

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Civil Application 351 of 2008

PAUL NJUGUNA KIMANI.....APPELLANT/APPLICANT

VERSUS

FAITH GATHONI KAROGA (suing as the legal representative of the estate of

EMMANUEL WANDERE.....RESPONDENT

R U L I N G

1. Paul Njuguna Kimani hereinafter referred to as the applicant, has moved this Court under section 3A and section 79G of the Civil Procedure Act, and Order XLI Rule 4 and Order XLIX of the Civil Procedure Rules, seeking an order for stay of execution pending the hearing and determination of his intended appeal. The applicant also seeks leave of this Court to file his appeal out of time.
2. As per the supporting affidavit sworn by Susan W. Murage, it is deponed that the judgment of the lower Court was delivered without notice to the applicant's counsel and that the applicant's advocates only became aware of the judgment sometime in May 2008 when they received a letter dated 20/5/08 addressed to the applicant's insurer by the respondent's advocate demanding payment pursuant to the judgment. The judgment having been delivered on 26th March, 2008 time had already ran out for the applicant to file the appeal. The applicant contended that he will suffer substantial loss if the application is not granted as the respondent may not be able to repay the decretal sum if the applicant is successful on appeal.
3. The respondent objects to the application contending that the same is an afterthought. It is maintained that the applicant failed to attend Court for the judgment and is therefore not deserving of the orders sought. It was maintained that the applicant was guilty of inordinate delay which delay had not been explained.
4. I have given due consideration to the application. It is evident to me that the applicant was not given due notice of the date of delivery of the judgment and was therefore not aware that time for filing appeal was running out. The delay in filing the appeal has been adequately explained. I think it is fair and just that the Court exercises its discretion in the applicant's favour with regard to extending time for the filing of the appeal.
5. As regards the application for stay of execution pending the hearing of the appeal, the applicant has already deposited the decretal sum in Court and that is sufficient security. The respondent is an administrator of the estate of the deceased. She has not sworn any affidavit in response to the applicant's allegations that she may not be able to refund the decretal sum if paid to her. The applicant's apprehension is therefore not unfounded.
6. For the above reasons I grant the application and issue orders as follows:
 - (i) That leave be and is hereby granted to the applicant to file his appeal out of time and that the appeal be filed within 21 days from the date hereof.

(ii) That there shall be a stay of execution pending the intended appeal on the following conditions

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(a) That the decretal sum deposited in Court shall be released to the parties' advocates to be deposited into an interest earning account in the joint names of the parties' advocates within 10 days from date of release.

(b) That if the appeal is not filed and disposed of within 12 months from the date hereof, the order for stay of execution shall be discharged unless otherwise extended by the Court.

Those shall be the orders of the Court.

Dated and delivered at Nairobi this 15th day of July, 2009

H.M. OKWENGU

JUDGE

In the presence of:

Waiganjo for the respondent

Advocate for appellant, absent