



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 286 OF 2012

KAMAU MUCUHA.....PLAINTIFF/RESPONDENT

-VERSUS-

CHARLES MUNGE.....DEFENDANT/APPLICANT

RULING

1. The defendant/applicant in this instance has brought the Notice of Motion dated 30th March, 2021 supported by the grounds set out in its body and the facts deponed in his affidavit. The applicant sought for the substantive orders for a stay of execution of the judgment and decree delivered by this court on 31st May, 2019 pending the hearing and determination of an intended appeal against the said judgment; and for the furnishing of security by way of a personal undertaking and/or bank guarantee within a period of 30 days.
2. The plaintiff/respondent opposed the Motion by filing the replying affidavit sworn by his advocate, **Livingstone Maina Ombete** on 26th April, 2021.
3. The Motion was canvassed through oral arguments.
4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing it; and the contending oral submissions.
5. A brief background of the matter is that the respondent instituted a suit against the applicant vide the plaint dated 11th June, 2012 and sought for general and special damages arising out of the tort of breach of contract and trust.
6. Upon hearing the parties, this court through the judgment delivered on 31st May, 2019 awarded the respondent an aggregate sum of Kshs.8,103,630.90 plus costs of the suit and interest thereon. Being aggrieved by the aforementioned decision, the applicant indicated his intention to challenge it on appeal in the Court of Appeal.
7. Before I consider the merits of the instant Motion, I will first address my mind to a preliminary issue which was raised by the respondent on the competency of the aforesaid Motion.
8. In his replying affidavit, advocate *Livingstone Maina Ombete* states that there is no basis for which this court can consider the instant Motion since there is no existing appeal in the first place.
9. The deponent states and argues in submission that since filing the notice of appeal, the applicant has not taken any steps to lodge the intended appeal within the stipulated timelines and has not sought for an extension of time or sought for leave of the court to file the appeal out of time.
10. In reply, *Miss Achieng* learned counsel for the applicant contends that the notice of appeal on record is sufficient.
11. Noting that the intended appeal lies with the Court of Appeal, **Rule 75(2)** of the **Court of Appeal Rules (“the Rules”)** dictates that a notice of appeal should be filed within 14 days of the judgment or order being appealed against.
12. Furthermore, **Rule 82(1)** of the Rules provides thus:

“Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the

notice of appeal was lodged—

(a) a memorandum of appeal, in quadruplicate;

(b) the record of appeal, in quadruplicate;

(c) the prescribed fee; and

(d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

13. **Rule 115** of the Rules provides for instances of relief from payment of fees and security for costs in civil appeals.

14. Upon my perusal of the record, I observed that the applicant lodged the notice of appeal on 13th June, 2019.

15. I note from the record that whereas it is apparent that the applicant vide the letter dated 12th June, 2019 requested for certified copies of the typed proceedings, judgment and decree, there is nothing to indicate that the applicant filed the requisite documents within the timelines stipulated under the provisions of **Rule 82(1)** (supra) or at all. There is equally nothing to indicate that the applicant has sought and obtained leave to file an appeal out of time or an extension of time to that effect.

16. However, it is possible the documents have been placed in the Court of Appeal file. It is within the power of the Court of Appeal to determine whether or not the applicant complied with its rules and come up with an appropriate remedy. The most important requirement. This court needs is for the applicant to show that he has lodged a notice of appeal which the applicant has established in this matter. Consequently, unless the court of appeal states otherwise the filing of a notice of appeal serves as evidence for the institution of an appeal.

17. The motion therefore is competently before this court. Having considered the material placed before me I am satisfied that the applicant has satisfied the conditions necessary for the grant of an order for stay pending appeal.

18. In the end the motion dated 30.3.2021 is found to be meritorious. It is allowed. An order for stay of execution pending appeal is granted on condition that the appellant provides a bank guarantee for the decretal sum within 30 days from the date hereof. In default the execution to issue. Costs to abide the outcome of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 8th day of October, 2021.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant