



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 468 OF 2018

MONICA MWAMBAL.....APPLICANT

VERSUS

STELLA KYENGO.....RESPONDENT

RULING

1. The Notice of motion dated 6th September, 2018 seeks orders that the memorandum of appeal dated 6th September, 2018 against the whole judgment and decree of the Chief Magistrate's Court at Nairobi, Civil Case No. 4604 of 2015 (By the Hon. E. Wanjala, Senior Resident Magistrate) delivered on 6th July 2018 be admitted out of time.
2. Secondly, that the Honourable Court be pleased to grant a stay of execution of the judgment and decree of the Chief Magistrate's Court at Nairobi, Civil Case No. 4604 of 2015 (by the Hon. E. Wanjala, Senior Resident Magistrate) delivered on 6th July, 2018 pending the hearing and determination of this appeal.
3. Judgment was entered in the lower court on 6th July, 2018 against the Applicant for the sum of Ksh.630,000/= interest and costs in respect of a claim arising out of loan allegedly given by the Respondent to the Applicant. According to the Applicant, there was no notice of the delivery of the judgment and she became aware of the same when auctioneers proclaimed her goods. It is contended that the appeal is arguable and that the Applicant stands to suffer irreparable loss if the application herein is not allowed and the appeal succeeds.
4. The application is opposed. It is stated in the replying affidavit that there is a lawful judgment on record and the Respondent is entitled to the fruits of the same. That no loss or damage that will be suffered has been demonstrated by the Applicant.
5. The application was argued through written submissions. I have considered the application, the response to the same and the submissions filed.
6. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

7. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution shall be made under sub-rule (1) unless –

- (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
- (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

8. The judgment of the lower court was delivered on 6th July, 2018. The application at hand was filed on 6th September, 2018. The delay is not inordinate and has been explained. There is no evidence of the notice served for the delivery of the judgment. The Applicant's position that he was not notified of the date for the delivery of the judgment remains uncontroverted.

9. There are no allegations that the Respondent is not capable of refunding the decretal sum in the event that the appeal is successful. There is on the other hand no positive averment from the Respondent that she is capable of refunding the decretal sum. As stated by the Court of Appeal in the case of **Wangethi Mwangi v Hon. Amb. Chirau Ali Mwakere CA Nbi.353/2009**.

“It is plain from the grounds set forth in the draft memorandum of appeal that the applicants have asked the appellate court to interfere with the awards of damages and there is possibility that the appellate court may either decline or reduce the awards considerably. In the event of the former there might be a long delay in recovering from the respondent the decretal sum as there are so many imponderables in the sale of the respondent's land which forms the bulk of his assets. It is obvious therefore that in such a likely eventuality, the applicant might be greatly inconvenienced. The balance of convenience is definitely in favour of the applicants, we would think so.”

10. To balance the competing interests of both parties, I allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning bank account of the counsels for both parties or in court within 30 days from the date hereof.

Dated, signed and delivered at Nairobi this 4th day of April, 2019

B. THURANIRA JADEN

JUDGE