



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 983 OF 2013

JOHN MAINA NJUGUNA. APPLICANT/DEFENDANT

VERSUS

ESTHER NJAMBI. RESPONDENT/DECREE HOLDER

RULING

The application before the court is the Notice of Motion dated 7th October, 2013. It seeks two prayers: -

- a. That the applicant be given leave to appeal out of time.
- b. That there be a stay of execution pending the hearing and final determination of the intended appeal.

The facts upon which the application is based show that the lower court judgment was delivered in the absence of the applicant and without relevant notice having been served on him. The facts also show that the applicant only realized that judgment had been delivered against him in Thika CMCC No. 224 of 2009 for Ksh.800,000/- when execution of a court decree for Ksh.921,353/- was being carried out on 19th September, 2013.

The Applicant filed at the lower an application for stay of the execution dated 25th September, 2013 but he had to withdraw it for technical reasons. He was unable to file an appeal because he realized he was out of time. So he argues, he had to file this application seeking leave to file an appeal out of time as well as stay execution of the decree until the intended appeal is finally determined.

The applicant further urges this court that unless there is a stay granted, if the appeal is allowed to be filed out of time, he will likely suffer a substantial loss as the Respondent is made of stew and will likely not be able to refund the decretal sum if the appeal succeeds. That he filed the application without inordinate delay and that in any case, he would be willing to comply with any conditions imposed by court in granting the stay, inclusive of depositing the decretal sum in a savings interest-earning account.

On the other hand, the Respondent argued that there was no proof that she will not be able to refund the decretal sum if paid to her and saw this application as time consuming and intended to deny her the realization of her judgment.

I have perused the application and carefully considered the representations from both sides. There is no denial or opposition from the Respondent to the fact that the applicant had not been served with the notice to attend court on judgment day. The respondent ought to have served such notice but did not. The applicant, therefore only knew of the judgment during execution of the decree which took place after the time for appeal had expired. The filing of this application was accordingly timely. He cannot be penalized

for an act he did not commit. For those reasons, and considering the right to appeal as a constitutional right, this court will grant him leave to appeal out of time.

As to the stay of execution until the intended appeal is determined, the applicant is willing to deposit the sum in an interest-earning savings bank account. His indication is mainly on the alleged excessive award of damages of Ksh.800,000/-. The Applicant did not suggest what he would think is a reasonable award. The court would accordingly find no good reason why the whole judgment award should be kept away from the Respondent who is entitled to it. The court finds it reasonable therefore, to allow the Respondent start enjoying part of the judgment sum while he waits the fate of the intended appeal.

Orders of Court

1. *The Applicant is granted leave to file an appeal out of time, which appeal must be filed within 14 days.*
2. *There shall be payment of Ksh.600,000/- being part of the decretal sum of Ksh.921,353/- to the Respondent/Decree-holder within 14 days.*
3. *The balance of the decretal sum being not less than Ksh.321,353/- shall be deposited in a counsel joint interest-earning savings account of the counsel's choice within 14 days.*
4. *In default of compliance of any of the above conditions the leave and stay granted as above shall stand discharged without more.*
5. *Costs of this application shall be paid by the applicant in any event.*

Dated and delivered at Nairobi this 24th day of September, 2014.

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JUDGE