

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC .CIVIL APPLICATION NO. 491 OF 2018

ELVIS KIPROP MUTAI.....APPLICANT

VERSUS

BENARD KIBERA GACHOLI (Suing as the Administrator and legal representative of

the estate of ANDREW GACHOLI KIBEBA (DECEASED).....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 22nd September, 2018 for orders that there be a stay of execution of the lower court judgment delivered on 16th August, 2018. There is also a prayer for leave to appeal out of time against the said judgment. The application is under Sections 1 A, 1B,3A,63 (e), 79G and 95 of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules.

The grounds relied upon have been set out on the face of the application which is also supported by an affidavit sworn by the advocate for the applicant. There is a draft Memorandum of Appeal annexed to the application. The application is opposed and there is a replying affidavit sworn by the respondent. A supplementary affidavit followed sworn by the advocate for the applicant and there are submissions by both parties which I have considered.

The applicant has a right of appeal while the respondent has a judgment which he desires to execute and enjoy the fruits thereof. Order 47 Rule 6 is instructive. The application was filed on 25th September, 2018 which was a few days after the expiry of the time allowed to file an appeal. The delay in filing the appeal and the application has been sufficiently explained in grounds 1 and 2 of the application and reinforced by the supporting affidavit.

I have looked at the reasons advanced in opposing the application. I have also perused the draft Memorandum of Appeal which has been filed alongside the application. There appears to be an arguable appeal in the circumstances. If the lower court judgment is executed, substantial loss may result in the event the respondent is unable to refund the said sum. The applicant has offered security in the form of depositing the entire sum in court or an interest earning account.

I am persuaded that in the interest of justice this application should be allowed. There shall be a stay of execution provided the applicant deposits the entire decretal sum in an interest earning account in the names of both advocates appearing for the parties. Leave to file the appeal out of time is also allowed. The deposit of the decretal sum and the filing of the appeal shall be effected within 30 days from the date of this ruling. The costs shall be on appeal.

Dated, signed and delivered at Nairobi this 10th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE