



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC APPLICATION NO. 343 OF 2018

MOSES NGANGA NGATA.....APPLICANT

-VERSUS-

CHRISTINE OUKO.....1ST RESPONDENT

PETER MUGO MWANGI.....2ND RESPONDENT

RULING

1. The Applicant herein took out the notice of motion under Articles 50 (1) and 159 (2) (d) & (e) of the Constitution; Sections 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act; and Order 50, Rule 6 and Order 42, Rule 6 of the Civil Procedure Rules and sought for the following orders inter alia:

i) Spent

ii) Spent

iii) THAT pending hearing and determination of the appeal, there be a stay of execution of the judgment and decree in MILIMANI CMCC NO. 7630 OF 2015 entered against the Applicant and the 2nd Respondent on 6th September, 2016.

iv) THAT the Applicant be granted leave to appeal out of time against the said ruling of Hon. A.M. Obura (Mrs.) (Senior Principal Magistrate) in MILIMANI CMCC NO. 7630 OF 2015.

v) THAT the Memorandum of Appeal annexed to the application be deemed to have been duly filed.

vi) THAT the Honourable Court be pleased to issue any other orders that it deems just.

vii) Spent

viii) THAT costs of the Application be in the cause.

2. In his supporting affidavit, Moses Nganga Ngata averred that interlocutory judgment was entered against him and the 2nd Respondent on 6th September, 2016. The Appellant filed an application seeking to set aside the said judgment which application was dismissed on 31st May, 2017 and that he instructed his then advocates to file an appeal and obtain an order for stay of execution of the judgment and decree.

3. In opposition thereto, the 1st respondent filed the Replying Affidavit sworn by **Josephine K. Maangi** plus grounds of opposition.

4. The principles to be considered when determining an application for stay of execution pending the hearing of the appeal are threefold.

5. On the issue as to whether the application has been timeously filed, the Applicant admitted that there was delay in filing the same. However, he argued that the delay resulted solely from the mistake on the part of his counsel, who had misrepresented the facts to him.

6. It is the deponent's averment that without his knowledge, his erstwhile advocate neglected to file the appeal as instructed; rather, he merely applied for typed proceedings and it was not until auctioneers served the Applicant with a proclamation notice that he realized no appeal had been filed nor stay secured.

7. In her grounds of opposition, the 1st respondent argued that judgment had been entered more than two (2) years ago, therefore the delay in bringing the application was inordinate and that an application for leave to appeal out of time can only be lodged at the Appeals division.

8. It is apparent that interlocutory judgment was entered against the Applicant on 6th September, 2016. Soon thereafter, an application seeking to set aside the aforesaid judgment was dismissed vide the ruling delivered on 31st May, 2017.

9. It is argued by the Applicant that instructions to seek for an order for stay and file an appeal were given to the previous advocate, who merely applied for typed proceedings on 2nd June, 2017 but did nothing more. Furthermore, the Applicant stated that he had given clear instructions to his then advocates to file the appeal but was let down. The Applicant maintained that all this while he was oblivious to the fact that the appeal had not been lodged by his previous advocate, hence the delay in lodging the application.

10. The court has in turn considered the 1st respondent's submission that there has been inordinate delay in filing the appeal and without reason; and that the Applicant does not have any triable issues to raise.

11. After a careful analysis of the arguments made by both sides, this court is convinced that whereas there was delay in bringing this application, the Applicant should not be made to suffer for the mistakes of his erstwhile advocate. The delay in filing an appeal within time was caused by the Applicant's former advocate.

12. On the issue of substantial loss, the Applicant submitted that his appeal has high chances of success and that he stands to lose his household goods in the execution process, thereby rendering the appeal nugatory. The Applicant went on to argue that the Respondents are unlikely to suffer any prejudice that cannot be compensated by way of costs. The court has considered the special circumstances of the Applicant and appreciates that household goods are deemed essential in any given situation. In this instance, the court is persuaded that substantial loss will result.

13. This court is convinced by the Applicant's argument that his appeal may dissipate if the order for stay is not given and in view of the fact that the 1st Respondent has not denied that she intends to execute the decree.

14. The remaining issue is the provision of security for the due performance of the decree. Though the parties did not address this court on the same, the court has the discretion to determine the appropriate form of security the Applicant should provide.

15. The Applicant is granted leave of 10 days from the date hereof to file the appeal out of time. An order for stay of execution pending appeal is also given on condition that the Applicant deposits the decretal sum of Kshs. 326,634/= in an interest earning account in the joint names of the advocates/firm of advocates within 30 days in default of which the motion will be treated as having been dismissed. Costs of the motion shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 23rd day of November, 2018.

.....

J.K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the 1st Respondent