

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 298 OF 2018

JAMES MUNGAI NGUMBA1ST APPELLANT/APPLICANT

SARIS HARDWAE LIMIED2ND APPELLANT/APPLICANT

VERSUS

SARAH WARINGA GATHAGE

GRACE MWONGELI MUTUKU

(Suing as the legal and personal representatives

of the Estate of SIMON MUTUKU MUTINDA

(Deceased).....RESPONDENTS

(Being an Appeal from the Judgment delivered on the 17th day of May, 2018 by the Hon. Gesora CM in Chief Magistrate Court at Nairobi CMCC NO. 5999 OF 2016)

RULING

This is an application by way of Notice of Motion dated 17th June, 2019 seeking a stay of execution of a judgment of the lower court delivered on 17th May, 2018 . There is also a prayer that the Memorandum of Appeal filed on 3rd June, 2019 be deemed to be duly filed and properly on record, and time be extended within which the decretal sum should be deposited in an interest earning account in both names of advocates of record. There is a supporting affidavit sworn by the advocate for the applicant in addition to the grounds set out on the face of the application.

The respondents have opposed the application and there is a replying affidavit sworn by the 1st respondent to that effect. Both parties have filed submissions to address the application. I observe that this is not the first application by the same applicant seeking the same orders. In Miscellaneous Application No. 403 of 2018, the applicant herein moved the court for the same orders and a stay of execution was allowed on condition that, the decretal sum be deposited in an interest earning account in the names of both advocates on record among other orders.

There has been noncompliance which the applicant has not denied. This has been a central issue in the submissions by both parties, but more so the respondent, in opposing the application. The applicant has demonstrated to satisfaction of the court that there were some challenges in complying with the court order, and more particularly the extraction of the decree from the court and the deposit of funds, which could not be transmitted by cheques but by RTGS. This was because of the high amount involved and I believe that was a genuine excuse for the delay. It cannot, in the circumstances, be said that by returning to the court seeking the same orders amounts to abuse of court process.

I know the respondents have a judgment they are anxious to execute, and equally the applicant have the right of appeal. I also know that counsel for the parties are the bridge between the court and the litigants. Both have set responsibilities, so does the court. The bottom line however is that, the courts exist to do justice and to uphold the rights of the parties, and this is the cornerstone of a civil society.

The determination and interest on the part of the applicants to have their day in court has been demonstrated by the payment of the auctioneer charges. That in my assessment is proof of good faith and therefore persuades this court to grant the applicant yet another chance to comply with the set conditions.

That being the case, stay of execution is allowed provided that the deposit of the decretal sum earlier ordered shall be affected within 14 days from the date of this ruling. The Memorandum of Appeal shall be deemed to be duly filed having noted that the relevant fee was paid on 3rd June, 2019 when the same was filed. The costs shall be on appeal.

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

A. MBOGHOLI MSAGHA

JUDGE