

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

MISC. CIVIL SUIT NO. 27 OF 2020

HEMSON ONCHOMBA NYAIGOTI.....PLAINTIFF/RESPONDENT

VERSUS

FRANCIS OGARO.....DEFENDANT/APPLICANT

RULING

Before me is the Notice of Motion dated 29th June 2020 by which the applicant seeks the leave of this court to file an appeal out of time and for a stay of execution of the judgement and decree of the lower court pending hearing and determination of the intended appeal.

The gist of the application as can be discerned from the grounds and supporting affidavit is that whereas judgement was delivered on 10th December 2019 the instructions to appeal although sent via email in good time did not come to the attention of Counsel until 1st June 2020. That therefore the delay in filing the appeal is excusable and is not inordinate. It is also argued that the appeal has high chances of success. In regard to the stay, it is argued that the decree holder is a man of straw and should the decretal sum be paid to him and the appeal succeeds he will not be in a position to refund the same and therefore the applicant shall suffer substantial loss.

The application is vehemently opposed. The respondent swore a replying affidavit on 16th October 2020 in which he deposes that the application is incurably defective, bad in law, incompetent, frivolous, vexatious, scandalous, an abuse of the court process and devoid of merit. He also deposes that judgement was delivered in the presence of both parties; that the delay is inordinate and the applicant being indolent is not deserving of the orders sought. It is also contended that the applicant has not demonstrated substantial loss and that there are no sufficient grounds therefore to grant a stay of execution. He further deposes that the application is an afterthought only meant to frustrate him from enjoying fruits of his lawful judgement and further that the applicant has not furnished security for the performance of the decree.

The application was canvassed by way of written submissions. I have carefully considered those submissions including the authorities cited.

The judgement sought to be appealed was delivered on 10th December 2019 and by the end of January 2020 an appeal ought to have been filed because as provided in **Section 79G** of the **Civil Procedure Act** every appeal from a subordinate court to the high court ought to be filed within 30 days from the date of the decree or order appealed from. I am however satisfied that although the delay in this case was prolonged the applicant has given a plausible explanation for it. Counsel could not have appealed without instructions and whereas those instructions were given promptly Counsel did not learn about them in time to file the appeal. To refuse this application would be tantamount to punishing a litigant for the sins of their advocate and I am not prepared to do that. In the premises the application for leave to appeal out of time is granted.

As for the stay of execution the same shall be allowed on condition that the applicant shall deposit the entire decretal sum either in court or in an interest earning account in the joint names of the advocates for the parties within twenty-one (21) days of this ruling. The appeal shall be filed within twenty-one (21) days of this ruling and in default of either of the above two conditions the respondent shall be at liberty to execute. The costs of this application shall be borne by the applicant. It is so ordered.

Signed, dated and delivered electronically this 11th day of February 2021.

E. N. MAINA

JUDGE