



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**MISC. CIVIL CASE NO. 1 OF 2020**

**PETER MACHONGO OTETE.....APPLICANT**

**- VRS -**

**LAWRENCE OSORO OBUNGU.....RESPONDENT**

**RULING**

What is before me for ruling is the Notice of Motion dated 13<sup>th</sup> January 2020 in which the applicant primarily seeks leave to appeal out of time and a stay of execution of the judgement and decree in Keroka PMCC No. 144 of 2016, delivered on 13<sup>th</sup> November 2019; pending the hearing and determination of the intended appeal. The gist of the application as can be discerned from the grounds on its face, the supporting affidavit as well as the submissions of Counsel for the applicant is that the delay was occasioned by the client's (insurance company who had retained Counsel for the applicant in the lower court) failure to give instructions to appeal on time.

The application is vehemently opposed on grounds that it is incurably defective, incompetent, bad in law and an outright abuse of the court process; that it is frivolous, vexatious, scandalous and has no merit and further that the applicant was granted 30 days stay of execution which lapsed without the applicant lodging an appeal. At the hearing of the application Counsel for the respondent also submitted that the application cannot be allowed as the applicant has not explained the delay, has not furnished security and has not demonstrated substantial loss.

**Section 79G of the Civil Procedure Act** limits the time for filing appeals to thirty days and then states: -

**“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.”**

Further, **Order 50 Rule 6 of the Civil Procedure Rules** provides: -

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”**

The power to enlarge time for lodging an appeal is therefore discretionary and like all such power it must be exercised judicially. Counsel for the applicant has given an explanation for not filing the appeal in time which in my view is plausible. Counsel could not proceed without instructions from the instructing client. She has annexed copies of e-mails evidencing the time when the requisite instructions were received. It is also not lost to me that the delay is not inordinate. Judgement was delivered on 13<sup>th</sup> November 2019 which was a Wednesday and time therefore began to run on 14<sup>th</sup> November and stopped running on 16<sup>th</sup> December 2019 (see Order 50 rule 3 of the Civil Procedure Rules) and given that the period between 21<sup>st</sup> December of any year and the 13<sup>th</sup> of January in the year next following must be omitted from any computation of time, it is clear that the applicant was within time in bringing this application.

I have perused the application carefully and I see nothing to demonstrate that it is incurably defective, incompetent or bad in law as alleged by the respondent. To the contrary I find that the leave sought is merited.

As for the stay of execution the applicant has demonstrated that he has an arguable appeal which is likely to be rendered nugatory should this application be refused. The applicant has in the supporting affidavit deposed that should the respondent proceed to execute the decree the applicant will suffer irreparable loss and has expressed willingness to deposit the entire decretal sum in an interest earning account in the joint names of Counsel for the parties as security for due performance of the decree. The decretal amount is huge and the respondent has not demonstrated that he would be in a position to refund the same should this application be refused and the appeal succeeds. In the premises I

am satisfied that the applicant has met the conditions for an order for stay of execution of the judgement/decree pending hearing and determination of the intended appeal. Accordingly, the application dated 13<sup>th</sup> January 2020 is granted on condition that: -

**i. The appeal shall be filed and served within twenty-one (21) days of this ruling.**

**ii. That the applicant shall within twenty-one (21) days of this ruling deposit the entire decretal sum either in an interest earning account in the joint names of the Advocates on record for the parties OR in this court or the court below.**

**iii. The applicant shall bear the costs of this application.**

It is so ordered.

**Dated, signed and delivered in open court this 20<sup>th</sup> day of February 2020.**

**E. N. MAINA**

**JUDGE**