



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL APPEAL NO. E009 OF 2021

(Being an Appeal from the Judgement of Honourable M.Maina Wachira – Principal Magistrate

delivered on 25.06.2021 in Lamu Cmcc No. 26 of 2019)

MR. SULTAN OMAR HUDHEFA.....APPLICANT

VERSUS

ANN MUTHONI NGUGI.....RESPONDENT

CORAM: Hon. Justice S. M. Githinji

Mr Kilonzo for the Respondent

Mr Nyambero for the Applicant

R U L I N G

Before court for determination is a Notice of Motion dated 18th October 2021 brought under section 1A, 1B, 3, 3A, 66 and 95 of the Civil Procedure Act, and Order 22 rule 22, Order 45 rule 1, Order 50 rule 6, and Order 51 rule 1, 10 (1) and (2) of the Civil Procedure Rules. The Appellant/applicant seeks the following orders:

- 1. Spent*
- 2. Spent*
- 3. That this Honorable Court be pleased to review, vary, extend and/or enlarge time for a further thirty {30} for compliance with the court order of 6th August 2021 requiring the Applicants to file a record of appeal within 30 days.*
- 4. That this Honorable Court be pleased to issue any other order it may deem just and appropriate.*
- 5. That this application be heard inter parties on such a date and time as this Honorable court may direct.*
- 6. That costs be provided for.*

The application is premised on the grounds on the face of it and the supporting affidavit of Nyabero Bokoo Brasiny, counsel for the applicant. Notably, the grounds listed thereon are clearly and mistakenly placed in this application. The situation was similar in his supporting affidavit. Apart from asserting that a sum of Kshs. 200,000/- had been paid to the Respondent, there was nothing else to warrant this Court to grant the substantive prayer herein. Further, when this application came up for mention to confirm filing of submissions on 1st February 2022, Mr. Nyabero acknowledged the confusion between the present application and the application in Civil Appeal No. 10 of 2021. This court directed counsel to rectify the error, something the Applicant did not do.

That notwithstanding, judgment was entered in favour of the Respondent on 25th June 2021 and an order for conditional stay pending appeal issued on 6th August 2021. A cursory perusal of the stay order granted by Nyakundi J, shows there was no time limit as to filing of the record of appeal. The learned Judge declared as follows:

“That the applicant has been favuored with a stay of execution against the judgment of the trial court conditioned in terms of

i. The pay out of Kshs. 200,000/- as part of the general damages assessed by the trial court to the respondent within thirty (30) days from today’s date.

ii. The balance of the decretal sum of Kshs. 200,000/- be deposited in a joint earning interest account... within the same timeline of thirty (30) days as in clause i above.

iii. The record of appeal be processed and served upon the respondent. The costs of this application to be pegged on the outcome of the appeal.”

In my view, this application is frivolous, vexatious, an abuse of the court process and a tactic to delay justice. I do not find merit to it.

Nonetheless, I observe that judgment was delivered on 25th June 2021. The Applicant filed a memorandum of appeal on 15th July 2021. The stay orders were issued on 6th August 2021. No record of appeal has been filed since then. I am alive to the fact that there is no prescribed time limit as to when a record of appeal should be filed. Section 79 G of the Civil Procedure Act applies to filing of the memorandum of appeal. The record of appeal can always be filed later after the memorandum of appeal has been served on the respondent and before the appeal is listed for directions under Order 42 Rule 13 of the Civil Procedure Rules.

However, that rule leaves no doubt that ideally, the record of appeal should be filed soon after service of the memorandum of appeal to pave way for fixing of a mention date for the purpose of giving directions on hearing of the appeal.

The aforementioned provisions provide as follows:

79G. Time for filing appeals from subordinate courts

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.

Directions before hearing [Order 42, rule 13.]

(1) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.

(2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this

rule.

(3) *The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.*

(4) *Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—*

(a) *the memorandum of appeal;*

(b) *the pleadings;*

(c) *the notes of the trial magistrate made at the hearing;*

(d) *the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;*

(e) *all affidavits, maps and other documents whatsoever put in evidence before the magistrate;*

(f) *the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:*

From the foregoing, it's vivid that this application is in want of merit and is therefore dismissed with costs to the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 1ST DAY OF MARCH, 2022.

.....

S.M. GITHINJI

JUDGE

In the presence: -

1. Mr Kilonzo for the Respondent
2. Mr Masolia holding brief for Mr Nyambero for the Applicant



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