

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURT

MISC CIV. APPLI. 356 OF 2008

MOSES MACHARIA GITHONGOAPPELLANT

V E R S U S

FIRST ASSURANCERESPONDENT

R U L I N G

This is an application for leave to lodge appeal out of time against a decree of the lower court passed on 8th February, 2005. The decree was for the sum of KShs. 132,592/00 awarded to the Respondent (who was the plaintiff) as damages for material loss occasioned by damage to his motor vehicle in a road accident. Parties were ordered to bear their own costs of the suit. It is the Applicant's case that the judgment was delivered in his absence and without notice to him, and that he learnt about it only on 2nd June, 2008. He filed the present application the following day, 3rd June, 2008. He also seeks stay of execution of decree pending disposal of such appeal.

The Respondent has opposed the application as set out in the replying affidavit filed on 20th June, 2008. The same is sworn by the Respondent's learned counsel. The grounds of opposition emerging from the replying affidavit are that the Applicant is guilty of inordinate delay which has not been explained, that he has not demonstrated an arguable appeal, and that he has not come to court with clean hands.

The Respondent's learned counsel submitted that though the judgment was not delivered as originally reserved (on 14th December, 2004), and was eventually delivered on 8th February, 2005 without notice to the Applicant, he should have followed up the matter. Had he done so, he would have learnt of the judgment much earlier. Learned counsel further submitted that the intended appeal has not any reasonable chance of success. The Respondent's claim was a liquidated one. The Applicant, who was present in court at the hearing, did not offer any evidence in his own defence. So what will the appeal be about?

In his supporting affidavit the Applicant says that from the year 2006 he has been ailing and that the cost of medication has rendered him unable to engage a lawyer. He has also exhibited a letter dated 11th September, 2006 by which he complained to have enquired at the court registry a number of times to know the position of his case without success.

Having considered all matters placed before the court, I make the following observations. When the case was heard by the lower court the Applicant was present. Indeed he testified in his own defence. This is apparent from the judgment of the lower court exhibited in the application. He did not say much in his defence save to dispute the document by which he had admitted liability for the accident and to complain that the suit should have been filed at Gatundu where the accident had occurred. The lower court was apparently satisfied that the Applicant had admitted in writing to causing the accident.

More importantly, having been present when the suit was heard and judgment reserved, even if not delivered as reserved, the Applicant should have done more to find out about the judgment. To wait more

than three years and rush to court only when he was served with execution process cannot be excused. Had he acted diligently he would have found out much sooner what the judgment was.

It also appears to me that the intended appeal has no reasonable chance of success and will only serve to delay justice. The Respondent's claim was for special damages which he proved before the lower court. The lower court accepted that the Applicant had admitted in writing to causing the accident that gave rise to the Respondent's loss. So, why should the Respondent be kept out of his money by an appeal that will in all likelihood be spurious?

I find no merit in the application by notice of motion dated 9th June, 2008. The same is hereby dismissed with costs to the Respondent. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF OCTOBER, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 17TH DAY OF OCTOBER, 2008