



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Civil Case 254 of 2012

JOHN MUSAU MUOKI APPLICANT

- VERSUS -

ZAKAYO MUTISYA MUSYIMIRESPONDENT

R U L I N G

1. By a **Notice of Motion** dated **26th April 2012** filed under Section 3A, 63 (e) and 79 G of the **Civil Procedure Act**, and **Order 51 Rule 1** of the **Civil Procedure Rules 2010**, the Applicant **John Musau Muoki** sought the following substantive orders:-
 2. That there be a temporary stay of execution of the judgment and decree in Nairobi CMCC 14066 of 2006 pending the hearing of this application *inter-partes*.
 3. That the Honourable Court be pleased to grant the Applicant extension of time to file and serve an appeal in an intended appeal from the Judgement of the Chief Magistrate court at Nairobi (Hon. S.A. Okato Principal Magistrate) delivered on **22nd June 2011** in civil suit number 14066 of 2006.
 4. That there be a temporary stay of execution of the Judgement and decree in Nairobi CMCC 14066 of 2006 pending the hearing and determination of the intended appeal
 5. That the warrants of arrest in execution of the Judgement in Nairobi CMCC 14066 of 2006 issued on **27th January 2012** be lifted.
 6. That the costs of this application be in the intended appeal.
2. The application is premised on the grounds stated therein namely:-
1. That on the **22nd June 2011** the Honourable S.A. Okato, Principal Magistrate in the lower court in Nairobi CMCC 14066 of 2006 delivered a Judgement in favour of the Respondent in the sum of **Kshs.859,610/=** with interest and costs.
 2. That the application intends to appeal against the aforementioned Judgement.
 3. That the Applicant could not file a proper appeal within the requisite period due to circumstances beyond his control.

3. The application is supported by affidavit of the Applicant dated **26th April 2012** together with its annexure. The affidavit reiterates the aforesaid grounds.
4. The application is opposed vide a replying affidavit by the Respondent Mr. **Zakayo Mutisya Musyimi** dated **26th June 2012** and also through grounds of objection dated **25th June 2012**.
5. The brief history of the application is that on **22nd June 2011**, Honourable S. A. Okato in **CMCC 14066 of 2006** delivered a Judgement in favour of the Respondent against the Applicant in the sum of **Kshs.859,610** plus costs and interests. For reasons stated in the affidavit the Applicant has failed to appeal in time against the said Judgement. In the meantime the Respondent is in the process of executing the Judgement and has, in addition secured warrants of arrest against the Applicant and hence this application.
6. The Applicant now wants this court to stay the said execution process and to allow the Applicant to file an appeal out of time, arguing that he has a good appeal capable of succeeding and that if this application is not allowed he stands to suffer irreparable injustice.
7. On his part the Respondent has submitted that the said warrants of arrest have never been executed because the Applicant has been hiding and could not be traced. As for the attachment nothing has been attached as the goods previously attached were found to belong to the Applicant's wife. The Respondent further submitted that this application is brought after an inordinate delay, and further that the Applicant has not come to court with clean hands and that the application is an abuse of the court process.
8. I have carefully considered the application and opposing submissions of the parties. There is a valid Judgement in favour of the Respondent which has not been satisfied. The reasons advanced as to why to date the Applicant has not filed his appeal are not convincing to me and I reject the same in totality. However, in the exercise of my discretion I will allow the application on the condition that the entire decretal amount together with costs and interest is deposited in an interest earning account in the joint names of the parties' advocates within **21 days** from today. In that event the said intended appeal shall be filed within **7 days** of the opening and operating the said joint account. Accordingly **prayers 3, 4, 5 and 6** of the application shall be allowed.

These are the orders of the court.

DATED, READ AND DELIVERED AT NAIROBI

THIS 27TH DAY OF SEPTEMBER 2012

E. K. O. OGOLA

JUDGE
PRESENT:

Ochola for the Applicant

M/s Gitonga for the Respondent

Teresia – Court Clerk