



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NUMBER 273 OF 2013

CHRIS MUTUKU. APPLICANT

VERSUS

STANLEY THAARA MUGACHA. RESPONDENT

R U L I N G

The application before the court is the Notice of Motion by the Applicant herein dated the 22nd March, 2013. It seeks two main orders: -

1. That there be a stay of execution of the judgment and decree in Nairobi Milimani CMCC No. 9572 of 2004 – Stanley Thaara Mugacha Vs Chris Mutuku dated 21st December, 2012 pending the hearing final determination of the intended appeal.)
2. That this court enlarges time to enable the applicant to appeal out of time.

The applicant bases the application largely on the grounds that failure to file an appeal in/on time was inadvertent and innocent and that the delivery of judgment on 21st December, 2012, was during Christmas season which made the applicant's advocates fail to inform the applicant of the result of the judgment. The applicant also stated that he had lost his mobile phone thereafter and could not be reached by his advocates. The applicant finally averred that his appeal will be sound and will have good chances of success.

The application is strainuously opposed on the grounds that: -

- a. The delay in seeking the leave to file appeal is inordinate and without reasonable application.
- b. that the judgment and decree being sought to be to be appealed against and in respect of which stay is sought, relates to Nairobi Milimani CMCC No. 5926 of 2007 in respect of which the parties herein were not parties.
- c. That the Respondent who has a decree in his favour will be prejudiced if the same is delayed from realization for whichever reasons.
- d. That the intended appeal shows little merit.

I have carefully perused this application and the grounds upon which it is made and/or opposed. It is not denied that between the 21st December, 2012 when judgment was delivered and the 22nd March, 2013 when this application was filed is just more than 90 days. The applicant does not deny the fact that he or

his advocate was in court and took delivery of judgment on the 21st December, 2012. It is shown on this file record and the same is not denied that the Applicant is an advocate and that the firm of advocates that handled the lower court suit is the same as the one now holding this application.

The grounds or facts presented in this application do not accordingly appear congruent with the grounds of delay to file the intended appeal. Indeed, that the judgment was read on 21st December, 2012 which might be a day within the Christmas Holiday, is not on its own, reasonable ground for the applicant's failure to file an appeal within the 30 days prescribed by law.

On the other hand, the mere fact that the applicant who himself is an advocate, may have lost his mobile phone, could not, in the court's view, prevent his advocates reaching him until March 21st 2013 when this application was filed.

It is the view and findings of this court therefore, that this application is not based on any reasonable grounds upon which this court can rightly exercise its favourable discretion to grant leave to appeal out of the time prescribed by law. In the circumstances, this application is found without merit.

The court as well observes that the application is focused on a different case from that concerning the parties herein whose judgment alone can be the focus of an appeal or stay of execution. That is to say, that even if this court were to grant a stay of execution of the decree in Nairobi Milimani CMCC No. 5926 of 2007 or to grant leave to appeal out of time in respect to the said case, the same will be of no relief or help to the Applicant whose intention to appeal or stay execution, is intended to affect Nairobi Milimani CMCC No. 9572 of 2004. Such an order if given, would be clearly in vain.

Finally, it may be rightly said that a certified copy of judgment or decree intended to be stayed or in respect of which leave to appeal out of time is sought, should always be attached to the application to enable the court examine the same for its correctness. It is trite law that where such a copy of judgment or ruling is not annexed, the court should be entitled to dismiss or strike out the application.

The result is that this application for either reason as stated above, is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 20th day of February, 2014.

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JUDGE