



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC APPL. NO. 749 "B" OF 2019

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....APPLICANT

VERSUS

RUMBA KINUTHIA.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

R U L I N G

1. The application dated 20th November, 2019 principally seeks orders that the Applicant be granted leave to appeal out of time, judgment having been delivered on 7th October, 2019.
2. Secondly, that pending the hearing and determination of this Appeal, there be a stay of execution of the decree dated 7th October, 2019, the warrants of attachment dated 13th November, 2019 and the proclamation of attachment dated 15th November, 2019.
3. The application is premised on the grounds stated therein and the affidavit in support. The delay in filing the Appeal is blamed on the delivery of the judgment of the Lower Court without notice. It is averred that the Applicant has an arguable Appeal which will be rendered nugatory and expose the Applicant to substantial loss. The Applicant is willing to deposit security for the due performance of the decree.
4. In a replying affidavit filed in opposition to the application, it is stated that the application is an abuse of the process of the court meant to delay the 1st Respondent from enjoying the fruits of his judgment. That the Applicant has a similar pending application before the Lower Court which application is yet to be heard and determined and therefore the instant application is irregular and *subjudice* the Lower Court application. That there is no existing Appeal and that the time for filing an Appeal has lapsed. That the intended Appeal has no chances of Success and that in the unlikely event that the Appeal is successful, the 1st Respondent is financially stable and able to refund the decretal sum.
5. It is further averred that notice of the delivery of the judgment was given by way of a telephone call from the Registry. That in any event the Applicant could have made follow-ups with the Court or the Registry but instead slept on it's rights.
6. The Applicant in response filed a supplementary Affidavit. It is stated that the application herein discloses that an application for stay of execution was filed in the Lower Court under certificate of urgency but that the orders sought were declined and the same was abandoned, can be withdrawn or any further action taken. That the application herein seeks leave to file the Appeal out of time. It is further stated that there is no evidence to substantiate the Respondent's financial stability. The court was urged to allow the Applicant to access his right to Appeal.
7. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties.
8. Under Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 the conditions for stay of execution are as follows:

“No order for stay of execution shall be made under sub-rule (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

9. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

10. Under Order 42 rule 6(1) Civil Procedure Rules, the Applicant has the liberty to file the application herein notwithstanding that a similar application was granted or refusal by the Lower Court.

11. It is not in dispute that an application for stay of execution was filed in the Lower Court and is still pending. Although the Applicant has stated in paragraph 10 of its supplementary affidavit that the said application was abandoned and is subject to withdrawal or the taking of any other step, the existence of a similar pending application before this court and the Lower Court offends the *subjudice* rule as provided under Section 6 Civil Procedure Act. The Applicant ought to have brought the application pending before the Lower Court to an end before filing the application herein. Having failed to obtain interim orders does not bring the application pending before the lower court to an end.

12. Section 6 Civil Procedure Act provides:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

13. The Applicant has explained the delay in filing the Appeal. There is no Notice of Delivery of Judgment exhibited herein. This being a court of record, what has been alluded to as a Notice by way of a telephone call is not satisfactory.

14. The Applicant is desirous of exercising its right of Appeal. On the other hand, the Respondent wishes to enjoy the fruits of his judgment. To balance the competing interests of both parties, and without undue regard to technicalities of procedure, I allow the application on condition that the decretal sum is deposited in a joint interest earning bank account of both parties or in court within 30 days from the date hereof. The Appeal to be filed within 14 days from the date hereof.

Dated, signed and delivered at Nairobi this 28th day of Jan., 2021

B.THURANIRA JADEN

JUDGE