



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. APPLICATION NO. 81 OF 2016

PETER MAINA MWANGI.....APPLICANT

VERSUS

NANCY MUTHONI NYARUAI RESPONDENT

RULING

1. The applicant in the Notice of Motion dated 4th March 2016 is the defendant. In his application he seeks an order of stay of execution of the Chief Magistrates Judgment delivered on the 12th October 2015 in **CMCC No. 230 of 2011** (Nyahururu) pending hearing and determination of the application.

He also seeks for an order of leave to file an appeal out of time from the said judgment.

Reasons in support of the application are that the judgment was delivered in his advocates absence the notice of such judgment having not been served by the plaintiff upon him and or his advocate and only came to know of the delivery of the judgment when a Notice to show cause why he should not be committed to civil jail was served upon him.

2. An interim stay of execution of the Judgment was granted on the 24th March 2016 upon application under a certificate of urgency.

3. The application is opposed by a Replying Affidavit sworn on the 23rd March 2016. For one reason or the other, the Notice of Motion has not been heard and primarily due to the none availability of the trial court file in the court registry for parties to peruse the said judgment.

I have considered the affidavit in support of the application together with the grounds thereof, together with the plaint in the trial court case being **PMCC No. 230 of 2011**. It was a claim for a liquidated sum of Kshs.166,000/= plus costs and interest. A copy of the judgment whose execution is sought to be stayed has not been attached. I have seen a copy of the Notice to Show Cause. It shows the decretal sum as Kshs.235,730/= as at the date of the Notice to Show cause which is not clear from the copy availed.

4. The applicants only reason as demonstrated in the supporting affidavit is that his Advocate did not have notice of the delivery of the said judgment.

The advocate has not sworn any affidavit to state his position. He has thrown the application and affidavit of the applicant to the court. In his submissions on the same, he added nothing new and relied on the affidavit as filed.

5. Nancy Muthoni Nyaruai the Respondent opposed the application by her affidavit sworn on the 23rd

March 2016. It is her deposition that the applicant was at all times aware of the case and that when the Notice to show cause came up, he offered to pay the decretal sum in two weeks but which he has not paid. She however did not answer to the main issue on whether or not the applicant had notice of the date of delivery of the judgment.

6. I have seen a hand written note by the defendant dated the 20th November 2010 whereof the applicant under took to pay the decree holder Kshs.166,000/= in instalments starting end of January 2011. It appears this agreement was not honoured. The applicant has not mentioned this note. In any event there is already judgment on record.

I have stated that no copy of the judgment or decree have been availed to court, and no effort or explanation has been tendered to court for that failure.

7. I am being asked to stay execution of a judgment and grant leave to the applicant to file appeal out of time when no such judgment is brought for the court to satisfy itself of its chances of success should the order be granted.

The applicant simply tells the court that the trial court file has not be availed. He has not told the court what efforts if any he has put towards having the file traced. No evidence by letters to the Executive Officer of the trial court have been availed as evidence. Indeed, nothing has been placed before the court.

8. The judgment and decree sought to be stayed is alleged to have been delivered on the 12th October 2015. There is no evidence to confirm that indeed that Judgment was delivered on the said date.

9. I have considered the applicants application. I am not persuaded that the orders sought are merited. Without any tangible and plausible explanation and reasons in support of the application, and in the absence of a copy of the Judgment and decree sought to be stayed and appealed from, I am unable to grant the orders sought.

The applicant has not satisfied the conditions and requirements stated under **Order 42 Rule 6(1)** that is:

- a) That the court is satisfied that substantial loss may result to the applicant unless the order is made.*
- b) That the application has been brought without unreasonable delay.*
- c) That such security as the court orders for the due performance of the decree.*

10. As to the order for leave to file appeal out of time, the court is not satisfied that such order is merited. No draft Memorandum of Appeal has been attached to enable the court peruse the same.

The decision on a court to extend time or not is discretionary. It ought to be exercised in a principled manner with reason and justice, by weighing and balancing relevant factors placed before the court. See **Kenya Shell Ltd -VS- Benjamin Kibiru & Others (1982-88) I KAR and David Mwenje -vs- Jubilee Insurance co. (2005) e KLR.**

11. I have stated above that nothing has been placed before the court. The conditions stated under **Order 42 Rule 6 of the Civil Procedure Rules** have not been met nor demonstrated. An order of stay is not automatic nor a matter of course.

12. For those reasons, I find no material facts upon which I could grant any of the orders sought in the application.

The interim order of stay of execution issued on the 24th March 2017 is lifted and the application is dismissed with costs.

Dated, Signed and Delivered this 19th Day of January 2017.

JANET MULWA

JUDGE