



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 332 OF 2015

TELPOSTA PENSION SCHEME..... APPLICANT

VERSUS

ONESMUS MUIRURI MUTHEE.....RESPONDENT

RULING

1. The applicant; **Telposta Pension Scheme** took out the motion dated 28th July 2015 in which it sought for the following orders:

1. ***THAT the matter be certified as urgent and be heard ex parte in the first instance.***
2. ***THAT this Honorable court be pleased to extend the time within which to file and serve the Memorandum of Appeal from the judgment of Lower Court in Nairobi Civil Suit No. 1996 of 2010 delivered on 30th January, 2015.***
3. ***THAT this Honourable court be pleased to order a stay of execution of the judgment and resultant decree in Nairobi CMCC No. 1996 of 2010 pending the hearing and determination of the Applicant's intended appeal.***
4. ***THAT the costs of and incidental to this application abide in the result of the said appeal..***

2. The motion is supported by the affidavit of **Miriam C. Metto**. When served **Onesmus Muiruri Muthee**, the Respondent, filed a replying affidavit he swore to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed off by written submissions.

2. I have considered the grounds stated on the face of the motion together with the facts deponed in the supporting affidavit filed for the motion and the grounds of opposition. I have also taken into account the rival written submissions. As it appears on the face of the motion, the Applicant is basically asking to be given two orders. First, is an order to extend time to file an appeal out time and secondly, to be granted an order for stay of execution pending appeal. In **Mutiso – Mwangi 1997 KLR 630**, the court held thus:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are first, the length of delay, secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if application is granted.

4. It is the Applicant's submissions that failure to file an appeal within the prescribed time was not

intentional. It argues that the judgment was delivered in the absence of the parties on 30th January, 2015 and the applicant became aware of it on 16th March, 2015 after the time to appeal had lapsed. It avers further that, it sought for typed proceedings and only received confirmation from court on 27th July 2015 after which it filed the current application. The applicants argues that the delay is not inordinate and that it has an arguable appeal which will be rendered nugatory should an order of stay fail to issue.

5. The Respondent on the other hand submitted that the explanation advanced by the applicant for the delay is lame, as it ought to have visited the court's registry to establish reasons for the delay of the response of its letter dated 7th January 2015 that sought a date of delivery of judgment. He added that he will be prejudiced by the delay since he will not enjoy the fruits of the judgment given that the applicant failed to repair the premises that the respondent was living in. He further averred that the applicant will not be in a position to reimburse the decretal amount of kshs 873,775 in the event that the appeal is successful and that the applicant did not offer to deposit the decretal sum in court.

6. Looking at the materials placed before me, there are correspondences annexed to the application by the applicant, it is evident that the applicant enquired on the judgment date vide a letter dated 7th January 2015 addressed to the Executive Officer. The response to that letter came forth through a correspondence dated 16th March 2015, where the Senior Principal Magistrate informed the applicant through its counsel that judgment was delivered on 30th January 2015. Through another letter dated 18th March 2015, the applicant's advocate requested for typed proceedings and judgment. The court then released the certified copies of the judgment and proceedings through a letter dated 15th July 2015. With respect, after considering the material placed before me; I am persuaded by the grounds raised and relied upon by the Applicant in support of the application for leave to appeal out of time. It is clear in my mind that the Applicant came to know of the delivery of the judgment long after the period to appeal had lapsed. The communication by the court on the judgment date was made to the applicant two months after the judgment was delivered. The applicant put in a request for a judgment date before delivery of judgment well within time but the court failed to respond in time. Indeed the delay can be considered to be inordinate, but the explanations advanced for the delay are reasonable and satisfactory in the circumstances. Consequently, I grant the applicant leave of 10 days from the date hereof to file an appeal out of time.

7. The second prayer is for an order for stay of execution pending appeal. I have carefully considered the rival arguments. The applicant claims that the appeal will be rendered nugatory should the order fail to issue. It states that it is apprehensive that the respondent will be in position to reimburse the decretal especially given the fact that the respondent has not shown that it will be in a position to reimburse. The respondent on the other hand argues that he will reimburse the decretal sum since he paid a similar amount of money to repair the house from his pocket, which money gave rise to the contention herein. The mere fact that the respondent claims he is man of means is not enough to show that he can reimburse the decretal sum when the matter is concluded. He has not tendered any manner of proof to indicate he would avail the sum of money. It is clear therefore, that if the stay order is not issued, then the appeal will be rendered nugatory. On the issue of provision of security. The Applicant has proposed to deposit the entire decretal sum in court, a position that the respondent also mentioned. I am satisfied that, that is a good proposal which this court accepts.

8. Consequently, I grant the order for stay of execution pending appeal on condition that the Applicant deposits the principal sum of Kshs. 873,775/= in an interest earning account in the joint names of advocates and or firms of advocates from both sides within 30 days from the date hereof. In default the motion will be treated as having been dismissed. Costs of the motion to await the outcome of the Appeal.

Dated, Signed and Delivered in open court this 12th day of February, 2016.

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant.

..... for the Respondent.