of Appeal on 18th December 2020. It is further argued that no prejudice will be suffered by the respondent as the appellant settled the decretal sum so as to avoid further execution. The appeal is not frivolous and the applicant is eager to pursue it. Counsel also cited the case of **EDWARD KAMAU & ANOTHER –V- HANNAH MUKUI GICHUKI & ANOTHER (2015) eKLR** where Aburili J. held:-

"The right of appeal, it has been held time and again, is a Constitutional right which is the cornerstone of the rule of law. To deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of a right to a fair hearing guaranteed under Article 50 (1) of the Constitution which latter right cannot be limited under Article 25 of the said Constitution. In my view, it has not been shown that the intended appeal is frivolous or a sham and therefore it is only fair and just that the applicants be accorded an opportunity to ventilate their grievances where they are aggrieved by a decision of the lower court, to challenge it before a superior court. By so doing, in my view, this court will be exercising its discretion judiciously to ensure that the applicants are not driven from the judgment seat even if there was some indolence leading to delay

The application is vehemently opposed. It is submitted that the applicant duly participated in the proceedings relating to a notice of motion date 18th November, 2019 before the trial court. Ruling was delivered on 29th may, 2020 and the applicant's defence was struck out. The applicant proceeded to settle the entire decretal sum in Milimani MCCC No. 1965 of 2019 while the current application was pending. The settlement was unconditional. It is therefore argued that the intended appeal lacks merit, is a mere

academic exercise and an abuse of the court process. The applicant admitted his indebtedness. The decretal sum was not paid into a joint account of both advocates. It is contended that the money was paid to the applicant for the respondent's child therapy. The applicant admitted that he owed the amount and the issue of the effectiveness of the therapy was not raised before the trial court and is being raised for the first time. Counsel relies on the case of **PERFECT SCAN LIMITED –V- HARRISON KAHINDI SAID (2021) eKLR** where the court held:-

"In any event, this court would be placed in an awkward situation were it to uphold the argument of the appellant where it is been called upon to decide on an issue which is raised for the first time on appeal. If this Court were to make a determination on the issue of jurisdiction on this appeal as urged by the appellant, this court would not be sitting on an appeal but be acting as a court of the first instance. This is because the issue of jurisdiction was not raised before the trial resident magistrate's court. I say no more on that score. I will disallow the grounds of appeal on jurisdiction."

According to counsel for the respondent, if indeed the applicant wanted to avoid execution, he could have deposited the decretal sum in an interest earning joint account instead of fully settling the debt unconditionally. The applicant was well aware of the ruling date since the same was given in the presence of his advocates.

The application is seeking extension of time to file a memorandum of appeal. The applicant is expected to explain the cause of the delay in filing the appeal. The explanation given is that after hearing the parties, the trial court scheduled its ruling for the 19th of April, 2020. No ruling was delivered on that date due to the Covid-19 pandemic. The applicant came to know that his defence was struck out and judgment entered when auctioneers went to his business premises on 27th November, 2020.

In the case of **KIRAGU –V- KIRAGU (1990) KLR 323** the Court of Appeal held:-

"An application for an extension of time for lodging an appeal may be made even after the prescribed time has expired. However, failure by an applicant to explain away the delay in prosecuting his appeal may lead to the extension being refused."

In the case of **GITHIAKA –V-NDUIGI (2004) 2KLR, 67** the Court of Appeal held:-

"In the exercise of its discretion, the Court's primary concern should be to do justice to the parties. The Court should, among other things consider:-

- the length of the delay in lodging the notice and record of appeal;

- where applicable, the delay in lodging the application for extension of time, as well as the explanation thereof;

- whether or not the intended appeal is arguable;

- The prejudice to the respondent if the application is granted;

- the public importance, if any, of the matter, and

- generally the requirements of the interest of justice in the case"

The respondent contend that the appeal is an academic exercise since the entire decretal sum was fully paid unconditionally. On his part, the applicant contend that he paid the decretal sum to avoid further execution. None of the parties annexed the ruling of the trial court so as to enable this court consider whether the applicant's defence raised triable issues. In my view the payment of a decretal sum by a judgment debtor does not erode that litigant's constitutional right to pursue an appeal. Indeed such payment cements his position in that the need for orders staying execution would be dispensed with. The court should not be made to ponder as to what would happen should the appeal succeed and the respondent is not in a position to refund the decretal sum. The respondent was happy to execute and subsequently received the decretal sum while knowing that the applicant was pursuing an appeal. The issues to be determined in the appeal have nothing to do with the respondent's ability or inability to refund the decretal

sum. That in itself cannot be a good reason to stop the applicant from pursuing the appeal. The respondent is in a better position in that should the appeal fail, there would be no need to execute as the entire decretal sum has already been paid. Should the appeal succeed, the respondent would refund what he has received from the applicant.

I do find that the explanation given by the applicant for the delay in filing the appeal is reasonable. There is no evidence that the applicant was aware as to when the ruling would have been delivered. Counsel for the respondent secretly obtained a decree without notifying the applicant's counsel. Order 21 Rule 8 of the Civil Procedure Code states:-

(1) A decree shall bear the date of the day on which the judgment was delivered.

(2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

(3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

(4) On any disagreement with the draft decree any party may file the draft decree marked as "for settlement" and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.

(5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the subrules shall refer to magistrate.

(6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.

(7) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.'

Although Order 21 Rule 8 does not use the mandatory term "shall", it does sets out the procedure to be used when preparing a decree. The respondent was equally expected to notify the applicant about the entry of judgment. The respondent has not explained how he ended up executing the decree, it appears that no proclamation was made. The extent of admission of the claim by the applicant has not been established as the defence and the ruling of the trial court have not been annexed.

Therefore, the court will have to determine the appeal on its own merit after evaluating the record of the trial court. No prejudice will be suffered by the respondent who has already been paid the decretal sum.

The upshot is that the application dated 8th January, 2021 is merited and the same is granted as prayed. The memorandum of Appeal filed on 18th December, 2020 is hereby deemed to be properly on record. Costs of the application shall abide the outcome of the appeal.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021.

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S. CHITEMBWE

JUDGE