



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 406 OF 2012

PAUL MWANGI GICHUKI.....APPELLANT/APPLICANT

- V E R S U S -

NAHASHON KANYI THEURI.....RESPONDENT

RULING

1) Paul Mwangi Gichuki, the appellant herein, took out the motion dated 11th August 2017 in which he sought for the following orders:

- 1. THAT this application be certified urgent and this honourable court deem it fit to hear it ex parte during this court's current vacation.***
- 2. THAT stay of execution of the lower court's decree be extended pending the hearing of this application.***
- 3. THAT the time for giving a notice of appeal be extended by such time as this honourable court will deem fit.***
- 4. THAT orders for stay of execution be given pending the hearing of the intended appeal to the Court of Appeal.***
- 5. THAT costs be provided for.***

2) The motion is supported by the affidavits of Dominic Njuguna Mbigi and that of Samuel Waichungo. When served with the motion, Nahashon Kanyi Theuri and James Kihara Theuri being the 1st and 2nd respondents respectively filed the replying affidavit of Benjamin G. Wainaina to oppose the same.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits. I have further considered the oral arguments presented by the appellant's advocate. It is the submission of the appellant/applicant that it took time to get access to the court file to obtain a fair copy of the judgment. It is said that by the time the court file was released to the registry, the time to file a notice of appeal had lapsed. The appellant has stated that he intends to file an appeal to challenge this court's decision before the Court of Appeal. It is agreed by the appellant that his appeal has arguable grounds of appeal. The appellant offered to have the decretal sum deposited in this court as a condition for the grant for the order for stay of execution to remain as such.

4) The respondents on the other hand urged this court to dismiss the motion because the applicant has given no plausible reasons to back the motion. The respondent's claim that he needed a copy of the judgment before filing a notice of appeal is unreasonable since one does not need such. The appellant was accused of deliberately delaying to file the notice of appeal to purposely frustrate the expeditious disposal of the matter.

5) Having considered the rival arguments, I have come to the conclusion that in order for a party to make a choice whether or not to appeal, it is always desirable to have a copy of the judgment. This is important because a party will be able to decide whether to issue a notice of appeal to either impugn the decision on liability or quantum or both. With respect, I agree with the appellant that in the circumstances of this appeal, it was necessary to first obtain a copy of the judgment to make a decision whether or not to appeal. The applicant has expressly stated that there was a delay by the court in releasing the file to the registry therefore he was unable to peruse the judgment until the time fixed to issue a notice of appeal had lapsed. The respondents did not controvert this assertion. I am satisfied that the appellant/applicant offered a plausible explanation for the delay to file a notice of appeal.

6) The other prayer which the appellant/applicant sought is the order for stay of execution pending the hearing and determination of the intended appeal. The respondents are of the submission that the order for stay is not available to the appellant because the order for stay is predicated on an existing appeal which is not the case here. With respect, I am not persuaded by the respondents' submission. It is apparent

on the face of the application that the appellant is seeking for an order for stay pending the hearing and determination of the intended appeal. The law envisages a situation where a party can even orally apply for an order for stay even before filing the notice of appeal. In this case the appellant/applicant decided to seek for both leave to file an appeal out of time and for stay contemporaneously. If the order for stay is not granted, the respondents will proceed to execute the decree to the utter detriment of the appellant/applicant.

7) In the end, I am satisfied that the appellant's motion has merit.

Consequently, I grant the appellant/applicant the following orders:

- i. Leave of 7 days to file a notice of appeal out of time.**
- ii. An order for stay of execution of the decree pending the hearing and determination of the intended appeal on condition that the decretal sum which had earlier been deposited in an in interest earning account to be retained.**
- iii. Costs of the motion to abide the outcome of the intended appeal.**

Dated, Signed and Delivered in open court this 6th day of July, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondents