

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC APPLICATION NO. 146 OF 2020

JULIUS MWANZIA MUTUNGA.....APPELLANT

VERSUS

VERONICAH MUSYIMI.....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 11th and filed on 12th March, 2020. It is brought under Order 22 rule 22, Order 42 rule 6, Order 51 rule 1,3,4, and 10 of the Civil Procedure Rules and Sections 1A, 1B,3,3A and 63 (e) of the Civil Procedure Act.

There are two substantive orders sought in the application the first being that, pending the determination of the intended appeal there be a stay of the ruling of the lower court delivered on 19th November, 2019 and secondly that, the proceedings and *ex parte* judgment delivered on 26th August, 2010 be set aside and further proceedings be stayed.

The application is opposed and there is a replying affidavit sworn by the respondent. Both parties have filed submissions which I have on record.

The *ex parte* judgment was entered on 26th August, 2010. The appellant did not move the court until 3rd July, 2019 seeking to set aside that judgment. The lower court dismissed the application on 19th November, 2019 aforesaid.

There is a draft memorandum of appeal where the appellant has challenged the ruling delivered on 19th November, 2019. The present application was filed on 12th March, 2020 which was five months from the date of the ruling. There is no explanation whatsoever in the affidavit or submissions filed to account for that delay, although the applicant states that there has not been any delay. The applicant has introduced the fact that United Insurance Company Limited secured a moratorium which was still in place and therefore the appellant could not execute her judgment.

It is instructive to note that, the applicant was notified of the judgment of the lower court on 14th September, 2011. Warrants of attachment had then been issued on 18th July, 2011 and executed by Bearing Auctioneers. There is also the fact that the applicant was served with a notice to show cause on 26th June, 2012 whereupon the applicant's counsel sought leave to provide or avail an order of moratorium in favour of his insurer. This was never done. After many years, the application to set aside the *ex parte* judgment was then filed.

As correctly submitted by counsel for the respondent, there is no explanation given why it took nine years to bring the application to set aside the *ex parte* judgment. The court is enjoined to administer justice in a just and equitable manner. It bears repeating that justice looks at both sides.

There has been indolence on the part of the appellant in the way this matter has been handled. There is inordinate delay which has not been explained. I bear in mind that the respondent has a judgment in her favour which she wishes to execute. The conduct of the appellant has denied her that right.

I am inclined to dismiss the appellant's application for obvious reasons set out hereinabove. I hold my hand to test the honesty and seriousness of the appellant by declining the orders sought, but ordering the deposit of the entire decretal sum, said to be Kshs. 814,566/=, in an interest earning account in the names of both advocates within 30 days from the date of this ruling. Failure to comply shall render this application dismissed without recourse to court. I further order that the applicant shall bear the costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2021.

A.MBOGHOLI MSAGHA

JUDGE