



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 18 OF 2013

TERRY KANYUA MARANGUPLAINTIFF/APPLICANT

-VERSUS-

WELLS FARGO LIMITED. DEFENDANT/RESPONDENT

RULING

Setting aside orders

[1] Before me is an application dated 18th September, 2015 which is asking this court to set aside the order of stay of execution issued on 10th December, 2014. It also seeks for costs of the application. The application is expressed to be made under Order 22 rule 22 and Order 51 rule 1 of the Civil Procedure Rules. It is grounded on the affidavit of Gilbert C. Mutembei, Advocate and another by Lucy Kaaria Advocate. It is also grounded on other grounds set out in the application. The major grounds for applying are; (a) that the respondent has not filed any appeal within the statutory period prescribed in law; and (2) the failure to file appeal defeats the purposes for which the stay was granted. The two affidavits by counsel for the Applicant have amplified these two grounds but the one by Lucy Kaaria whilst acknowledging the filing of appeal and request for proceedings, she clearly stated that the Respondents have not been following up on the proceedings and she accused them of dilatory conduct thereto. She averred that the plaintiff has a judgment of Kshs. 8,456,500 which she cannot execute even an urgent surgery she now requires. On the basis of that ground the applicant prays for the stay granted to be set aside.

[2] The respondent opposed the application and filed a replying affidavit and deposed *inter alia*; that the application is a non-starter for two reasons; (1) they have already filed a Notice of appeal as prescribed; (2) also applied for certified copies of proceedings and judgment; the proceedings are yet to be supplied by the court; and they implored this court to supply them with proceedings so that they can prepare the record of appeal. On that basis, they sought for the application to be dismissed.

DETERMINATION

[3] First things first. A notice of Appeal was filed in court on 23rd October 2014. Accordingly, an appeal was duly filed. Again, the Respondents applied for certified copies of typed proceedings on 23rd October 2014. The two issues are not in dispute. But despite that finding, it is quite unfortunate that this matter has taken such a long time to procure typed and certified copies of proceedings and judgment for purposes of appeal, yet the Applicant is in dire need of surgery and which surgery is as a result of the injuries sustained in an accident that is the subject of these proceedings. Isay this fully aware that both parties have

rights: the Respondents have right of appeal which included that his appeal should not be rendered otiose; and the Applicant has right to full realization and enjoyment of the fruits of her judgment. The Applicant has averred through her counsel that the Respondents did not follow for provision of certified proceedings since 23rd October, 2014 when they applied for them. That is a substantial argument in law. The Respondent failure to follow up on the proceedings is one of the sources of the delay I am seeing. But, in the circumstances of this case, it will be unfair to attribute the delay herein entirely to the Respondents. An early intervention by the Applicant may have also awakened the Respondent or have these proceedings moved forward. Now, I should think that I should give an order which balances the rights of these parties in an almost symmetrical bound. Accordingly, as courts are now more efficient, I direct the Deputy Registrar to ensure the proceedings herein have been typed and provided as by the law required not later than 30 days from today. I will also assign this case a mention date before me to ensure that these my directions have been executed for the sake of justice. With those directions, the application dated 18th September, 2015 is spent; I order each party to bear own costs thereto. It is so ordered.

Dated, signed and delivered in open court at Meru this 19th day of September, 2016.

F. GIKONYO

JUDGE

In the presence of :

M/s. Kaaria advocate for the plaintiff

M/s. Njenga advocate for Kibicho advocate for the defendant

F. GIKONYO

JUDGE