

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. 528 OF 2018

PAUL MWANGI CHURU.....APPLICANT

VERSUS

ELIZABETH AKOTH.....RESPONDENT

RULING

The application before me is by way of Notice of Motion dated 22nd October, 2018 seeking stay of execution of the lower court judgment and leave to lodge the Memorandum of Appeal out of time. It is brought under Sections 1A, 1B, 79G and 95 of the Civil Procedure Act and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules.

The application is supported by an affidavit sworn by the applicant together with grounds set out on the face thereof. It is opposed and there is a replying affidavit sworn by the advocate for the respondent alongside grounds of opposition. Counsel agreed that this application be determined on affidavit evidence.

The lower court judgment was delivered on 11th July, 2018. This application was filed on 22nd October, 2018 a period of about 3 months delay. The judgment was first supposed to be delivered on 6th July, 2018 but was differed to 11th July, 2018. Counsel for the applicant did not attend the court on the said 11th July, 2018.

The reasons advanced are that, the advocate recorded in the diary that it would be delivered on 12th November, 2018. The annexure to that effect has been displayed. The only time the advocate for the applicant knew that judgment had been delivered was upon receipt of the letter dated 12th October, 2018 from the advocate for the respondent.

This is said to have been an innocent mistake which should not be visited upon the applicant. Further, it is the applicant's position that there is an arguable appeal and that he is prepared to provide adequate security in the form of a bank guarantee for half of the decretal sum as a conditional for stay.

I have considered the rival arguments in the affidavits. Although no draft memorandum of appeal has been attached, the affidavit in support of the application challenges the finding on liability. The respondent has a judgment in her favour while the applicant has a right of appeal. The delay in this matter is not inordinate and in any case may be excused in view of the explanation given in the affidavit of the applicant. Further, no serious prejudice has been said shall befall the respondent if stay is allowed.

In balancing the interests of both parties, I agree that there should be a stay of execution of the lower court judgment on condition that the applicant provides a guarantee by either an insurance company or a bank for the entire decretal sum pending the hearing and determination of this suit. The guarantee shall be effected within 14 days from the date of this ruling.

Further, leave is hereby granted for the applicant to file a memorandum of appeal within 7 days from the date of this ruling. Failure to comply with the conditions set out herein above, the stay shall be lifted and execution proceed. The costs shall be on appeal.

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

A. MBOGHOLI MSAGHA

JUDGE