



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. E007 OF 2021

RONALD WANJE JEMBE.....APPELLANT

VERSUS

PHEOBIANA REHEMA KALENGA & SHEILA CHAN THOYA (*Suing on their own behalf and in their*

***capacity as the administrators of the estate of the late CALLISTUS IHAH
THOYA*).....RESPONDENT**

CORAM: Hon. Justice S. M. Githinji

Kimondo Gachoka & Company Advocates for the Appellant

Jengo & Associates Advocates for the Respondent

RULING

The Respondents herein filed a Notice of Motion Application dated **28th July, 2021** seeking the following orders: -

1. THAT the Memorandum of Appeal dated 15th July, 2021 and filed in court on the same day and the Record of Appeal dated 13th July, 2021 and lodged in court on 22nd July, 2021 be struck out for being otherwise an abuse of the court process.

2. Costs.

The grounds on the face of the Affidavit are that the Judgment in the subordinate Court was delivered on 25th September, 2020 in Civil Case No. 48 of 2019 and that the Defendant/ Appellant had 30 days to file an appeal and failed to do so. That on the 15th day of December, 2020, the court ordered the appellant to file an appeal within 45 days and deposit the decretal amount in a joint account within 30 days or the right of appeal would lapse. Further that the Plaintiff failed to comply and on 7th April, 2021 the court extended the time by 21 days which time lapsed on 28th April, 2021. That the Appellant filed the Memorandum of Appeal on 15th July, 2021 and the record of appeal on 22nd July, 2021.

The Respondent asserts that there is a delay of 90 days from the day leave to deposit the decretal amount lapsed and 150 days from the date leave to file an appeal out of time lapsed. That the appeal is filed out of time without leave of the court in violation of Section 79C of the Civil Procedure Act Chapter 21 Laws of Kenya.

The application was accompanied by the affidavit of **Pheobiana Rehema Kalenga** who averred that in addition to the Memorandum of appeal and the record of appeal having been filed out of time, upto date the appellant has not complied with the conditionality upon which they were granted leave to file the appeal out of time and orders of stay including appeal and the

execution of the decree has been initiated.

She also averred that the appellants do not seem to be keen in complying with the court orders and are not worthy of the exercise of the court's discretion. That this delay is a proper case for striking out the pleadings and dismissing the appeal which is irregular and incompetent.

The Respondents in their Further Affidavit reiterated the events leading to the appellant's failure to comply with the timelines issued by the court. Further that the Appellant has since not deposited the decretal amount in court as ordered by the court. She further asserts that the overriding objective of the Civil Procedure Act and Article 159 of the Constitution are not licenses for the Appellant to fail to respect the court orders and also disregard statutory provision of *Section 79G of the Civil Procedure Act*.

It was also a contention that the scales of justice and equity have been very soft on the appellant and accommodated them a lot but they have failed and or refused to seize the opportunity given to them.

RESPONSE

The Appellant/ Defendant filed his Replying Affidavit through his Advocate **Nyabero Bokoo Brasiny**. He averred that the Appellant was ready and willing to prosecute the appeal and had deposited the entire amount in court. He further averred that the only thing that is preventing the appeal from proceeding is the application by the Respondent dated 28.07.2021.

He stated that the Honourable court ordered on the 15th day of December, 2020 that the Defendant deposit as security the entire Decretal amount in a joint interest earning account in the name of the advocates within 30 days. That on the 8th day of February, 2021 he forwarded the account opening forms to the Plaintiff's advocate for execution in order to open the account. He deposed that vide a letter dated 9th February, 2021, the Plaintiff's advocate expressed unwillingness to open an account for reason that the forty-five days granted by the court to deposit the sum had lapsed, there was no cheque attached to the forms and that there were no consultations on the issue of the bank to be used.

He asserted that the decretal sum involved was colossal and the court directed the parties to open a joint interest earning account in a reputable financial institution and the bank proposed by the Plaintiff advocate presented insurmountable logistical challenge to the Defendant to deposit the decretal amount. He also asserted that the delay in the account opening process was neither intentional nor deliberate and that the Applicant greatly contributed to the delay in compliance of court orders by deliberately refusing to fill opening of the joint account forms presented to them by the appellants without any valid reason despite the forms being from a reputable financial institution.

