

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC APPLICATION NO. 275 OF 2019

GRACE WANGUI GITHIRE (Suing as Legal Representative of the Estate of

PAUL NGUGI GITHIRE (Deceased).....PLAINTIFF/RESPONDENT

Versus

MBOTE HENRY.....DEFENDANT/APPLICANT

RULING

This is an application by way of Notice of Motion dated 25th March, 2019 under Sections 3A, 79G and 95 of the Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules for orders that time be extended, and leave be granted to the applicant to lodge a Memorandum of Appeal out of time, against the ruling of the lower court delivered on 14th December, 2018.

There is also a prayer that there be a stay of further proceedings in the lower court pending the determination of the intended appeal. The application is supported by grounds set out on the face thereof, alongside a supporting affidavit sworn by the General Manager of Directline Assurance Company Limited which had insured the motor vehicle registration No. KAY 155L involved in the accident leading to the suit in the lower court.

The ruling of the lower court has not been annexed to the application. The reason it is being challenged may only be apparent from the draft Memorandum of Appeal which is annexed to the application. It appears the respondent sued the applicant and upon service of the plaintiff there was default leading to an interlocutory Judgment being entered against the applicant.

The lower court was then moved to set aside the interlocutory judgment but dismissed the application by holding that, service was properly done and that the judgment was properly entered. Further, the lower court held the defendant's draft defence did not raise any triable issues.

The application is opposed and there are grounds of opposition alongside a replying affidavit sworn by the respondent. Parties have also made their respective submissions which I have considered alongside the authorities cited.

The respondent has complained that the applicant is bent on delaying the cause of justice by lodging this application and in any case, a stay of execution cannot be issued in the absence of an existing appeal. The respondent, it is added, has been denied he right to execute a valid decree since April, 2016 and there must be an end to litigation.

This court recognises the applicant's rights to appeal the lower court decision, and at the same time the anxiety of the respondent to enjoy the fruits of the judgment rendered. The orders sought by the applicant are discretionary, but each case depends on its own circumstances.

Order 42 Rue 6 has set out the conditions an applicant must meet to be entitled to the orders sought. With a view to protecting the rights of the parties herein, I have considered the grounds advanced by the applicant and the opposition raised by the respondent. The applicant is ready able and willing to comply with reasonable conditions that the court may set to enable him pursue the appeal.

In matters of this nature, any respondent should be secured in the event the appeal does not succeed. Guided by the conditions set in the provisions of law cited and the decided cases, I find that the filing of the application though delayed by about three months, has been sufficiently explained and does not cause any prejudice to the respondent.

A party wishing to be heard, and more so, pleading that no summons were ever served should be given that opportunity. In the instant case, the ends of justice shall be met if the orders sought are granted as prayed.

Accordingly, the application is hereby allowed in terms of prayer 1, such that the time is extended and leave granted to lodge the Memorandum of Appeal within 14 days from the date of this ruling. In addition, thereto, the applicant shall deposit the entire decretal sum in an interest earning account in the joint names of the advocates for the parties within 30 days from the date of this ruling to secure the stay of execution. The costs shall abide by the outcome of the appeal.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE