

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC APPL. NO. 295 OF 2019

MARTIN MUHORO.....APPLICANT

VERSUS

DANCAN MUTUAL MUKESYA.....RESPONDENT

RULING

1. The application dated 2nd April, 2019 seeks orders that this honourable court be pleased to grant leave to the Applicant to file and serve the Memorandum of Appeal out of time against the judgment and decree delivered on the 6th February, 2019 by Hon. Peter Muholi SRM.

2. Secondly that this honourable court be pleased to allow a stay of execution of the judgment and decree rendered on the 6th February, 2019 by the Hon. Peter Muholi SRM pending the hearing and determination of the appeal or the intended appeal.

3. The Applicant's case is that he is aggrieved by the judgment in Milimani CMCC 5015 of 2015 and wishes to appeal. The delay in filing the appeal is blamed on the failure by the court to supply the certified copies of the judgment in time. It is stated that the delay is not inordinate and that the intended appeal has high chances of success but stands to be rendered nugatory in the event that the application is not allowed.

4. The application is opposed. It is contended that the application is a delaying tactic meant to derail the Respondent from enjoying the fruits of the judgment. It is further stated that following the accident, the Respondent depends on handouts from friends and relatives as he can no longer carry out manual work like before. The court was urged to release half of the decretal sum in the sum of Ksh.467,531/= to the Respondent and deposit the balance of a similar amount in a joint account.

5. I have considered the application, the response to the same and the submissions made.

6. Under Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 the conditions for stay of execution are 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.”

7. The application herein was filed on 2nd April, 2019. The judgment the subject matter of the Appeal was delivered on 6th February, 2019. That is a delay by a period of about one month. The delay is not inordinate and has been explained.

8. On substantial loss, the Applicant is apprehensive that the intended appeal will be rendered nugatory. It is noted that the appeal is both on liability and quantum. It would not therefore be prudent to order the payment of half of the decretal sum at this stage. Although the Applicant has submitted that the decretal sum had already been deposited in CMCC 4145/14 and CMCC 4144/14, there is no evidence to demonstrate that the deposit in respect of CMCC 5015/15 which is the subject of the appeal was made.

9. To balance the competing interest of both parties, I allow the application on condition that half of the decretal sum be deposited in court or in a joint interest earning Bank account of the counsels for the parties herein within 30 days from the date hereof. Costs in cause. The Memorandum of Appeal to be filed and served within 14 days from the date hereof.

Dated, signed and delivered at Nairobi this 11th day of Dec. 2019

B.THURANIRA JADEN

JUDGE