



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HC.MISC. APPL. NO. 113 OF 2018**

**GEDION MUTHOKA MUSYA.....APPELLANT/APPLICANT**

**-VERSUS-**

**URBANUS MULELE MUSYOKI &**

**VERONICA MBITHE MUSYOKI (*Suing as the***

***administrators of the estate*) of JOHN MUSYOKI MULELE.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The application dated 26<sup>th</sup> November 2018 filed under certificate of urgency is brought under Sections 1A, 1B, 3, 3A and 79G of the Civil Procedure Act, Order 22 Rule 22 (1), (2) & (3), Order 42 Rule 6 (1) & Order 51 Rule 1 of the Civil Procedure Rules 2010. It seeks.

a) *Spent*

b) *Spent*

c) **THAT** this honorable Court be pleased to make an order for release of motor vehicle registration No. KCF 562Z pending the hearing and determination of this application.

d) **THAT** the applicant be granted leave to lodge an appeal out of time against the judgment in Makueni RMCC No. 168 of 2015.

e) **THAT** upon grant of prayer 4 above, there be a stay of execution of the judgment and the decree in Makueni RMCC No. 168 of 2015 pending the hearing and determination of the applicant's intended appeal.

f) **THAT** costs be in the cause.

2. The application is supported by the grounds on the face of it, the supporting affidavit of Gedion Muthoka Musya sworn on 26<sup>th</sup> November 2018.

3. The principle grounds are that;

a) The motor vehicle registration No. KBC 873G that was involved in the accident does not belong to the applicant and as such, he was erroneously/improperly joined in the suit

b) Motor vehicles registration No. s KCF 562Z and KCJ 190X registered in the applicant's name have been proclaimed in execution of the decree in the matter.

c) That the applicant was not aware of the judgment until 09/11/2018 when the auctioneers proclaimed his motor vehicles.

d) The applicant had filed an application for stay in the lower Court but it was dismissed.

e) The respondents' earnings and economic status is unknown to the applicant and he is therefore apprehensive that the respondent will not be in a position to refund the decretal sum if the appeal succeeds.

4. The application is opposed through a replying affidavit sworn on 28<sup>th</sup> November 2018 by Counsel Faith Mutio Mutuku. The gist of the opposition is that the applicant did not raise the issue of ownership in the trial Court and did not call any witness to controvert the respondent's evidence.
5. The application was canvassed orally but the applicant filed written submissions as well.
6. I have considered the application, the supporting affidavit thereto, the replying affidavit as well as the applicant's submissions.
7. This Court has been called upon to exercise its discretion to grant leave to the applicant to lodge the appeal out of time.
8. In **Leo Sila Mutiso –vs- Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)**; the Court of Appeal stated as follows with regard to how such leave should be exercised.

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.***

9. The judgment was delivered on 11/10/2018 and this application was filed on 26/11/2018, approximately 44 days later. The law requires appeals from subordinate Courts to the High Court to be filed within 30 days from the date of the decree or order appealed against. After lapse of the statutory period, the delay in this matter is about 2 weeks.
10. The applicant explained that he only learnt about the judgment on 09/11/2018 when auctioneers went calling. The judgment is silent on whether any of the parties were present during delivery and I have also noted that no 'notice of entry of judgment' has been exhibited by the respondent. The applicant's explanation on when he learnt about the judgment is therefore cogent.
11. The applicant was represented by the firm of J. Mutua & Co. Advocates during trial but the application for stay in the lower Court was done by M.M Uvyu & Co. Advocates. At the time the applicant learnt about the judgment, there were still 2 days left to lodge an appeal but evidently, he was in the process of changing representation. It is therefore probable that he was caught up in the confusion and ran out of time.
12. The application for stay filed in the lower Court was clearly incompetent as it was not hinged on anything. In my view however, the important thing is that upon learning about the judgment, the applicant took steps to try and arrest the situation.
13. On whether the appeal has chances of success, I note that the question of ownership which has been raised by the applicant is a triable issue with the potential of altering the judgment.
14. Further, determining the culpability of parties in a matter supersedes any prejudice that may be suffered by a party who has to wait a little bit longer to enjoy the fruits of his judgment.
15. The totality of the foregoing is that the applicant has demonstrated that he deserves leave to appeal out of time.
16. Having allowed the applicant to appeal out of time and after looking at the circumstances of this case *vis-à-vis* the conditions for grant of stay, I am satisfied that the applicant is likely to suffer substantial loss if the stay orders are not granted. The application has been brought without unreasonable delay and the applicant has deposed that he is ready and willing to furnish security for the due performance of the decree.
17. It is also my considered view that once security is furnished, it will be pointless to continue holding motor vehicle registration No. KCF 562Z. The applicant deposes that it is his only source of livelihood.

## **CONCLUSION**

The court finds that the application has merit and makes the following orders.

- i. -The applicant shall file appeal within 7 days**
- ii. -The stay of execution of lower court decree is granted on condition that the entire decretal amount shall be deposited in joint interest earning account in names of parties advocates within 30days from dates herein and in default application to stand dismissed.**
- iii. -Costs Ksh.20,000/= to be paid to the respondent with 30 days and in default execution to issue.**
- iv. -Applicant to pay auctioneer charges to be agreed or assessed by the court.**

**SIGNED, DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2019 IN OPEN COURT.**

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**HON. C. KARIUKI**

**JUDGE**