



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC.CIVIL APPLICATION NO. E064 OF 2021

PATRICK MUNYAO KISINGU.....APPLICANT

VERSUS

MICHAEL NGILA MUUTU.....RESPONDENT

RULING

1. The applicants **Notice of Motion** dated 16th April 2021 prays that he be granted leave to file his appeal out of time and meanwhile pending the said intended appeal there be stay of execution of the lower courts orders delivered on 11 March 2021. The application is supported by the sworn affidavit dated the same date and the grounds on the face of it.
2. The applicant contents that he was denied a chance of being heard at the trial court since he was not formally served and thus he was challenging the *ex parte* judgement dated 12th August 2020. His efforts to have the same set aside was dismissed by the same court on 11th March 2021 and this paved way for the respondent to commence execution proceedings against him.
3. He deponed that he stands to suffer loss if the execution is not stopped and that the intended appeal shall be rendered nugatory.
4. The respondent vide his replying affidavit dated 26th June 2021 has opposed the said application arguing that the same is unmeritorious and abuse of the court process. That the applicant has not met the criteria for being granted the orders sought and that the applicant only moved the court when execution proceedings commenced.
5. In the premises, the respondent avers that he stands to suffer serious loss and damage and that he was capable of repaying the decretal amount if need be.
6. The court directed the parties to file written submissions which they have complied and essentially they all gravitate along the grounds of granting stay pending appeal as envisaged under the provisions of **Order 42(6) of the Civil Procedure Rules**. The applicant on his part believes that he has a good chance on appeal and specifically states that he has paid a sum of Kshs. 181,595 to the respondent which sum was not captured by the trial court.
7. The respondent on his part has denied that the above sum was paid to him but was instead paid to the hospital and the applicant should have claimed a refund of the same. He said that should the court consider the application meritorious then the applicant should be ordered to deposit the entire decretal sum in court.
8. The court has perused the application as well as the submissions herein. The court at this juncture is not expected to consider the merit or otherwise of the intended appeal. It is true that the trial court did not find any merit in the application for setting aside its judgement for the simple reason that the applicant had been served and he failed to defend the suit. This was indeed the discretion of the court which it exercised judicially.
9. On the other hand, the court must weigh the options provided under **Order 42(6) of the Civil procedure rules**. This court does not find the application brought inordinately late though. The only issue is to balance the interest of the parties. The applicant has not explained what he stands to suffer if the decree is settle.
10. However, in the interest of both parties the applicant needs to be granted a chance in court considering for instance that there was a sum already he paid whether to the applicant or the hospital. That in my view is an issue which merits consideration.
11. Consequently, the application is allowed as hereunder;

- a. The applicant shall deposit the entire decretal sum in a joint interest earning account of both advocates on record within 30 days from the date herein.**
- b. The applicant shall pay the assessed costs to the respondent within 30 days from the date herein.**
- c. The applicant shall file and serve his appeal within 14 days from the date herein and in default execution shall issue for the whole decretal sum.**
- d. The auctioneer's fees to be taxed or agreed upon and the same to be paid by the applicant within 30 days from the date herein.**
- e. The respondent shall have the costs of this application.**

DATED SIGNED AND DELIVERED VIA VIDEO CALL THIS 11TH NOVEMBER, 2021

H K CHEMITEI.

JUDGE