



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCC. MISC APPL NO. 71 OF 2019

SIMON MULI MUSUU.....APPLICANT

VERSUS

REGINA KANINI MUIA.....RESPONDENT

RULING

1. The Applicant has brought this application dated **29th January, 2019** and filed on **20th February, 2019** under Order 42 Rule 1 and 2 Civil Procedure Rules and Sections, 3 and 3A of the Civil Procedure Act seeking the following orders: -

i. Leave to file appeal out of time.

ii. Stay of execution of the Lower Court Judgment.

2. The application is supported by the grounds on its face and the Applicant's supporting affidavit. He contends that he was not aware of the delivery of the judgment as the trial court had promised to inform them of the judgment date. This according to him was never done. That he went to court to check on the position and found a judgment had been delivered on **1st August, 2018**.

3. He is fearful that execution arising out of the said judgment would cause him substantial loss/ irreparable loss and damages. That as he prepared to file an appeal he was served with a notice to show cause (SMM/2) why he should not be arrested and committed to civil jail, for not paying the decretal sum.

4. He has deponed that the Respondent will not suffer any prejudice if the application is allowed.

5. The application was opposed by the Respondent who filed a replying affidavit in which she explained how the matter had been heard before the trial court. She further explained the steps she had taken following the destruction of her crops by cows and goats allegedly belonging to the Applicant (RKM 2-4). She deponed that the Applicant herein only took action after he had been issued with the notice to show cause.

6. To her, this application is an abuse of the court process.

ANALYSIS AND DETERMINATION

7. I have considered the application, affidavit and annexures herein. The issue for determination is

whether the Applicant has satisfied the threshold for the grant of leave to file an appeal out of time and stay of execution of the Lower Court decree.

8. On the issue of leave, Section 79G of the Civil Procedure Act provides:

“Every appeal from a subordinate court to the High court shall be filed within a period of thirty 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 a 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.”

9. What this court has to consider is whether the Applicant had a good reason for failing to file an appeal in good time. The judgment complained of was delivered on the **1st August, 2018** and the Applicant moved this court with his application on **20th February, 2019** which is six months late.

10. A perusal of the judgment shows that it was delivered in the absence of both parties. Since a copy of the proceedings has not been filed, this court cannot confirm whether the parties were aware that judgment was to be delivered on the **1st of August, 2018**.

11. The Applicant has averred that the judgment in this case had been deferred severally and that the last time they were in court they had been informed that they would be issued with a notice for delivery of the judgment. He averred that he was never issued with the notice. This has not been disputed by the Respondent.

12. The Applicant has however averred that on **12th November, 2018**, he went to the court and it was then that he learnt that judgment had been delivered on **1st August, 2018**. Even with this knowledge, he went and sat until he was jerked by the service of the notice to show cause on him. It was then that he filed the present application on **20th February, 2019**.

13. I have duly considered all that I have set out above and the fact that the Applicant was not represented in the court below. At least he took action after being served with the notice to show cause. I will in the circumstances give him the benefit of doubt and find that the delay was not deliberate.

14. The next issue is ***whether stay of execution of the decree should be granted pending the filing and determination of the intended appeal***. I have read and considered the judgment filed herein. There is no doubt that the Respondent’s crops were damaged and she incurred losses. The Lower Court found that the animals that destroyed the crops belonged to the Applicant. This is contested by the Applicant and is the subject of the intended appeal.

15. This is a monetary decree and the common thread has been that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 Civil Procedure Rule are satisfied.

16. Order 42 Rule 6 (2) CPR, 2010 provides that an Applicant seeking a stay of execution pending appeal must demonstrate the following: -

i. Substantial loss may result to the Applicant unless the order was made.

ii. The application was made without unreasonable delay; and

iii. 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.

17. All these three (3) conditions must be read together as the key word therein is **“and”**. I have keenly

read through the Applicant's affidavit and I find that he has not explained what substantial loss or suffering he will suffer. He has not said that in the event of a successful appeal the Respondent would not pay back the decretal sum. In other words, she has not been shown to be a pauper.

18. The Applicant has also not made any offer for security for the due performance of the decree. All he says is that he is dissatisfied by the judgment of the lower court and his appeal shall be successful. This being a monetary decree, the Applicant ought to have offered a security for its due performance and / or that the Respondent is a person of straw and can't make good the decree in the event of a successful appeal.

19. The decree herein is for Kshs. 65,277/= as at 14th January, 2019. In all fairness, the Respondent should not be barred from enjoying the fruits of her judgment. I will however allow her to a portion of the decree while the other portion will be deposited in court. All in all, the application for leave to file appeal out of time is allowed. The appeal to be filed within 14 days from today.

20. There shall be stay of execution on the following conditions: -

i. The Applicant to pay the Respondent Kshs.30,000/= (Thirty thousand shillings) within 14 days).

ii. The balance of the decretal sum (being Kshs.35,277/=) to be deposited in court as security within 14 days.

21. Failure to comply with any of the conditions set out at paragraph 20 will automatically vacate the order of stay of execution. Costs shall be in the cause. Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 9TH DAY OF APRIL, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE