

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 139 OF 2016

TONONOKA ROLLING MILLS APPELLANT

VERSUS

RODA MUNYIVA KIMEU

and CHARLES NZIOKI KIMEU Suing as personal representatives of the Estate of

ROBERT NDAVI KIMEU (DECEASED)..... RESPONDENT

RULING

The appellant herein was aggrieved by the Judgment of the lower court which awarded the respondents a sum of Kshs. 1,152,877/= being the total of several heads of damages. No appeal was lodged immediately and now there is before an application by way of Notice of Motion dated 24th March, 2016 seeking several orders among them that there be a stay of execution of the decree entered against the appellant on 11th December, 2015 by the lower court; that there be a stay of execution of the said judgment and decree pending determination of the appeal; that the appellant be granted leave to appeal out of time against the said judgment and that the memorandum of appeal dated 24th March 2016 be deemed as filed and served within the prescribed time.

The application is supported by grounds set out in the face thereof alongside an affidavit sworn by Paul Kariba the advocate for the appellant. The application is opposed and there is a replying affidavit sworn by Chalres Nzioki Kimeu who is one of the respondents.

Both learned counsel have filed submissions and cited some authorities which I have noted. At some stage counsel alluded to a settlement which however did not come through. It is not necessary for me to go through the entire argument presented by the parties for the following reasons. The delay in filing the appeal has been sufficiently explained by the counsel for the appellant.

I am persuaded that the reasons are plausible. So as to comply with order 42 Rule 6 of the Civil Procedure Rules, the appellants have offered to deposit the entire decretal sum in an interest earning account in the names of both counsels for the parties.

I have looked at the memorandum of appeal. Basically the main complaint is on quantum and whereas I appreciate the offer of security made by the appellant it is only fair and just the part of the decretal sum be paid to the respondents pending the determination of the appeal.

Accordingly I make the following orders. The application is allowed and leave granted to the appellant to file the appeal out of time. The record of appeal shall be filed within 30 days of today. There shall be a stay of execution of the judgment and the decree of the lower court provided that a sum of Kshs. 5,00,000/= is paid to the respondents and the balance of the decretal sum is deposited in an interest earning account in the names of both advocates appearing for the parties. The said payment to the respondents and the deposit of the balance aforesaid shall be done within 30 dyes from the date of this ruling. The costs shall be on appeal.

Orders accordingly.

Dated, signed and delivered at Nairobi this 1st Day of February, 2017

A. MBOGHOLI MSAGHA

JUDGE