



Case Number:	Miscellaneous Application 58 of 2015
Date Delivered:	16 Dec 2015
Case Class:	Civil
Court:	High Court at Busia
Case Action:	Ruling
Judge:	Francis Tuiyott
Citation:	Nicholas Ouma Were v Victor Benard Wafula [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Busia
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed in part
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**MISC APPL NO. 58 OF 2015**

**NICHOLAS OUMA WERE.....APPLICANT**

**VERSUS**

**VICTOR BENARD WAFULA.....RESPONDENT**

**R U L I N G**

1. By an Application dated 5<sup>th</sup> May 2015 this Court is moved for the following orders:-

- i. **THAT this Application be certified as urgent and that it be heard on priority basis.**
- ii. **THAT this Honorable court do grant to the Applicant leave and or enlargement of time to file his appeal emanating from the judgment in BUSIA CMCC NO. 358 OF 2012 outside time.**
- iii. **THAT upon such leave being granted there be issued an order of stay of execution of the lower court judgment and all other consequential orders pending the hearing and determination of this application the intended appeal and or until further orders of this court.**
- iv. **THAT costs of this application be in the cause.**

2. The Applicant was the Defendant in Busia CMCC 358 of 2012 VICTOR BENARD WAFULA VS-NICHOLAS OUMA WERE. The Applicant is desirous of appealing against a Judgment delivered therein in favour of the Respondent. In an affidavit sworn on 5<sup>th</sup> May 2015, the Applicant has explained why he did not file the Appeal within the period prescribed by the law.

3. The Applicant has deponed that the Judgment was read in absence of both himself and his Advocate. He explained that he has been ill since 25<sup>th</sup> May 2014 and was therefore unable to follow the proceedings in the Lower Court. The Applicant has annexed to his affidavit treatment notes from Ikonzo Dispensary in proof of his illness. The Applicant also argues that neither he nor his advocate were notified of the entry of Judgment.

4. Annexed to his affidavit is also a draft Memorandum of Appeal. The Applicant believes that the intended Appeal is highly meritorious.

5. In resisting the Application, the Respondent filed an affidavit through his Advocate Mr. Francis Omondi sworn on 16<sup>th</sup> June 2015. The Advocate depones that the Trial closed without the Defendant offering any evidence. The Court then fixed the matter for mention on 22<sup>nd</sup> July 2014 for parties to file their respective submissions. That he duly notified Counsel for the Applicant of the mention date. On 22<sup>nd</sup> July 2014, both advocates appeared in Court but the Applicant's Advocate had not filed any submissions and requested for more time to do so. The request was granted and the matter stood over

to 29<sup>th</sup> July 2014, a date when the Trial Court did not sit. The Advocate fixed the matter for mention on 18<sup>th</sup> August 2014 (or should this be 19<sup>th</sup> of August 2014"). On 19<sup>th</sup> August 2014 Advocates for both parties were in Court and the Hon. Magistrate fixed the matter for Judgment on 30<sup>th</sup> September 2014. On that day Judgment was delivered but in the absence of the Applicant's Counsel. Further, through a letter dated 18<sup>th</sup> November 2014, Mr. Omondi wrote a letter to the Applicant's Advocate demanding settlement of the Judgment debt but they did not respond.

6. This Court was asked by the Applicant to allow the Application because it had merit and was brought without inordinate delay. Further that the Respondent will not be prejudiced with such orders.

7. The Respondent argued that the Advocate for the Applicant was aware of the date of Judgment but did not explain why he never attended Court. That at any rate, once the Judgment was delivered, it was brought to the attention of the Applicant's Advocate through a letter of 18<sup>th</sup> November 2014, and the Application was therefore brought after undue delay. Further that there was no legal requirement for the Advocate of the Respondent to serve a Notice of Entry of Judgment upon the Applicant's Counsel as the matter in the Lower Court proceeded inter-parties and on merit. Lastly this Court was asked to disregard the treatment notes shown to it by the Applicant as they did not prove incapacity on part of the Applicant because there was no medical opinion on the nature of treatment received by the Applicant.

8. It is true that the Applicant's Counsel has not explained why he did not attend Court on the Judgment date. It is also true that if any effort had been made by the Advocate to find out what transpired in his absence on the Judgment date, then it has not been shown to this Court. In addition, why this Application was not brought soon after 18<sup>th</sup> November 2014 upon the Applicant's Advocate being notified of the Judgment by the Respondent's Advocate was not adequately explained. The Application was filed some six months later on 6<sup>th</sup> May 2015. All these disfavor the Application for enlargement of time.

9. Yet some latitude should be judicially exercised by the Court so as to facilitate the determination of matters including Appeals, on merit. Although there was delay in bringing this Application, the Respondent's may not be prejudiced if he is not further delayed from enjoying the fruits of a Judgment in his favour. This Court although inclined to allow the Application for enlargement of time is unable to accede to the request for stay of execution as the Application does not meet the conditions for stay set out in Order 42 Rule 6(2) of the Civil Procedure Rules.

10. Order 42 Rule 6(2) of the Civil Procedure Rules provides:-

**2. No order for stay of execution shall be made under subrule (1) unless-**

**a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

I have keenly looked at both the Grounds and the Affidavit of the Applicant in support of the Application, the Applicant does not argue or state that it shall suffer any substantial loss if stay is not granted.

My orders are therefore as follows:-

- i. **The Applicant is granted leave of 14 days to file and serve a Memorandum of Appeal.**
- ii. **The Application for stay is dismissed.**
- iii. **The Respondent shall have costs of the Notice of Motion of 5<sup>th</sup> May 2015.**

Dated, signed and delivered at Busia this 16<sup>th</sup> day of December 2015.

**F. TUIYOTT**

**J U D G E**

In the Presence of :-

Oile - C/Assistant

NA/ for Applicant

N/A - for the Respondent



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