



**REPUBLIC OF KENYA**

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

**MISC CIVIL APPLICATION NO 26 OF 2019**

**ROBERT KARIUKI MUNGAI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**GACHOKA SAMMY T/A CORNERSTONE MISSION CENTER.....DEFENDANT/APPLICANT**

**RULING**

**The case for the applicant**

1. Pursuant to the provisions of Order 42 Rule 6 (1) and (4), Order 50 Rule 6, Order 51 Rule 1 and 13 (2), section 1A, 1B and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and all other enabling provisions of the law, the applicant under certificate of urgency seeks the following major orders. 1. An order to extend/enlarge time within which to file and serve a memorandum of appeal out of the prescribed time. 2. An order that the draft memorandum of appeal be deemed to be properly filed and served upon payment of the court filing fees. 3. an order of stay of execution and all consequential orders arising therefrom, pending the hearing and determination of the application and the intended appeal. 4. an order to make provision for costs.

2. The application is supported by both the grounds that are set out on the face of the notice of motion and the 17 paragraphs supporting affidavit of the applicant. The major grounds in support of the application are as follows. The judgement in the instant application was delivered on 18<sup>th</sup> September 2018. The time within which to file an appeal has since lapsed. The delay in filing the appeal within the prescribed time was due to the delivery of the judgement in the absence of the applicant's advocate and/or without notice. That the applicant learned of the judgement when he received a notice to execute the decree on 19<sup>th</sup> March 2019, from the respondent's advocates. As a result, the applicant was unable to file the appeal in time as required, since he did not have enough time to lodge the appeal.

3. The delay is not inordinate. The applicant has stated that there is a high and probable likelihood that execution may issue if the orders sought are not granted. The applicant has further stated that he has an arguable appeal and that any execution will render the intended appeal nugatory. Finally, the applicant has stated that he stands to suffer irreparable loss and/or harm unless the orders sought are granted.

4. In his supporting affidavit, the applicant has deponed to the following major matters. The applicant has replicated the same matters that are set out on the face of the notice of motion as grounds in support of the motion. The only exception is that he has annexed to his affidavit a seven grounds memorandum of appeal, which is marked as annex "RM 2".

5. Counsel for the applicant have filed written submissions in support of the application. They have submitted that they were unable to file the appeal within the prescribed time, since the judgement was delivered without notice to them. They only became aware, when they were served with a notice of the decree of execution. They have further submitted that they are challenging the quantum of damages awarded (shs 800,000) and they are seeking apportionment of liability. They are also seeking an order of stay of execution pending the hearing and determination of the intended appeal, a matter in regard to which they have filed a memorandum of appeal. The order of stay of execution is intended to preserve the subject matter of the intended appeal. Counsel have cited Order 42 Rule 6 (1) of the 2010 Civil Procedure Rules and other authorities in support of their submissions.

**The case or the respondent**

6. The respondent has filed a 17 paragraphs replying affidavit in opposition to the application. His counsel has filed written submissions in support of the opposition. The major grounds in the replying affidavit are as follows. He has deponed that the applicant was all along aware of the judgement date, which he chose to ignore. The respondent has also deponed that the applicant was notified of the date of judgement. He has further deponed that the applicant delayed for seven months in filing the application, since judgement was delivered on 18<sup>th</sup> September 2018, while the instant application was filed on 22<sup>nd</sup> March 2019, which delay he depones is inordinate.

7. Furthermore, the applicant has also deponed that the appeal is of a general nature and is impossible to assess its chances of success. He has further deponed that if stay of execution is granted it will deny the respondent the fruits of his judgement. Finally, he has deponed that the applicant should deposit the whole decretal sum of money in court, or open a joint account with an interest account in a bank.

## **Submissions of counsel for the respondent**

8. Counsel for the respondent have filed written submissions in opposition to the application. He has cited a number of authorities, among them, the case of *Stephen v Central Glass Industries Ltd, Civil Case No 6726 of 1991*. They have submitted that in that case, the court held that the following conditions must be shown to exist before an order of stay of execution is granted. 1. Sufficient cause 2. A likelihood of the occurrence of substantial loss 3. No unreasonable delay in prosecuting the matter; and 4. Security must be offered.

9. I have considered the affidavit evidence and the submissions of the parties and the applicable law. As a result, I find the following to be issues for determination. 1. Whether or not the applicant has shown sufficient cause to be granted leave to appeal out of time. 2. Whether or not the applicant has satisfied the conditions laid down in Order 42 Rule 6 (1) in order to be granted an order for stay of execution pending the hearing and determination of both the application for leave to appeal out of time and the intended appeal. 3. Who bears the costs of this application?

### **Issue 1**

10. The applicant has deponed that he was not notified of the date of judgement and only came to learn of it, when notice of the decree of execution was served upon advocates. In this regard the respondent has deponed that the applicant was served with notice of the date of judgement. The respondent has not annexed to his affidavit an extract of the said notice. In the circumstances, I find that the applicant was not served with notice of the date of the said judgement. I further find that this was the cause of the delay on the part of applicant in filing the appeal as prescribed by law. I therefore find that the applicant has shown sufficient cause that warrants his being granted leave to appeal out of time.

### **Issue 2**

11. I find that unless stay of execution is granted, execution will proceed with the result that the applicant will suffer irreparable loss. Furthermore, unless an order of stay of execution is granted the intended appeal will be rendered nugatory. I also find that the applicant is willing to provide security. Finally, I find that the delay in prosecuting the application is excusable. The applicant has therefore met the conditions laid down in Order 42 Rule 6 (1) and (4) of the Civil Procedure Rules.

### **Issue 3**

12. Costs of this application will be costs in cause.

13. The upshot of the foregoing is that the applicant's application is hereby allowed in terms of prayer numbers 2, 3, 4 and 5 of his notice of motion dated 1<sup>st</sup> April 2019, subject to depositing in this court the entire decretal sum of shillings one million one hundred and twenty thousand, eight hundred and eighty-five (Shs 1,120, 885) within 30 days failing which this order will lapse.

Ruling dated, signed and delivered at Narok in open court this 11<sup>th</sup> day of July, 2019 in the absence of both parties.

**J. M. Bwonwonga**

**Judge**

**11/7/2019**