



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC. APPLICATION NO. 186 OF 2016

BENJAMIN MUSYOKAAPPLICANT

VERSUS

OBADIA MUTIA.....RESPONDENT

RULING OF THE COURT

1. The Notice of Motion application before the court is dated **22nd August, 2016** in which the applicant prays for the following orders;

- a. That this application be certified as urgent and heard *ex parte* in the first instance.
- b. That there be a temporary stay of execution of the judgment and decree emanating from the judgment in Machakos CMCC No. 180 of 2015 delivered on **16th June, 2016**, pending the hearing of this application *inter partes*.
- c. That there be stay of execution of the said judgment and decree in Machakos CMCC No. 180 of 2015 pending hearing and determination of this application.
- d. That the applicant be granted leave to lodge an appeal against the judgment that was delivered on **16th June, 2016** out of time.
- e. That upon grant of prayer 4 above, there be a stay of execution of the judgment and decree pending the hearing and determination of the applicant's appeal.
- f. That the costs of this application be in the cause.

2. The application is premised on the grounds set out therein, and is supported by affidavit of **Linda Mukami** sworn on **22nd August, 2016**.

3. The applicant's case is that judgment was entered herein for the respondent in Machakos CMCC No. 180 of 2015 **Obadia Mutie vs Benjamin Musyoka**. However, the applicant did not file Notice of Appeal because the applicant's file in the matter got lost and it took time to locate it. The applicant was insured by an Insurance Company which had insured the motor vehicle registration No. KBV 518W in which the respondent was travelling when an accident took place and the insured was injured. The applicant's insured then took time to reconstruct the file and by the time they were advised by their advocates to appeal the judgment, time to appeal had lapsed hence this application. The applicant's case is that he has a good appeal on both quantum and liability. In the lower court the court had entered judgment for the respondent as follows:

a. Liability at 80%:20% against the applicant

b. General damages Shs. 400,000

c. Special damages Shs. 7,190

Total Shs. 325,752

plus costs and interests.

4. It is the applicant's case that the respondent is a man with no known means of income, and if the application is allowed but stay is not granted, there is a possibility that the intended appeal would be rendered nugatory.

5. The application is opposed. The Respondent filed a Replying Affidavit in which he deponed that the cause of action in this matter is a Road Traffic Accident on or about 10th May, 2014 in which he was involved and as a result I sustained severe life threatening injuries. The matter proceeded for full hearing and the defence did not call for any witnesses and judgment was delivered in his favour on **16th June, 2016**. At the time of delivery of the judgment the defence counsel was present in court and the defendant was granted stay of thirty (30) days. On 22nd June, 2016 the applicant admits that she was duly informed of the judgment of the court, and on 22nd June, 2016 the defence counsel forwarded a consent for stay of the judgment of the lower court vide a consent drafted by the defence on 22nd June, 2016. On the 12th July, 2016 the defence counsel again forwarded a consent for the costs of the lower court vide a letter dated the same day. After both consents were signed the defence willingly failed and/or neglected to pay the decretal sum plus costs deliberately to deny plaintiff/respondent enjoyment of his lawfully obtained judgment. The applicant admits to have known about the judgment since back in June, 2016 when it was delivered and thus the assertion by the applicant that she did not trace her office file are untrue and made in bad faith meant to mislead this court.

6. The respondent submitted that he is man of means, he is a driver earning Kshs. 18,000/= per month and thus able to repay the decretal sum. If this application is allowed the plaintiff/respondent will be greatly prejudiced since he still needs money for further treatment for the injuries he sustained, two fractures, one on the distal tibia(right foot), fracture of distal fibula (thigh) and dislocation of right ankle joint.

7. I have carefully considered the application. The issue I raise for consideration is whether or not the applicant was diligent in this matter, and whether or not the application is filed in good faith.

8. To begin with, it is not disputed that when the judgment here was delivered on 16th June, 2016 both parties were in court and the applicant was granted thirty (30) days stay. The parties then agreed on the issue of costs vide a letter dated 12th July, 2016. Even if it is accepted that the insurance file got lost, what stopped the defendant's advocates from filing a Memorandum of Appeal from the record of their court file or the court file itself. The record of appeal or Memorandum of the same did not require the insurance file. All it required was the advocate's file. Therefore the reason given herein for delay is not convincing. The decision to appeal appears to have been an afterthought and solely meant to frustrate the plaintiff/respondent from enjoying the fruits of the judgment. No convincing reasons have been advanced for this application.

9. The same is herewith dismissed with costs to the plaintiff/respondent.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 29TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

M/S Juma holding brief for Wanjiru for applicant

M/S Ngatia holding brief for M/S Thoronjo for respondent

Court Assistant – Mr. Munyao