



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL APPEAL NO.14 OF 2013**

**MARTIN KUNDU.....APPELLANT**

**VRS**

**FLOICE ANYANGA.....RESPONDENT**

*(Appeal arising from Judgment and decree of Hon. P. N. Areri,*

*Senior Resident Magistrate*

*in*

*BGM CM CC No.883 of 2011)*

**RULING**

1. Before me is an application by way of a Notice of Motion dated 8<sup>th</sup> August, 2013. In the Motion brought under Sections 3, 3A, 63 (e) and 95 of the Civil Procedure Act and Orders 42 Rule 6 (2) and 50 of the Civil Procedure Rules, the Applicant sought two orders. Firstly, that the time for furnishing security for the performance of the decree in BGM CM CC No.883 of 2011 be extended and that the court does grant leave to the Appellant to deposit a non-monetary security.
2. The application was supported by the Appellant's Affidavit sworn on 08/08/2013. The Appellant contended that vide his application dated 29/4/2013, the court granted a stay of execution in BGM CM CC No.833 of 2011 on condition that he deposits in court the decretal sum; that he however was unable to raise the sum of Kshs.399,903/= as ordered by the Court and he therefore prayed that the court do allow him to deposit a non-monetary security in the form of title deed. The Appellant further contended that execution had already commenced and if the prayers sought were not granted, his appeal will be rendered nugatory. He therefore prayed that the application be allowed.
3. The application was opposed vide the respondent's Replying Affidavit sworn on 07/04/2014. She contended that the Appellant was unserious with court processes; that throughout the proceedings in the lower court as well as in this court, the Appellant had engaged firms of Advocates to represent him without first seeking leave of court contrary to law and that the Appellant had not sought first to vary or review the order of 02/05/2013 before making the present application. She therefore prayed that the application be dismissed.
4. Both Mr. Otyula and Mr. Waswa appearing for the Appellant and Respondent, respectively asked the court to look at the Affidavits on record and make a decision on the application. I have carefully

considered the Affidavits on record.

5. It is not in dispute that on 02/05/2013, this court (Gikonyo J) made the following ex-parte order on the Appellant's application dated 25/04/2013:-

***“1. That the application is certified as urgent.***

***2. That meanwhile a temporary stay is granted provided that the Appellant deposits in court the entire decretal sum within 30 days from the date hereof.***

***3. That inter-parties (sic) hearing on the 10<sup>th</sup> day of July, 2013”***

6. That application was never heard on the 10/07/2013 or at all. To date, that application remains on the file un-prosecuted. Instead of listing the said application for hearing and/or seek to vary the order of 02/05/2013, the Appellant filed the present application seeking the orders set out at the beginning of this ruling. In my view, that is a terrible mistake. Firstly, the order to deposit the decretal sum was in the interim pending the hearing of the application dated 25/04/2013 inter partes. Secondly, that order can only be varied in that application and not by a separate application. On the foregoing grounds alone, the application is for dismissal.

7. If I am wrong on the foregoing, let me consider the application on merit. In an application for extension of time, the court considers the length of time, the reasons advanced for non-compliance and the prejudice, if any, to be suffered by the opposite party.

8. In the present case, the order of 02/05/2013 was to last until 02/06/2013. The present application was made on 08/08/2013, over two (2) months later. In my view, failure to comply with the order that had given specific time lines and approaching the court over 60 days later is inordinate delay. The application was not made timeously. As regards the reasons for non-compliance, none was given by the Appellant. He only stated that he was unable to raise the sum ordered by the court. He never demonstrated any efforts he had undertaken in an attempt to comply therewith. For those reasons, I believe I need not consider the issue of prejudice suffered by the Respondent by the aforesaid non-compliance but suffice it to state that delay is justice denied and it will be contrary to Article 159 (2) (c) of the Constitution of Kenya.

9. In my view, having failed in the first prayer, the second prayer for non-monetary security does not fall for consideration. However, even if the Appellant had succeeded on the first prayer, I would still have declined to grant the second prayer. The full particulars of proposed title deed were never disclosed. If there was any bonafides on the part of the Appellant, he should have exhibited a copy of the proposed title together with a search certificate and a valuation in respect thereof. These lacking, I am of the considered view that there was no bonafides on the part of the Appellant in making that prayer.

10. The upshot of it is that the application is without merit and the same is hereby dismissed with costs to the Respondent.

**DATED and DELIVERED at Bungoma this 22<sup>nd</sup> day of September, 2014.**

**A. MABEYA**

**JUDGE**