He also stated that the delay in opening a joint account caused the lapse of time for compliance with the Court orders of 15. 12. 2020 and the Appellants approached court and obtained orders for varying the earlier court orders and extend time for compliance and the court granted the orders and directed the appellants to deposit the decretal amount in court.

SUBMISSIONS

Mr. Nyabero on behalf of the Appellant opted not to file submissions in the matter while the Respondents filed their submissions on the 18th Day of November, 2021 through their *Advocate Jengo Associates Advocates*.

Mr. Jengo submitted that the Court take very seriously situations where parties don't respect its orders. He relied on the Authority of *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Coordination of National Government vs Miguna Miguna & 4 others (2018) eKLR* where the court held as follows;

"When courts issue orders, they do so not as suggestions or pleas to the persons at whom they directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding.....This court, as must all courts, will deal firmly and decisively with any party who designs to disobey Court orders and will do so not only to preserve its own authority and dignity but more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities."

Similar position as discussed above was held in the case of *Trusted Society of Human Rights Alliance vs Cabinet Secretary for*

Devolution and Planning & 3 Others (2017) eKLR.

His submission was that the proceedings as they stand are an abuse of the court process due to failure to respect court orders on filing of the appeal within a limited period and refusal to deposit the decretal amount. That an appeal filed out of time without leave of Court as the instant one is incompetent and an abuse of the court process and should be dismissed with costs.

ANALYSIS AND DETERMINATION

I have given due consideration to the application, the supporting affidavit, the Replying Affidavit as well as the Respondents written submissions and the authorities cited. I have also read the Court's record. Having done so, I find that the only issue arising for determination in this application is whether or not the appellant's appeal was filed within the time prescribed by the law.

The law governing filing of appeals from subordinate court to the High Court **Section 79 G of the Civil Procedure Act (the Act)** which provides that:

“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 79G of the Civil Procedure Act requires that before the Court enlarges the time for appeal, the applicant must satisfy the court that he had good and sufficient cause for not filing the appeal in time. In ***Alibhai Musajee vs. Shariff Mohammed Al-Bet Civil Appeal No. 283 of 1998***, the Court of Appeal held that whereas the **Civil Procedure Act** allows for extension of time for filing appeal, if good and sufficient cause shown, failure to act does not constitute a good or sufficient cause.

The Appellant contended in his Replying Affidavit that he had acted without inordinate delay and in good faith but this is far from the truth. The record clearly shows that the Appellant ought to have filed his appeal within thirty (30) days and on the 15th Day of December, 2020 the court also directed that the appellant file his appeal out of time within forty-five (45) days and deposit the decretal sum in a joint interest earning account within thirty (30) days. The Appellant only filed the memorandum of appeal on 15th July, 2021 and the record of appeal on 22nd July, 2021.

The only reason given by the appellant for not taking action within the prescribed time is that of inadvertence. However, the nature of the inadvertence is not explained at all and his actions only amounts to a litigant who has slept on his rights. In ***Itute Ngui & Anor vs. Isumail Mwakavi Mwendwa Civil Application No. Nai. 166 of 1997, Omolo, JA*** held that whereas advocate's *bona fide* error is a special reason for extension of time within which to appeal, the nature and quality of the mistake must be considered. It is therefore clear that whereas inadvertence may be a ground for extension of time, the nature and quality of the inadvertence must be disclosed for consideration by the Court. It therefore does not suffice to simply state that the failure to comply with the prescribed timelines was due to “inadvertence”, as the applicant did in this case.

The conduct and the demeanor of the Appellant appears to be a case of mere inaction and as was held in ***Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others [1990-1994] EA 337***, inaction on the part of an advocate as opposed to error of judgment or a slip is not excusable.

This Court is therefore not satisfied that the contumelious delay or default on the part of the appellant has been satisfactorily explained. The Appellant failed to comply with the timelines of this Honourable Court. I therefore find for the Respondent. Stay Orders earlier granted to the Appellant cannot be granted, enjoyed or even extended in a vacuum.

The upshot is that the Respondent's application dated **28th July 2021** is merited and the same is allowed with costs to the Respondent.

Orders accordingly.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT GARSEN THIS 1st DAY OF MARCH, 2022.

.....

S.M. GITHINJI

JUDGE

In the presence of:

1. Miss Julu for the Respondent

2. Mr Masolia holding brief for Mr Nyankero for the Applicant



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)