

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION 340 OF 2017

GATHIMBA NJURE MWANGI T/A

GEENEM PUBLISHERSAPPLICANT

VERSUS

GRACE WAMBUI WACEKERESPONDENT

RULING

There is a judgment in favour of the respondent herein against the applicant. The case in the lower court was as a result of an accident in which the respondent blamed the applicant. Following that judgment execution proceedings followed. Upon proclamation of the applicant's goods, the applicant paid some money in part fulfilment of the decree.

There is now before me an application by way of Notice of Motion dated 23rd August, 2017 under Sections 79 G, 3A of the Civil Procedure Act and Order 42 of the Civil Procedure Rules for an order that leave be granted to the applicant to file an appeal out of time.

The application is supported by an affidavit sworn by the applicant herein. The application is opposed and there is a replying affidavit sworn by the respondent herein. Both parties filed submissions in argument of the application. The thrust of that application is that the judgment was delivered in the absence of the advocate for the applicant. There is also a complaint that liability was not apportioned and that the award of Kshs. 600,000/= was excessive in the circumstances of the case.

It is the respondent's case that upon attachment of the applicant's goods he paid Kshs. 287,000/= in cash and issued a cheque for Kshs. 700,000/= which cheque was however stopped by the applicant without any notice. There is also an averment in the replying affidavit that the applicant's motor vehicle registration No. KBR 221E was sold by the auctioneer and the proceeds forwarded to the advocate for the respondent. The letter and the cheque has been annexed to the replying affidavit.

In effect, the decree has been executed and those averments have not been denied by the applicant. Whether or not there has been full payment is not an issue in this application. What is clear is that the conduct of the applicant and the delay in moving the court when considered against the record and the reply by the respondent are self-defeating.

I am unable to exercise the discretion of the court in favour of the applicant and therefore this application is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 30th day of May, 2018.

A.MBOGHOLI MSAGHA

JUDGE