



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS CIVIL APPLICATION 184 OF 2005

MERU CENTRAL FARMERS CO-OP. UNION LTD PLAINTIFF

VERSUS

JUSTUS MURIUKI ANDREW RESPONDENT

RULING

The applicant in the instant motion dated 7th November 2005 seeks that the execution of a decree in Meru CMCC No. 527 of 1999 be stayed pending the hearing and determination of the intended appeal herein. He also seeks extension of time for filing of the appeal.

The application is based on the grounds that the notice of the date of the delivery of judgment was not communicated to the applicant; that his goods have been proclaimed in execution of the decree from the said judgment; that being dissatisfied with the judgment he has appealed against the same; that unless the order of stay is not granted he will suffer substantial loss as the decretal sum of Kshs. 606,182 is substantial and the respondent who is a peasant farmer will not be able to refund the same should the appeal succeed.

In reply the respondent has averred that the applicant's advocate, Mr. Akwalu, and counsel for the state, Mr. Njogu, were informed albeit verbally the same day about the judgment having been delivered.

I have considered these arguments and find as follows:-

At the time of proclamation the decretal sum stood at Kshs. 606,182.70 plus Kshs. 15,000/=, the auctioneer's fees. The court was informed from the bar that the Attorney General who was the 2nd defendant in the original suit has settled half of the decretal sum. What is being contested, therefore, is half of Kshs. 606,182.70 which may have obviously grown to some higher figure, given the time lapse.

The applicant was aggrieved by the judgment and intends to file an appeal to challenge the same. He seeks leave to file the appeal out of time, in the first instance. The judgment under consideration was delivered on 11th July 2005. This application was brought on 8th November 2005. By dint of section 79G of the Civil Procedure Act appeal against the said judgment ought to have been filed within thirty (30) days from the date of the judgment.

That would, generally speaking, translate to the month of August 2005. The appeal had not been filed in

November 2005 when the instant application was brought. The proviso to section 79G aforesaid donates discretionary power to the court to extend time if the applicant satisfies it that he had good and sufficient reason for not filing the appeal in time. It is not in dispute that the delivery of the judgment was adjourned several times, from 24th October 2003 to 23rd May 2005. It was not delivered on 23rd May 2005 but on 11th July 2005. It is further not disputed that counsel for the applicant was not in attendance. It is, instead, contended that he was informed verbally. It is the duty of the court to inform, by a notice, counsel representing parties or parties acting in person of the date of judgment if the original date has been changed to avoid ambush. Indeed, order 20 Rule 1 of the Civil Procedure Rules enjoins the court to pronounce judgment either immediately after hearing evidence or within 42 days from the date of the conclusion of the trial and due notice of such date must be given to the parties or their advocates.

I am satisfied from the applicant's explanation that he was not aware of the delivery of the judgment; no processes after such delivery was served upon him and was ambushed with a proclamation.

For that reason the applicant is granted leave to file and serve his appeal within fourteen (14) days from the date of this order. He has also sought that execution be stayed pending appeal. Although no provision of the law has been cited on the application for this prayer no objection can be taken simply on that omission. There being no appeal pending, Order 41 Rule 4 of the Civil Procedure Rules is not applicable. The court's inherent jurisdiction has been invoked. I am satisfied that the applicant may suffer substantial loss; and the application for stay has been brought without unreasonable delay.

Given the fact that the applicant was not aware of the judgment and the decree until his goods were proclaimed on 2nd November 2005, this application was brought timeously on 8th November, 2005.

The applicant has expressed his apprehension that should he pay over to the respondent the balance of the decretal sum and the appeal were to succeed subsequently he (the applicant) may not be able to recover the same from the respondent who is only a peasant farmer. The onus was upon the respondent to rebut this claim.

This he has not done with the result that the applicant's apprehension of loss is real. The applicant has expressed the willingness to abide by an order as to security.

For these reasons, it is ordered that there will be a stay of execution of the decree in terms of prayer (e) of the motion subject to the applicant depositing within thirty (30) days of this order, Kshs. 300,000/= in an interest-earning account with a reputable bank in the joint names of counsel for the respondent and his counsel pending the filing, hearing and determination of the appeal. The appeal to be filed and served within fourteen (14) days of this order, failing to comply with the above two conditions, execution shall proceed without further orders.

Costs to be costs in the intended appeal.

Dated and delivered at Meru this 11th ..day of June. 2009.

W. OUKO

JUDGE