

2006.

f. That the delay to comply with the Court of Appeal Rules was not intentional and/or occasioned by negligence of the applicant.(sic)

g. That the plaintiff in the subordinate court in PMCC No. 412 of 2005 Kitui did not serve Notice of Judgment, Certificate of Costs and Decree, and the costs in the subordinate courts were not assessed according to the law.

h. That the respondent is in the process of executing the judgment herein.

i. That the applicant honestly and reasonably believe (sic)that he has high chances of success in the Appeal and his intended appeal risk (sic)to be rendered nugatory should the respondent execute the judgment herein.

j. That the applicant got Notice of Judgment on November 1, 2006 when the respondent attempted to attach the applicant's goods with respect to the judgment.

k. That the applicant risks suffering substantial loss and damage.

3. The application is also supported by the sworn affidavit of Mary Muli Ndolo in which she says that she got notice of the judgment delivered on 1/08/2006 on 1/11/2006 when the respondent attempted to attach her goods in satisfaction of the judgment; that she had not been served with a formal notification of the judgment, and further that the respondent did not serve her with the subject suit decree. The deponent also says that she was also not served with the subject suit Certificate of Costs, Decree and Bill of Costs and that the costs were assessed without the applicant being given an opportunity to be heard. She also says that if she had received all the requisite notifications, she would have instructed her advocates appropriately and on time in order to avoid the embarrassment of attachment and that she would have been able to file her appeal on time. It is also the deponent's contention that the respondent did not prove that the applicant owned motor vehicle registration No. KAT 569G; that the trial court was wrong in finding that the applicant was 100% liable in negligence; that the trial court failed to consider Medical evidence as per Dr. Wokabi's report dated 21/07/2006 and particularly failed to note that the respondent suffered only soft tissue injuries. She also says that since her advocates in the court below did not attend judgment on 1/08/2006, it was incumbent upon the respondent to serve her and her advocate with Notice of Judgment. She contends further that having not been given an opportunity to participate in the assessment of the Bill of Costs, then the decree arising from such Bill of Costs was unlawful.

4. The deponent also says that she brought her application without undue delay and further that it is unlawful for the respondent to execute against her personally when the subject motor vehicle was fully insured by Standard Assurance who had since paid out the sum of Kshs. 354,327/= into an interest earning account jointly owned by the parties' advocates and that it is in the interests of justice that this application be allowed.

5. The application is opposed. The respondent says that the applicant has not shown good cause for the granting of the orders sought. The Replying Affidavit as sworn by Margaret Malonza Ndemwa says that the applicant has not given any good reason why she did not attend court on the day of the judgment; that on 17/08/2006, the applicant's advocates wrote to the respondent's advocates seeking a copy of proposed costs after judgment. Annexure marked "MMNI" is a letter dated August 17, 2006 –by Charles Kioko, Munyithya & Company Advocates to J.K. Mwalimu & Company Advocates for the respondent and says:-

“Dear Sir,

RE: PMCC No. 412 OF 2005- KITUI-MARGARET MALONZA NDEMWA -VS- MARY MULI NDOLO

The above matter refers.

Kindly let us have a copy of the tabulation of your proposed costs for our perusal and further action.

..... Signed

Charles Kioko Muthusi”.

6. The respondent also says that following the applicant’s advocates’ letter dated August 17, 2006, the parties’ advocates spoke and agreed that the proposed costs were reasonable and that the applicant’s advocate had advised the insurance company to pay. She also says that execution proceedings were only taken out as a last resort when the applicant’s insurer failed to pay the amount due. She also says that when the applicant’s properties were attached, both her husband and their family company filed objections to attachment as per annexures MMN-3 and MMN-4.

7. The respondent further says that in light of annexures MMN-3 and MMN-4, the applicant cannot be heard to say that she was not aware of the judgment of the subordinate court, and that the sole reason why the applicant has chosen to feign ignorance is because she wants to frustrate every effort by the respondent to realize the proceeds of her lawfully obtained judgment, and that the applicant’s application is a mere afterthought and an abuse of the court process.

8. An application for stay of execution before this court is governed by the provisions of order 41 rule 4(2) of the Civil Procedure Rules which state as follows:-

“4(2) No order for stay of execution shall be made under sub-rule (1) unless

a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay, and

b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

9. The question to ask is whether the applicant has satisfied the three conditions for the granting of the application. After carefully considering all the available material before me, I do not think that the applicant has satisfied these conditions. She has not demonstrated to the court what substantial loss, if any she is likely to suffer if the order for stay is not granted. She says that her insurer has already paid the decretal sum into an interest earning account, so that personally, she has no prejudice to suffer if the stay order is not granted.

10. Further, I am not satisfied that this application was filed timeously, and in any event by 17/08/2006, the applicant was fully aware of the judgment against her. There is no adequate explanation given by the applicant on the delay between the date of judgment and the date of this application. In my view the application was a mere afterthought. Furthermore, the applicant has made no offer of costs in this case. For the above reasons, the prayer for an order for stay of execution fails.

11. What about the applicants’ prayer for leave to file appeal out of time? This prayer is made pursuant to the provisions of section 79G of the Civil Procedure Act, Cap 21 which provides that-

“79 G- Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or Order appealed against excluding from such period any time which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or Order:-

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

12. A perusal of the pleadings as filed reveals that apart from the Proclamation Form, the Memorandum of Appeal and the letter applying for certified copies of proceedings and judgment and the payment cheque for Kshs. 354,327/=, the copy of the judgment ,decree or order being appealed from are not filed in court along with the application nor is there any lower court Certificate of Delay explaining the delay, and thus necessitating this application. It is not even in evidence that the applicant paid for the certified copies of proceedings and judgment as requested for vide her advocates' letter dated 3/11/2006. In the circumstances, the court is not satisfied that a good and sufficient cause has been given for the delay in filing the intended appeal. Thus the second limb of the applicant's application also fails.

13. In the result, the applicant's entire application is found to have no merit. The same is dismissed in its entirety with costs to the respondent.

14. It is so ordered

Dated at Machakos this 29th day of November, 2007

R.N. SITATI

JUDGE