



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 187 OF 2016**

**N.K. BROTHERS CONSTRUCTION CO. LTD.....APPLICANTS**

**VERSUS**

**DAVID MULEI.....RESPONDENT**

**RULING OF THE COURT**

1. Before the court is a **Notice of Motion** application dated 20<sup>th</sup> June 2016 seeking the following orders:-
  - i. THAT **this application be certified as urgent and be heard *ex parte* in the 1<sup>st</sup> instance.**
  - ii. THAT **there be stay of execution pending the hearing and determination of this application and the intended appeal.**
  - iii. THAT **the Applicant/proposed Appellant be granted leave to appeal out of time against the Judgment/Decree of Honourable Mrs. C.K. Kisiangani delivered on 13/4/2016 in CMCC No. 715 of 2014 and the time for filing appeal be extended.**
  - iv. THAT **the costs be in the cause.**
2. The application is premised on the grounds stated therein and is supported by affidavit of **Susan Murage** sworn on 20<sup>th</sup> June 2016.
3. The Applicant's case is that they were instructed by the Applicant's insurers to represent the Defendant/Applicant and defend the suit. They then filed a Memorandum of Appearance and Defence on behalf of the Defendant/Applicant. The said suit was set down for hearing on diverse dates but was finally heard on 20<sup>th</sup> January 2016. After the hearing, the magistrate gave a mention date for 17<sup>th</sup> February 2016 for purposes of filing written submissions. On 17<sup>th</sup> February 2016, the Applicant attended court and filed his submissions but the Respondent had not filed the submissions and the court on its own motion ordered that the matter be mentioned further on 30<sup>th</sup> March 2016 to enable the Respondent to comply. After they filed their submissions they did not attend court on the mention date of 30<sup>th</sup> March 2016 as the mention was for the purposes of the Plaintiff to file submissions. After the Plaintiff filed their submissions they were not notified of the judgment date and were not served with any Notice of Judgment and only they came to learn of the Judgment through the Respondent's Advocate's letter of 10<sup>th</sup> May 2016. It is from the mentioned letter, that they learnt that Judgment was delivered on 13<sup>th</sup> April 2016 in their absence. They then instructed their Court Clerk to pursue the court file and establish what had transpired on 13<sup>th</sup> April 2016. The Defendant/Applicant was aggrieved by the judgment both in terms of liability and quantum and they instructed them to file an appeal against the judgment. It is the Applicant's contention

that due to time lapse from the date judgment was delivered that there is real danger of execution against the Defendant/Applicant and that the Defendant/Applicant would suffer substantial loss if stay of execution is not granted. The Applicant is ready and willing to deposit the decretal sum in court as security pending the hearing of the intended appeal and that the Plaintiff/Respondent might not be able to refund the decretal sum as she has no stable means of earning.

4. The application is not opposed. It was served upon the Respondent on 8<sup>th</sup> September 2016 and there is an affidavit of service filed herein on 15<sup>th</sup> September 2016 to the effect. The Respondent did not attend to the hearing.

5. I have carefully considered the application and the grounds upon which it is based. It is alleged by the Applicant that they did not receive notice of the judgment and the same was delivered in their absence. This allegation is not challenged and so it is the finding of this court that the Applicant has proved that it is entitled to leave to file appeal out of time. As regards other prayers, the same have also not been opposed. This court is particularly impressed with the Applicant's willingness to deposit the decretal sum in a joint account pending the intended appeal. In allowing the application I make the following orders:-

**a. There is issued herein an order of stay of execution pending the hearing and determination of the intended appeal.**

**b. The Applicant is herewith granted the leave to appeal out of time against the Judgment/Decree delivered on 13/4/2011 in CMCC No. 715 of 2014 and the time of filing such appeal is hereby extended by 10 days from the date of this ruling.**

**c. The Applicant shall within 10 days deposit the entire decretal sum arising from the said Judgment in an interest earning account in the joint names of the Advocates for the persons.**

**d. Costs shall be in the cause.**

Orders accordingly.

**Dated and delivered at Machakos this 13<sup>th</sup> day of October 2016.**

**E. OGOLA**

**JUDGE**