

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Application 257 of 2012

GATAKAINI INVESTMENTS..... APPLICANT

VERSUS

JUWALA INSURANCE BROKERS..... RESPONDENT

R U L I N G

The application before me is a Notice of Motion dated 9th May, 2012. It seeks leave to appeal out of time and consequently, a stay of execution of the lower court decree in Milimani CMCC No. 1749 of 2002, pending the result of that intended appeal. The Applicant depones that the judgment of the lower court was delivered on 23rd November, 2011, the costs in respect thereof were taxed and then a proclamation for attachment was done on 4th May, 2012.

The ground for delay to appeal within the prescribed time is shown to be that an advocate in the law firm of Kirundi and Company, who was handling the case, quit the firm in February, 2012 without properly handing over the specific file while and before the said advocate had not filed the intended appeal as instructed by the Applicant when the judgment was delivered in November.

For the above reason, the Applicant opined that the mistake that led to the failure to appeal in time lay with the former advocates and not who accordingly, should not be penalized for the mistake of his advocate.

This court further notes that a certified copy of the judgment to be appealed from, was not annexed to enable this court to observe the grounds upon which the judgment was based by the trial court and to assess, prima facie, whether the intended appeal has arguable issues that should justify an appeal and/or a stay of execution.

It is important also to note that the judgment of the trial court merely dismissed the Applicant/Plaintiff's claim and made no substantive orders except on costs which costs, after taxation have been deposited in court by the consent of the parties.

I have perused the supporting and replying affidavits of the parties. Although neither party filed the written submissions each promised to file within 21 days, either way, I have considered the facts deponed in the said affidavits. I have come to the conclusion that there is no harm or there will be no loss to the Respondent if the Applicant is allowed to file his/its appeal out of time. The Respondent's taxed costs are already paid into court. The Applicant is not disputing the costs or a possible order paying them to the Respondent who had victory in the lower court.

In the court's view, although the ground for delaying the filing of appeal in time is not convincing, the Applicant should be allowed to file his appeal, and have his day in court.

I have considered also the Applicant's prayer for stay of execution which relates only to costs. I do not find it meritorious. In the circumstances, the prayer for stay will not be granted.

The final orders are: -

a) That Applicant is granted 7 days within which to file a formal appeal.

b) The prayer for stay of execution is hereby dismissed with costs of this application to the Respondent.

Dated and delivered at Nairobi this 25th day of September, 2012.

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D A ONYANCHA
JUDGE