

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 523 OF 2016

CHINA ROAD & BRIDGE ENG. CO. LTDAPPLICANT

VERSUS

ANNE NJOKI WAINAINARESPONDENT

RULING

This is an application by way of Notice of Motion dated 7th October, 2016 under Sections 79G, 1A and 3A of the Civil Procedure Act and Order 50 Rule 6, Order 51 Rules 1 and 3 of the Civil Procedure Rules. It seeks substantive orders that the applicant be granted leave to file and serve appeal out of time arising from the Judgment of the lower court delivered on 28th July, 2016.

The other orders sought are that if that leave is granted, it should operate as a stay of execution pending the determination of the said appeal. The application is opposed by the respondent.

The grounds upon which the application is premised are that after the delivery of the Judgment the applicant through its advocates made an application for typed and certified copy of the judgment; however even as at the time of filing the application the said copies had not been received and time to file the appeal had expired. There is apprehension that the respondent may execute the decree.

There are other grounds that are set out which go to the root of the intended appeal and it is not prudent to address them at this stage. From the material placed before the court, the lower court judgment was based on a traffic accident that involved the applicant's motor vehicle registration No. KBU 223 L which collided with motor cycle registration No. KMCN 018V which was being ridden by the deceased John Chege Wainaina.

The issues for determination in the lower court were therefore liability and quantum. The appellant was held liable to the extent of 90% while the deceased was held to have contributed to the accident at the rate of 10%. The issue of liability is the subject of appeal going by the draft memorandum of appeal on record. The other issue is on quantum leading to the award of Kshs. 1,726,549/=.

It is clear from the correspondence supplied by the appellant's advocate that the failure to file the appeal in time was occasioned by delayed provision of the lower court proceedings. This is a systemic challenge within the institution and no litigants should be blamed for delay not within their control.

Considering all the material before me, I believe the applicant has made a good case to warrant the grant of the orders sought albeit conditionally. Accordingly, leave is hereby granted to file appeal out of time which has to be done within 30 days from today.

There shall be a stay of execution of the lower court judgment on condition that the applicant pays the respondent a sum of Kshs. 500,000/= out of the decretal sum and the balance be deposited in an interest earning account in the names of both advocates for the parties. This shall be complied with within 30 days from the date of this ruling. The costs herein shall be on appeal.

Dated, signed and delivered at Nairobi this 21st Day of March, 2017.

A. MBOGHOLI MSAGHA

JUDGE