



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

MISCELLANEOUS CIVIL APPL. NO. 107 OF 2013

AQUARIUS BEACH RESORT.....PLAINTIFF

VERSUS

CINZA RE.....DEFENDANT

RULING

The appellant filed the application before me on 6th August, 2013 seeking inter alia extension of time to file appeal against and stay of execution in respect of the judgment delivered by the learned trial magistrate on 10th February, 2012.

The application is expressed to be brought under Section 3A and 79G of the Civil Procedure Act and Order 42 rule 6 (1) of the Civil Procedure Rules. The grounds in support of the application are expanded in the affidavit of Nyongesa Wafula, counsel for the applicant in the Lower Court. The relevant grounds are:

- “(a) That upon the close of the defence case in civil case no. 287 of 2002 on the 19th day of August, 2011 the matter was fixed for a mention on the 25th day of November, 2011 for purposes of confirming filing of written submissions.**
- (b) That on the 25th day of November, 2011 upon confirming that parties had filled their respective written submission the honourable Principal Magistrate gave an order that judgment would be delivered on the 6th day of January, 2012.**
- (c) That on the said date judgment was not delivered and either were the parties informed of the date that the judgment would be delivered.**
- (d) That on the 10th day of February, 2012 the learned Principal Magistrate delivered the said judgment in the absence of both parties and without any prior notice to the advocates for the parties herein.**
- (e) That the applicant’s advocates only came to learn that the said judgment had been delivered when they received a letter dated 17th July, 2013 from the respondent’s advocates informing them that the judgment had been delivered for a sum of Kshs. 1,825,470/=.**
- (f) That the applicant herein feels aggrieved by the judgment and would wish to appeal against it.**
- (g) That the applicant has strong arguable grounds for the intended appeal.**

(h) That the delay herein has been occasioned by the applicant's advocates not being informed of the fact of the delivery of the judgment."

In the first instance the appellant was granted conditional stay but there had been no compliance with the condition "C deposit of decretal sum "C by the date of hearing. The respondents filed grounds in opposition to the application, key among them being:

"(1) That the application is bad in law and an abuse of court process calculated merely to delay the realization of the decree herein.

(3) That the defendant/applicant has not demonstrated or shown any evidence that it will suffer for substantial loss of payment of the decretal as it is a lawfully obtained judgment and or that payment would prejudice it in any event.

(4) That the defendant/applicant has shown in the face of the application to settle the decretal sum and merely wishes to withhold the same for its own convenience with a view of frustrating the plaintiff."

The application was argued on 25th November, 2013. The arguments were centred on the respective filed material.

I have considered all the material canvassed before me and take the following view of this application. With regard to the prayer for extension of time to file appeal, there is nothing to controvert the affidavit of Nyongesa Wafula that the applicant was unaware that judgment had been delivered. The photocopy judgment attached to the affidavit shows that none of the parties were present at the reading. I will therefore grant prayer (2) of the Notice of Motion and order that a memorandum of appeal be filed within 14 (fourteen) days of today's date.

The prayer for stay pending appeal is brought under Order 42 rule 6 (1) of the Civil Procedure Rules. Order 42 Rule 6 (2) of the Civil Procedure Rules is in the following terms:

"No order for stay of execution shall be made under subrule (1) unless-

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant"

The appellant herein was content to rely on the affidavit of his advocate Nyongesa Wafula. While the advocate was properly entitled to give an account of the progress of the suit in the Lower Court, it is my view that he crossed the line when he purported to swear on behalf of his client on key matters falling under rr (2) of rule 6 (see paragraph 14 and 15 of his affidavit). The onus lies with the appellant to demonstrate the risk of suffering substantial loss, timeous action and offer of security.

On the first issue, there is no demonstration of the substantive loss that the appellant is likely to incur. The fact that the decretal sum is over Shs. 1.8m is itself not sufficient. Secondly, the appellant has not indicated any intention of offering security. Todate there has been no compliance with the orders of deposit of the decretal sum given on 6th August, 2013. The appellant has not offered any. It seems to me that the appellant rushed to court with a bald application in hopes of forestalling execution. A court of law will not order stay of execution and thereby deny a litigant of the fruit of his judgment without good cause being shown.

In my considered opinion, the appellant's prayer for stay pending appeal cannot succeed and is refused. The appellant has therefore only succeeded in part.

Costs will be in the cause.

Delivered and signed at Malindi this 17th day of **February, 2014** in the absence of parties.

Court clerk - Samwel

C. W. Meoli

JUDGE