



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 173 OF 2020

BONIFACE NJOROGE.....APPELLANT/APPLICANT

VERSUS

NANCY NJOKI NYAGARESPONDENT

RULING

1. This ruling is precipitated by the Notice of Motion dated 28/12/2020 brought by the appellant/applicant under the provisions of Order 42 Rule 6, Order 50 Rule 5, Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, 3A & 79G Civil Procedure Act, Article 159 (2) (d) of the constitution of Kenya 2010 and Article 165(1) of the constitution of Kenya 2010, Section 10(1) (2) (a) of the High Court (organization and Administration) Act 2015 and the High Court of Kenya Christmas Recess 2020 Rules seeking the following orders;

a. Spent

b. Spent

c. Spent

d. That this honorable court be pleased to grant a stay of execution of the judgement and decree delivered on 6/12/2019 in Milimani CMCC Civil Case No. 2840 of 2013 pending the hearing and determination of the appellants appeal herein.

e. That this honorable court be pleased to enlarge time of the appellant to file an appeal and consequently deem the memorandum of appeal filed in Milimani High court Civil Appeal No. 173 of 2020.

f. That the honorable court may make any other order as it deems necessary for the just disposal of this matter

g. That the costs of this application be in the cause.

2. The application is based on the grounds stated on the face of it And the facts deponed in the supporting affidavit of Mary Nganga, the legal officer of the appellant's/applicant's insurers, Jubilees Insurance Co. Limited. In it she deponed that this matter was heard on 29/8/2019 and submissions confirmed as filed on 14/10/2019 after which judgment was scheduled on 26/11/2019.

3. The said judgment was however delivered on 6/12/2019 without notice and in the absence of the appellant/applicant who only became aware of its existence on 23.1.2020 when he received the respondent's letter requesting for payment of the judgement sum.

4. The appellant/ applicant's advocate stated that she thereafter tried to obtain the said judgement in order to file the appeal, only to be notified that the court file could not be traced. It was 24/2/2020 that a handwritten judgement was availed.

5. She added further that the applicant's instructions to file an appeal clashed with the spring of COVID 19 cases in Kenya which led to down scaling of operations within the court registries.

6. The appellant also stated that he since then filed a memorandum of appeal and on 28/2/2020 he lodged a request to be supplied with certified copies of the proceedings and judgment for purposes of filing a record of appeal.

7. The appellant further averred that if the order for stay of execution is not granted, the execution process may commence rendering the appeal nugatory.

8. He also claimed that substantial loss may result to the applicant unless an order for stay of execution is made. He argued that the appeal raises points of law and fact his insurers who are instructing the client herein are willing to pay the deposit the decretal sum as security for the due performance of the decree.

9. The application is opposed by the respondent who filed a relying affidavit she swore. She stated that the orders issued in Milimani CMC civil case No. 240 of 213 were delivered about two years ago on 6/12/2019 and therefore there are no good reasons for the applicant's unreasonable delay in filing this application.

10. It is also argued by the respondent since the judgment was delivered the applicant has never applied for a stay and neither did he seek for leave to file the memorandum of appeal out of time despite being aware that judgement was delivered as early as 23/1/2020.

11. It is not in dispute that the matter before the lower court was slated for judgement on 26/11/20019. It is not also disputed that judgement was eventually delivered on 6/12/2019 in the absence of the applicant's counsel.

12. The applicant has explained that he learnt of the delivery of the judgement on 23/1/2020 when he received a letter demanding payment of the judgment sum. By then the period within which an appeal should have been filed had lapsed.

13. Section 79G of the Civil Procedure Act provides:

“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.”

14. The applicant's application for leave to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal during the specified time.

15. The applicant explained during the proceedings that the delay was caused because the lower court file could not be traced until April of last year.

16. On perusal of the court file, it is noted that the memorandum of appeal was filed on 5/6/2020 which the respondent indicated was not served upon him until 19/3/2021. The instant application was filed on 28/12/2020 and the applicants have explained that the delay was caused by the scaling down of court operations due to covid 19.

17. This court is persuaded the delay may have been caused by the scaling down of court operations due to the outbreak of Covid 19 pandemic leading to closure of court premises for a while. I am convinced that the applicant should benefit from the court's discretion.

18. In the end, I find the motion dated 28.12.2020 to be meritorious.

The same is allowed thus giving rise to a grant of the following orders:

i. The appellant is granted leave of 10 days from the date of this ruling to appeal out of time.

ii. An order for stay of execution of the decree pending appeal is granted on condition that the applicant deposits the decretal sum in an interest earning account in the joint names of learned advocates within 30 days from the date of this ruling.

iii. In default the application for stay shall be deemed to have been dismissed.

iv. Costs to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF JUNE, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent