

REPUBLIC OF KENYA

High Court at Nakuru

Miscellaneous Civil Application 101 of 2013

B.O.G. NAIVASHA MIXED SCHOOL.....PLAINTIFF

V

WILSON MUCHAE WANYUMBA.....DEFENDANT

RULING

By the application dated 11/2/2013, the appellant/applicant seeks an order of stay of execution of the decree arising from the judgment delivered in Nakuru CMCC 785/2010, pending the hearing of the appeal. The second prayer is that the applicant be allowed to file the appeal out of time. The application was supported by grounds found on the face of the application and the affidavit of Rev. Paul Matheri, the Chairman of the Board of Governors.

In Nakuru CMCC 785/2010, the respondent had sued the applicant for damages for injuries which he sustained in a road traffic accident involving the applicant and respondent's motor vehicles. The applicant filed a defence and counterclaim, and was heard. The applicant was not aware of the judgment having been entered in favour of the respondent on 11/1/03 for Kshs.689,000/- until 31/1/2013 when he received a letter dated 14/1/2013. The applicant claims to be dissatisfied with the whole judgment of the lower court and has filed a memorandum of appeal which was exhibited.

The application was opposed and the respondent filed an affidavit contending that the applicant was notified of the judgment after delivery and that the application is an abuse of the court process. The respondent is of the view that stay can only be granted if a substantial sum is paid to him and the balance deposited in court.

When the application came up for hearing, Mr. Murimi, counsel for the applicant and Mr. Mong'eri appearing for the respondent agreed that the application be allowed and that the applicant do lodge his appeal out of time within 14 days of 18/4/2013. However, they were not agreed on the issue of security. Mr. Murimi was agreeable to the entire sum being deposited in court within 21 days because the applicant contests both the issue of liability and quantum. However, Mr. Mong'eri urged that half the decretal sum, which amounts to Kshs.500,000/- be paid to the applicant while the balance be deposited in court.

It is not in dispute that the issue of liability was contested and the applicant also filed a defence and counterclaim. As per the exhibited decree, the decretal sum is about Kshs.1,018,545/-. Half of the decretal is about Kshs.500,000/- which is a substantial sum. The applicants have not shown that the respondent is unable to repay the said sum in the event the appeal is successful. Likewise, I believe the respondent had a duty to tell the court what his means are, and whether he is able to repay the said sum in the event the appeal is successful.

The accident herein is said to have occurred on 6/3/2010, just over 2 years ago. The case has not been delayed. In my view, it would be fair to both parties and safer to have the decretal sum deposited in an interest earning account in the names of both advocates so that it earns interest. The applicant can then file the record of appeal and expedite the hearing of the appeal. I order that stay be and is hereby granted upon the decretal sum being deposited in an interest earning account in the names of both counsel in an agreed bank within 14 days hereof. In default, execution do proceed.

Costs of the application to abide the appeal.

DATED and DELIVERED this 26th day of April, 2013.

R.P.V. WENDOH
JUDGE

PRESENT

Mr. Murimi holding brief for Mr. Kitilu for the applicant

Mr. Mongeri for the respondent
Stephen Mwangi – Court Clerk