



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**MISC CIVIL APPLICATION NO 3 OF 2018**

**PAUL KARIUKI.....APPLICANT**

**VERSUS**

**ANN WAIRIMU WACHIRA.....RESPONDENT**

**R U L I N G**

1. The application herein by **notice of motion dated 18/03/2018** seeks two main orders -

- (i) Leave to appeal out of time against the decree in Nanyuki CMCC No. 64 of 2016 passed on 24/01/2018.
- (ii) Stay of execution of the decree pending such appeal.

2. The application is brought under the **proviso** to **section 79G** of the **Civil Procedure Act, Cap 21** (leave to appeal out of time) and under **Order 42, Rule 6** of the **Civil Procedure Rules, 2010** (stay of execution pending appeal). It is supported by the annexed affidavit of the Applicant's advocate. The Respondent, Annie Wairimu Wachira, has opposed the application by a replying affidavit filed on 09/05/2018.

3. I have read the supporting and replying affidavits. I have also considered the written submissions of the parties, including the cases cited.

**Leave to appeal out of time**

4. Under section 79G aforesaid of Cap 21, appeals from subordinate courts to the High Court must be filed within 30 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 a copy of the decree or order).

5. In the present case decree was passed on 24/01/2018. As there is no certificate of delay issued by the lower court, the intended appeal should have been filed on or before 23/02/2018. However, under the **proviso** to section 79G aforesaid, 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.

6. The present application having been filed on 10/04/2018, the delay we are dealing with here is 46 days. The following reasons are given in the supporting affidavit for the delay -

- (i) That the advocate in the Applicant's firm of advocates dealing with the matter left the firm without proper handover, and that by the time it was realized an appeal had not been lodged as instructed it was too late.
- (ii) That the Applicant has a good and arguable appeal.
- (iii) That the mistakes of counsel should not be visited upon the Applicant.
- (iv) That the Respondent will not suffer any loss that cannot be compensated by way of costs.

7. In the replying affidavit the following issues have been raised -

- (i) That there has been inordinate delay which has not been properly explained.

(ii) That the lower court record would show that the counsel who has sworn the supporting affidavit is the same counsel who had conduct of the matter for the Applicant in the lower court, and that therefore the Applicant is not being candid.

8. The right of appeal is an important aspect of the administration of justice; it will not be lightly denied. I do not have before me the lower court proceedings, and therefore I have no way of knowing whether the counsel who has sworn the supporting affidavit is the same counsel who had conduct of the matter for the Applicant in the lower court, in which case there would be a serious issue of deliberately lying to the court. For now I am prepared to give the Applicant the benefit of doubt. I am thus satisfied that the Applicant had good and sufficient cause for not filing his appeal in time. I will therefore grant the leave sought. The memorandum of appeal must be filed within ten (10) days of delivery of this ruling.

#### **Stay of Execution**

9. Under **Rule 6(2) of Order 42 of the Civil Procedure Rules, 2010** an applicant for stay of execution of decree must demonstrate:-

(a) That substantial loss may result to the applicant unless the order is made.

(b) That the application for stay has been made without unreasonable delay.

(c) That such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

10. Ordinarily stay of execution of decree is sought immediately after delivery of the decree or order. In this case it has been sought 46 days later. But the explanation for the delay given in respect to leave to appeal out of time is a good enough explanation in respect to stay of execution; I am therefore satisfied that the application for stay of execution was made without unreasonable delay.

11. What about substantial loss? The Applicant has stated at paragraph 6 of the supporting affidavit that there is a likelihood that he will not recover the decretal amount which is substantial because the respondent is a "man of straw." To begin with, the Respondent is a woman, not a man! She has stated categorically at paragraph 8 of the replying affidavit that she is a large-scale farmer and could easily refund the decretal sum. There is no answer to this averment.

12. I am not satisfied that the Applicant stands to suffer any substantial loss unless the stay sought is granted. In this connection I note from what has been stated at paragraph 11 of the supporting affidavit that the intended appeal will be against quantum only. I will refuse the application for stay of execution, and the same is dismissed. The interim stay of execution is hereby lifted.

13. The Respondent shall have costs of the application.

**DATED AND SIGNED AT NANYUKI THIS 17<sup>TH</sup> DAY OF JULY 2018**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 19<sup>TH</sup> DAY OF JULY 2018**