



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NUMBER 337 OF 2016**

**ENDMOR STEEL MILLERS LTD.....PROPOSED APPELLANT**

**VERSUS**

**JAMES WAKHULUNYA MAKUTO.....PROPOSED RESPONDENT**

**R U L I N G**

The application before the court is the one dated the 23<sup>rd</sup> June, 2016 by the proposed appellant (applicant) expressed to be brought under Order 42 of the Civil Procedure Act and Order 49 Rule 5 of the Civil Procedure Rules. The application seeks the following orders: -

- a) That this application be certified as urgent and service be dispensed with in the first instance.**
- b) That a stay of execution in CMCC No. 2891 of 2013 be granted pending the hearing and determination of this application.**
- c) That the proposed Appellant be granted leave to appeal out of time against the whole judgment of the Hon. D. W. Mburu (Mr.) Principal Magistrate, delivered on 18<sup>th</sup> September, 2015.**
- d) That the Notice of Appeal and Memorandum of appeal annexed hereto be deemed as duly filed and served.**
- e) That the costs of this application be provided for.**

It is premised on the grounds set out on the body of the same and the annexed affidavit of Simon Wachira sworn on the 23<sup>rd</sup> June, 2016.

According to the deponent, exparte judgment in the lower court matter was delivered on the 18<sup>th</sup> September, 2015 in favour of the Plaintiff and immediately thereafter the defendant made an application dated 7<sup>th</sup> October, 2015 to set aside the same judgment and be allowed a chance to defend the suit.

The said application was dismissed on the 19<sup>th</sup> February, 2016. The proposed appellant being aggrieved and dissatisfied with the said judgment intends to appeal against the same. It is deponed that the proposed appellant has a strong and arguable defence and hence the suit ought to have been heard on merits.

The Applicant is also seeking the leave of the court to file appeal out of time as the time within which to file the appeal has already expired. The Applicant avers that the delay in filing the application was caused

by the delay in having the proceedings and the judgment typed which, the applicant was not able to get by the time the application herein was filed. It is further averred that the delay is not inordinate and it urges the court to excuse the same.

The Applicant avers that the Respondent is likely to proceed with execution unless a stay is issued and that the Respondent herein will not suffer any prejudice if the application herein is granted.

The application proceeded ex parte as the Respondent did to file any response notwithstanding that his advocate had been served with the application on the 27<sup>th</sup> June, 2016.

This court has duly considered the application, the supporting affidavit and the submissions made by the advocate for the applicant when the application came up for hearing on the 30<sup>th</sup> August, 2016. The applicant has sought two main orders in the application. The court will first deal with that of stay of execution. This is provided for under Order 42 Rule 6 of the Civil Procedure Rules. Under this said order an applicant has to satisfy the court that: -

***1) It will suffer substantial loss if the stay is not granted and that such an application has been brought without undue delay.***

***2) Such security as the court orders for the due performance of such degree or order as may ultimately be binding on him has been given.***

I have perused the affidavit in support of the application. It has not been deponed that the applicant shall suffer substantial loss or at all if stay of execution is not granted. In the case Machira t/a Machira & Co. Advocates, the court held that substantial loss is the cornerstone for granting an application for stay of execution.

On the issue of delay in filing the application; the ruling that the Applicant seeks to appeal against, was delivered on the 19<sup>th</sup> February, 2016, while the application herein was filed on the 23<sup>rd</sup> June, 2016 a period of four (4) months after the ruling. The reason given for the delay is that the applicant applied for typed proceedings and a copy of the judgment. The letter applying for the proceedings is dated the 17<sup>th</sup> March, 2016 which was just a day before the expiry of the 30 days period provided for appeal. It is also noted that the applicant filed the application before it could obtain the proceedings and a copy of the judgment which therefore means that it could as well have filed the application earlier before the period within which to appeal expired. In my view, the reason given for the delay is not plausible.

On the issue of security, it is noted that the applicant has not offered any security and in fact, the issue has not even been addressed at all.

It is the finding by this Honourable Court that the applicant has not satisfied the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules for grant of stay of execution. In any event, it has sought for stay pending the hearing and determination of the application.

However, in the interest of justice, the applicant is hereby granted leave to file the appeal out of time. The Memorandum of Appeal be filed within a period of 14 days from the date of this ruling.

The prayer for a stay of execution is hereby disallowed.

Costs of the application are awarded to the Respondent.

Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of October, 2016.

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**L NJUGUNA**

**JUDGE**

*In the presence of*

..... *for the proposed Appellant*

..... *For the proposed Respondent*