



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL CASE NO.310 OF 2018**

**CYRUS NDUNGU.....PLAINTIFF/APPLICANT**

**VERSUS**

**MATTHEW THUKU.....DEFENDANT/RESPONDENT**

**RULING**

The defendant/applicant moved this court by way of a Notice of Motion dated the 28<sup>th</sup> May, 2018 for orders that the applicant be granted leave to file an Appeal out of time against whole judgment by Hon. P. Muholi delivered on the 26<sup>th</sup> April, 2017 at Nairobi and that the Memorandum of Appeal annexed hereto be deemed as duly filed and served.

The applicant has also sought a stay of execution and/or enforcement of the judgment dated the 28<sup>th</sup> April, 2017 pending the hearing and determination of the proposed Appeal by the Applicant.

The application is based on the grounds set out on the body of the application and its supported by the annexed affidavit of Mwangi Matthew Thuku sworn on 28<sup>th</sup> May, 2018.

In the supporting affidavit, it is deponed that failure to file Appeal on time was caused by the fact that he was not aware that the judgment in CMCC No. 168 of 2012 had been delivered.

He avers that the Appeal has high chances of success due to the errors of law and fact committed by the subordinate court. That if he is not granted the stay of execution, he will suffer substantial loss. The application has been brought without undue delay and that he is willing to comply with any conditions that this Honourable Court shall impose.

The Respondent filed grounds of opposition dated the 13<sup>th</sup> day of September, 2018. He opposes the application on the grounds that the application has no merits, that the applicant has failed to establish the essential requirements for grant of the orders sought, that the defendant/applicant admits to his failure to make consistent follow up on the matter and thereby failed to Appeal on time, that the Respondent has not established that he has an arguable Appeal, that the applicant has not provided any security for the payment of the decretal sum as provided for under the rules, that the plaintiff is entitled to enjoy the fruits of his successful litigation, the plaintiff would be adversely prejudiced by grant of stay of execution and that the application is clearly an after thought and an abuse of the court process.

The court has considered the application, the affidavit in support and the oral submissions by the respective parties.

The applicant seeks leave to appeal out of time and a stay of execution pending the hearing and determination of the Appeal. The reason given for his failure to file Appeal on time is because the lower court delivered judgment without giving notice to the Applicant in that it was scheduled to be delivered on the 26<sup>th</sup> April, 2017 during which time the court was not sitting and it was deferred to 28<sup>th</sup> April 2017. That, on the said date, Counsel for the plaintiff attended court and he was informed that it would be delivered on notice and only got to know about the same through the defendant's letter dated 5<sup>th</sup> February, 2018.

The Applicant has averred that the Appeal has good chances of success. He has further prayed for a stay of execution pending Appeal. He submitted that an Appeal is a right under the constitution and to deny a party such a right is tantamount to infringing on his right which is guaranteed in the Constitution.

On part of the Respondent, it was argued that since the judgment was delivered on the 28<sup>th</sup> April 2017, the applicant is yet to pay the decretal sum. The Respondent avers that the delay in filing this application is inexcusable as the same was filed more than one year later. He blames the Applicant for his failure to follow up the matter and hence the delay in filing the Appeal on time. It was submitted that the applicant has not met the threshold set out in Order 42 of the Criminal Procedure Rules and that the Appeal has no chances of success. That no security has been offered and a stay will prejudice the Respondent who should be allowed to enjoy the fruits of his judgment.

The court has considered the application and the material before it.

Stay of execution pending Appeal is provided for under Order 42, Rule 6 (1) of the Civil Procedure Rules. The applicant has to show that the application has been brought without undue delay, offer security for due performance of the decree and show that he shall, suffer substantial loss if the orders sought are not granted.

The judgment the subject matter of this Appeal was delivered on the 28<sup>th</sup> April 2017 and the application herein was filed on the 28<sup>th</sup> May, 2018. This is a delay of one year. The applicant contended that he was not aware that judgment had been delivered as he was not informed. Both parties are in agreement that judgment was scheduled for delivery on the 26<sup>th</sup> April 2017 but was not delivered as the court was not sitting. It was delivered on the 28/4/2018 but there is no evidence that the applicant was made aware of the same until the 5<sup>th</sup> February 2018 when the Respondent's counsel wrote to his Advocate calling for the cheque for the decretal sum and enclosing tabulated costs.

I do concur with the Respondent that the delay is inordinate but with no evidence that the applicant was aware of the judgment before his advocate received the letter dated 5<sup>th</sup> February, 2018, this Court shall give the applicant the benefit of doubt and find that the delay was explained.

On security the applicant averred that if a stay of execution is not granted, the Appeal shall be rendered nugatory. I have perused the draft memorandum of Appeal annexed to the affidavit in support. I find that the same is on both quantum and liability and it's only fair that the Applicant be granted leave to Appeal against the judgment of the trial court.

In the premises foregoing, I find that the application has merits and the same is allowed as prayed. The applicant is granted leave to appeal and the annexed Memorandum of Appeal be deemed as duly filed upon payment of the requisite fees.

Stay of execution against the judgment dated the 28<sup>th</sup> April, 2017 is hereby granted on condition that the whole decretal sum is deposited in court within 30 days from today failing which the stay order shall lapse.

The costs of the application shall abide the outcome of the Appeal.

**Dated, Signed and Delivered at Nairobi this 25<sup>th</sup> day of October, 2018**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:-

.....**For the Plaintiff/Applicant**

....**For the Defendant/Respondent**