

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CAUSE NO. 421 OF 2017

HERMATION LITSWA.....PLAINTIFF/RESPONDENT

VERSUS

THE NAIROBI CITY COUNTYDEFENDANT/APPLICANT

RULING

The respondent herein has a judgment against the applicant in the sum of Kshs. 1,500,000/=. There is now before me an application for leave to appeal out of time against the said judgment and that there be a stay of execution pending the hearing of the appeal. The application is brought under Sections 79G and 95 of the Civil Procedure Act, Order 42 Rule 6 (1), Order 43 of the Civil Procedure Rules and Article 159 of the Constitution. The judgment of the lower court was said to have been delivered on 29th February, 2016. This application was filed on 26th September, 2017 which translates to about 1 and ½ years after the judgment of the lower court.

It is the applicant's case that the said judgement was delivered without notice and that it is about to be executed. If the respondent proceeds with the execution the applicant will suffer irreparable loss and damage. There is a supporting affidavit sworn by the Director of Legal Affairs. The application is opposed and there is a replying affidavit sworn by the plaintiff/ respondent.

I have considered the averments of the parties as contained in the rival affidavits. I have also looked at the Memorandum of Appeal. Without a copy of the judgment on the record, I am unable to tell the nature of the claim that led to the said judgment and therefore feel handicapped in addressing the interests of the parties herein. The applicant is ready to comply with any conditions that may be set by the court.

At the same time, I have to consider that the respondent is entitled to the fruits of his judgment. The respondent in his replying affidavit has stated that he is has been having financial challenges because he is retired without any income, and in fact could not afford to pay the further court fees assessed at Kshs. 69,945/= before the decree could be extracted.

That is sufficient evidence that in the event the appeal succeeds then he may not be able to repay the decretal sum if the same would be paid to him at this stage. The foregoing being the case, I am inclined to grant leave to the applicant to file appeal out of time which must be filed within 30 days from the date of this ruling.

There shall also be a stay of execution of the lower court judgment provided the applicant causes the decretal sum to be deposited in an interest earning account in the names of both advocates for the parties within the same period of 30 days. In default of the above two conditions, the respondent will be at liberty to execute the decree of the lower court. The costs shall be on appeal.

Dated, signed and delivered at Nairobi this 11th day of June, 2018.

A. MBOGHOLI MSAGHA

JUDGE