



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 392 of 2002

KARIUKI KIRUBIPLAINTIFF

VERSUS

1) M.C.M.....1st DEFENDANT

2) STEPHEN MUANGE MUTUA2ND DEFENDANT

RULING

The 2nd Defendant herein, Stephen Muange Mutua, took out a notice of motion pursuant to the provisions of Order XLI rule A (1) and Order XLIX rule 5 of the Civil Procedure Rules in which he sought for inter alia:

(a) An order for stay of execution of the orders given on 10th February 2006 pending the filing and the determination of the intended appeal against the aforesaid decision.

(b) An order extending time to file and serve a notice of appeal against the decision delivered on 10th February 2006.

The applicant filed an affidavit he swore on 10th May 2006 in support of the motion.

The plaintiff resisted the motion by filing a replying affidavit. It is the submission that the 2nd defendant that he was not served with a judgment notice hence time to file and serve a notice of appeal lapsed. This fact is admitted by the plaintiff. The proceedings of 10th February 2005 clearly indicate that the judgment was read in the absence of the 1st and 2nd defendants. I think this is a sufficient reason to enable this court extend time for the 2nd defendant to file and serve a notice of appeal pursuant to the provision of rule 74(2) of the Court of Appeal Rules embodied in the Appellate Jurisdiction Act.

It should be noted that the applicant invoked the provisions of order XLIX rule 5 of the Civil Procedure Rules in seeking to enlarge time to issue a notice of appeal. However, the above provision is only applicable where the time is fixed under the Civil Procedure Rules or by summary notice or by a court order. In this matter, time is fixed to 14 days under Rule 74(2) of the Court of Appeal Rules. Any party who wishes to seek for an enlargement of time must invoke the provisions of Rule 4 of the Court of Appeal Rules. Since that jurisdiction was not properly invoked I will not grant the order under order XLIX rule 5 of the Civil Procedure Rules. Let the applicant invoke the right jurisdiction.

The 2nd defendant has urged this court to grant him an order of stay pending the filing and service of the notice of appeal under order XLI rule 4(1) of the Civil Procedure Rules. The conditions are expressly set out in that it must be shown that substantial loss may result and that the application was made without unreasonable delay. It is also a mandatory that the applicant must provide some form of security for the due performance of the decree. There is no doubt the application was filed timeously. The dispute is in respect of title to land where the judgment had the effect of directing cancellation of title. It is obvious the 2nd defendant is likely to suffer substantial loss if an order for stay is not granted to maintain the status quo pending appeal. What remains for determination is the form of security the applicant should give. The applicant did not make any offer any form of security. The plaintiff/Respondent has urged this court to direct the 2nd defendant/applicant to provide substantial security.

The applicant is granted order of stay of execution of the judgment given on 10th February 2006 for 6 months from the date of this ruling pending the lodging of a Notice of Appeal and pending the hearing and determination of the intended appeal on the following conditions:-

- (i) the applicant deposits in a joint interest account in the names of the advocates participating a sum of Kshs.100,000 as security for the due performance of the decree within 30 days from the date hereof.
- (ii) That the applicant should seek for leave to file a notice of appeal out of time within the next 30 days.

In default of any one of the above conditions the motion shall stand dismissed leaving the plaintiff/respondent at liberty to execute the decree. Costs of the motion shall abide the outcome of the appeal.

Dated and delivered at Mombasa this 1st day of September 2006.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Bosire h/b Mutisya for the Defendant/Applicant.

N/A for Ouma Weloba and Co. Adv.