



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Miscellaneous Civil Application 35 of 2012**

(An application for leave to file an appeal out of time and stay of execution of the decree in Kakamega CMCC No. 542 of 2010)

**STEPHEN GITAHU ..... 1<sup>ST</sup> APPLICANT**

**STEGI BUILDING CONSTRUCTION LTD. .... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**BOAZ ADAGALA LUMWAGI T/A BOADA INVESTMENT .....RESPONDENT**

**RULING**

The application by way of Notice of Motion dated 11.7.12 seeks orders that the applicant be granted leave to appeal out of time.

Secondly, that there be a stay of execution of the decree in Kakamega CMCC No. 542/10.

The application is supported by the affidavit of the applicant, STEPHEN GITAHU sworn on 11.7.12. According to the said affidavit, warrants of execution of the decree have been taken out and the said warrants reflect the applicant as Stegi Construction (2<sup>nd</sup> applicant). The applicant's contention is that no personal liability attaches to him as Stegi Construction Ltd. is a limited liability company.

The applicant's stand is that he has a good appeal. He has attributed the delay in the filing of the appeal to the non-availability of the court file in the registry. The grounds of appeal also stated that the applicant was not present when the judgment was delivered.

In opposition to the application, the respondent BOAZ ADAGALA LUMWAGI filed a replying affidavit sworn on 17.7.12. According to the said affidavit, the judgment was delivered on 16<sup>th</sup> March, 2012 and the costs were assessed on 4.5.12. The respondent's stand is that the intended appeal has no chances of success and that the applicant has not shown what substantial loss would be suffered.

Mr. Munyendo advocate appeared for the applicant. He relied on his written submissions. On the first prayer that the appeal be admitted out of time, under S.79G of the CPA, the applicant must satisfy the court that he has good and sufficient cause for not filing the appeal in time.

The applicant has stated that the file could not be traced in time from the registry as it had gone to the typing pool for the typing of the warrants of attachment and execution.

There is however no certificate of delay from the lower court. The warrants of attachment exhibited were

signed by the magistrate on 5.7.12. No decree has been attached in these proceedings. The draft memorandum of appeal reflects the date of judgment as 18.5.92. The parties are not in agreement on which date judgment was delivered and there is no document annexed from which this court can confirm the date of judgment. Be as it may, the applicant's affidavit has not disclosed why he was not in court when judgment was delivered.

The period of delay as stated by the respondent amounts to about less than one month while according to the respondent the period is about over two months.

Although there is no reasonable explanation for the delay, the delay is not inordinate.

The respondent has contended that prayers for stay of execution should be denied because the applicants have not demonstrated any substantial loss to be suffered nor offered any security for the performance of the decree as required under Order 42 rule 6 (6). The applicants have however exhibited warrants of attachment and execution which reflect he trades as Stegi Construction and has argued that Stegi Construction is a Limited liability company. That implies that the applicant stands to suffer the loss of Kshs.335,990/=.

Although no security has been offered for the performance of the decree, this court can proceed to make orders for the deposit of the same.

With the foregoing, I will exercise this court's discretion and allow the application on condition that the applicant deposits the decretal sum in court or in a joint interest earning bank account of both counsels herein within the next 30 days. In default execution to proceed. Costs of the application to the respondent.

*Delivered, dated and signed at Kakamega this 22<sup>nd</sup> day of November, 2012*

**B. THURANIRA JADEN**  
**J U D G E**