



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPLI. NO. 64 OF 2016**

**ANKUSH ENTERPRISES LTD..... DEFENDANT/APPLICANT**

**V E R S U S –**

**JULIUS MUTUI MUSEE.....PLAINTIFF/RESPONDENT**

**RULING**

1. Ankush Enterprises Ltd, the applicant herein took out the motion dated 27.2.2016 in which he sought for inter alia leave to appeal out of time and for an order for stay of execution of the decree pending appeal. The motion is supported by the supporting affidavit of Victor Kisanya and the supplementary affidavit of George Ombati. When served, Julius Mutui Musee, the respondent herein, filed the replying affidavit of Nelson Kaburu Felix to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.
2. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival written submissions. It is the submission of the applicant that he was not aware of the date of the delivery of judgement and only came to know about its delivery when he was served with a demand notice for payment of auctioneers fees of kshs.503,923/= by **Front Bench Auctioneers**. He now intends to challenge the same on appeal. The applicant avers that he has an appeal with arguable grounds. He has also submitted that unless the order for stay is given he would suffer substantial loss and that he is ready to provide security for the due performance of the decree by depositing in an interest earning account of half the decretal sum.
3. The respondent on the other hand is of the view that judgment notice was duly served upon the applicant. The respondent further argued that the applicant's advocate was served with a draft decree vide the letter dated 10.8.2015. The respondent accused the applicant of failing to disclose that he was served with the notice of entry of judgment and with the draft decree with a view of stealing a match. Mr. Nelson Kaburu Felix, the respondent's advocate avers that he personally spoke to Mr. Ombati, learned advocate for the applicant about the entry of judgment more once but the learned advocate kept mum. It is also pointed out that there has been a long and unexplained delay in filing the application.
4. After a careful consideration of the material placed before this court plus the rival written submissions it is not in dispute that the judgment was delivered in the absence of the applicant on 3<sup>rd</sup> July 2015. A decree has now been issued for the sum of ks.2,398,307/= plus auctioneers fees for ksh.503,923/=. The question which this court has been left to grapple with is whether or not the applicant had notice of the date of delivery of judgment? The applicant has made a specific averment that the trial court had initially given notice that judgment would be delivered on

30.4.2015 but on the aforesaid date, judgment was not ready. It is said that since Hon. Obulutsa was on transfer the parties were informed that judgment would be delivered on notice. The applicant has denied being served with a notice. The respondent has claimed that a judgment notice was served upon the applicant. I have perused the notice of judgment dated 25.6.2015 and attached to the affidavit of Nelson Kaburu Felix. It is a notice issued to the parties to inform them of the date of delivery of judgement. There is however no clear evidence that the notice was brought to the attention of the applicant. In other words there is no evidence from the trial court to show that the applicant was served with the aforesaid notice.

5. I am convinced that in the circumstances of this case, that the applicant was not aware of the date of delivery of judgement. It has been averred that a draft decree was forwarded to the applicant's advocate for approval thus notifying him of the existence of the judgment. The applicant's advocate has also denied knowledge of that. In view of the express denial of service by the applicant I expected the respondent's advocate to provide credible evidence of service of the draft decree and the certificate of costs. In the absence of that, I am inclined to believe the applicant's averments that he was not served. I am satisfied that the applicant is entitled to leave. I grant him leave to file an appeal within 10 days from the date hereof.
6. The applicant has also asked to be given an order for stay of execution pending the filing and determination of appeal. I am satisfied that upon the applicant learning of the execution process, he quickly filed the application for stay. There was therefore no undue delay in filing the motion.
7. The applicant has averred that if the decretal sum is paid to the respondent, he will not be in a position to repay. The respondent has not personally made an averment to respond this allegation but his advocate has merely stated that the respondent is ready to provide a renewal bank guarantee. I have perused the proceedings and it is evident that the respondent described himself before trial court as a carpenter who was earning kshs.700/= per day. I am satisfied that if the decretal sum is paid to the respondent he may not easily refund thus forcing the applicant to file an action to recover the same should the appeal succeed. This court is therefore convinced that the applicant may suffer substantial loss if the order for stay of execution is denied.
8. The applicant has offered to at least deposit half of the decretal sum as security for the due performance.
9. In the end, I find the motion to be with merit. I grant the applicant leave of 10 days to file an appeal out of time. The applicant is also given an order for stay of execution pending appeal on condition that the applicant deposits the decretal sum of kshs.2,398,307/= in interest earning account in the joint names of the learned counsels and or firms of advocates within 60 days from the date hereof. The auctioneers fees to await the outcome of the intended appeal.
10. In default, the motion shall be deemed as having been dismissed.
11. Costs of the motion to abide the outcome of the intended appeal

Dated, Signed and Delivered in open court this 27<sup>th</sup> day of May, 2016

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent