



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA TA NYERI**

**MISC APPLICATION NO. 5 OF 2017**

**JOHN MWANGI MACHARIA.....APPLICANT**

**VS.**

**JENNIFFER KEIYA MUTEGI (Sued as the administrator of the  
Estate of PETER MUTEGI MUTHURWA (DECEASED).....RESPONDENT**

**RULING**

Before me is a Notice of Motion dated 3<sup>rd</sup> March 2017 filed under the certificate of urgency of Paul Ngigi Karomo, advocate.

The urgency is based on the claim that the delivery date of judgment in Nyeri CMCC 443 of 2013, where the respondent was awarded damages of Ksh 2,907,000 was not known to the applicant. That the applicant became aware of the same when the respondent went to execute.

The application seeks the following orders that

- There be a stay of execution of the judgement delivered on 15 December 2015 Nyeri CMCC 443 of 2013 and any consequent decree pending the hearing and determination of this application
- the court be pleased to grant leave to the applicant to file an appeal out of time against the judgement delivered on 15<sup>th</sup> of December to 2013
- there be stay of execution judgement delivered on 15<sup>th</sup> of December 2013 in Nyeri CMCC 413 OF 2013 in the consequent decree form pending the hearing and determination the of the appeal
- costs of the application the cause.

The motion is brought under Order 42 rule 6(1) of the Civil Procedure Rules 2010, section 1A and 1B, 3A, of the Civil Procedure Act, Article 159 (2)(d) & (e) of the Constitution of Kenya and all other enabling provisions of the law.

The main ground for the application is set on the certificate of urgency. The second ground is that the applicants is desirous of appealing against the judgement and which he believes has high chances of success. And further that the delay in filing the appeal is not inordinate as to be inexcusable. Further that unless a stay is granted, the applicant is bound to suffer irreparable loss and damage.

The applicant is also able and willing to deposit such security for the due performance of such a decree or order as may ultimately be binding on him as this hon court may order.

The application is supported by the affidavit of John Mwangi Macharia and the annexures there to. The facts making the background this case are clearly set out in the supporting of the application. The annexures include the decree, the proclamation, and a draft memorandum of appeal

The respondent filed a replying affidavit dated 16<sup>th</sup> March 2017 opposing the application on the ground that a similar application was dismissed by the lower court and that the applicant was given 30 days in which to settle the decretal sum and instead of doing so the applicant came to this court.

Parties agreed to dispose of application by way of written submissions.

The applicant's submissions emphasise the court's discretion in granting the orders the applicant is seeking and relies on the case of FREDRICK MUTONYI GITONGA vs. ISALIAH MUTONYI WAMBUGU AND ANOTHER [2015] eKLR.

The respondent submissions are to the effect that this application is an attempt to overturn the lower court's decision throwing out the applicant's application for stay without appealing that decision. However, the respondent is of the view that in the event the court is inclined to allow the application, to do so with costs to the respondent and order that the applicant to provide security for the performance of the decree in the sum of Ksh 2,770 795 in an interest earning account in the joint names applicant's and respondent's advocates within a specified period of time.

The first issue is whether by virtue of the dismissal of the application in the lower court the applicant is estopped from filing a similar application before this court.

The answer is found in Order 42 rule (6) of the Civil Procedure Rules which provides as follows;

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, **and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

Three caveats to this are set; first, that the court must satisfy itself that that substantial loss may result to the applicant unless the order is made, secondly, that the application has been made without unreasonable delay, and thirdly, that such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

So to begin with, the fact that the applicant's application for stay in the lower court was dismissed is not a bar to filing a similar application before this court. Secondly on the issue of delay in filing the appeal there is a clear explanation as having been caused by the fact that the applicant was not aware of the date when judgement was delivered. That in my view is excusable. Further, courts have been reluctant to shut the door of justice in the face of a party seeking to exercise the right of appeal.

In the case of **Major Igweta vs. M'ethare & Anor Civil Appl Nai 8/00 (UR)** the court of appeal stated that among the factors to be considered are;

The period delay of the reason for the delay (possibly), the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent, ...

Even where the delay was caused by mistakes by counsel, the courts will act in the interests of justice. This came out in the case of **Lucy Wambui Maina and 2 others v Peter Sundra Maina [2005] eKLR** where the Court of Appeal, recalling that it had held in many occasions there are excusable mistakes of counsel which ought not to be visited on the clients, quoted the from **Murai vs. Wainaina (No. 4) (1982)**

**KLR 38**, the words of Madan JA (as he then was)

A mistake is a mistake. It is not less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel for the case of junior counsel the court made feel compassionate more readily. A blunder on a point of law can be mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

I need not say more.

Will the applicant suffer irreparable damage? Or the respondent suffer prejudice? Suffice it to say that the applicant is willing and the respondent is amenable to the deposit of security in the performance of the decree.

I have carefully considered the application, the affidavits, and the submissions by each counsel.

I find that the application has merit.

It is therefore allowed in the following terms;

1. There shall be stay of execution of the judgement and decree in Nyeri CMCC 443/2013 pending the hearing and determination of the appeal herein.
2. That the decretal sum will be deposited, as security, in an interest earning account in the joint names of the advocates herein in a reputable bank within 30 days hereof.
3. That the applicant will file and serve the appeal within 45 days hereof, in default the stay will lapse.
4. The costs of the application to the respondent.

Right of Appeal 30 Days.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 31<sup>ST</sup> MAY 2017**

**TERESIA MATHEKA**

**JUDGE**

**J. K KIBICHO ADVOCATES FOR THE APPLICANT**

**ANDREW KARIUKI (A.K) &CO, ADVOCATES.**

**COURT ASSISTANT HARRIET**