



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. APPLICATION NO. 14 OF 2016

KIMUYA ABEDNEGO ALIAS ABEDNEGO MUNYAO.....APPLICANT

VERSUS

ZIPPORAH SYOMBUA MUNYOKA

**JOHN MBITH KAVOI (*suing as the legal representative for and on behalf*
of the estate of SHADRACK MUENDO KAVOI (Deceased))...RESPONDENT**

RULING OF THE COURT

Introduction

1. The Notice of Motion application before the court is dated **26th January, 2016**. It prays that the court enlarges the time within which to file the Memorandum of Appeal out of time from the judgment of **Tawa SRMCC No. 71 of 2015** delivered on **2nd December, 2015**. It also prays for stay of execution of the said judgment pending the hearing and determination of the intended appeal.
2. The application is premised on the grounds that the applicant was not aware of the contents of the judgment since the court personnel failed to issue a typed copy of the judgment in time.

The application

3. The application is supported by affidavit of **Kinyanjui Theuri** sworn on **26th January, 2016**.
4. The applicant's case is that on **2nd December, 2015** they attended court for judgment which was delivered in open court with the court only reading the final award. The applicants proceeded to the registry to peruse the contents of the judgment so as to get the ratio decidendi but the contents thereof was illegible. The applicants have since made several trips to Tawa Law Courts in a bid to get the copy of the typed judgment but to no avail. The applicants only became aware of the contents of judgment after the Executive Officer of Tawa Law Courts scantily read to them the contents of the said judgment. The applicants' case is that they have a good appeal on merit as demonstrated by the draft appeal (*annexture "KT-2"*). They are apprehensive that execution may issue any time now as the initial stay of execution issued has lapsed. The applicants are ready and willing to give security for the due performance of a stay order. The applicants also pray for an order of stay of execution pending an appeal.

The Response

5. The application is opposed by the respondent vide a Replying Affidavit sworn by **Zipporah Syombua**

Musyoka on 29th January, 2016. The respondent's case is that at the time judgment was delivered on **2nd December, 2015** a **M/S Akola** for the applicants was present in court and clearly understood the contents of the judgment. The applicants advocate even applied for stay of execution for thirty (30) days which was granted. The delay in filing the appeal has not been explained and was therefore intentional and deliberate on the part of the applicants. In any case, no appeal has been filed before this court and therefore the orders sought for stay of execution in **Tawa SRMCC No. 71 of 2015** pending hearing and determination of intended appeal cannot be granted. The respondent's case is that the wording of **Order 42 rule 6** is clear that there should be an appeal before stay pending appeal can be granted upon the applicant satisfying several conditions. The applicants have been mean with the truth as they have not disclosed when the Executive Officer of Tawa Law Courts read the contents of the judgment to them. The applicants have not annexed any letter requesting for typed and certified copies of court proceedings and judgment and this confirms that they made no efforts in obtaining the same. The respondent's case is that the application is devoid of merits and should be dismissed. The decretal amount is Kenya Shillings 2,363,140/= and costs of this suit amount to Kenya shillings 153,896/= making a total sum of Kenya Shillings 2,517,036/=. However should the court be inclined to allow the application the respondent submitted that he be paid half of the decretal amount of Kenya Shillings 1,258,518/= and the balance be deposited in court.

Submissions, Analysis and determination

6. Parties filed submissions which I have considered. Both sides relied on the provisions of **Order 42 rule (6)** to support or object to the application. Under **Order 42 rule 6(2)** no order for stay of execution shall be made under **rule 1** unless

- a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b) Such security as the court order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

7. The issue for determination is whether or not the application satisfies the requirement of **Order 42 rule 6(1) (2)**.

8. On the issue of substantive loss the applicant submits that if the stay is not granted the respondent may not be able to refund the decretal sum if the appeal succeeds. The respondents denied this, but did not show the means of the respondent or his ability to refund the sum of over Kshs. 2,500,000 should the intended appeal succeed. Without clear submissions by the respondent on his ability to refund the decretal sum, this court is entitled to believe that the applicant may suffer substantial loss should it fail to recover the decretal sum from the respondent in the event that the appeal succeeds.

9. As to whether the application is brought without undue delay, there is some attempt by the applicant to blame the court for failure to provide typed judgment in time. Be that as it may, the judgment was delivered on **2nd December, 2015** and this application was filed on **26th January, 2016**. This court finds that the delay is not, in the circumstances, one which would be said to be unreasonable.

10. On the issue of security, this court observes that the respondent is entitled to enjoy the fruits of his judgment. Although the applicant appeals against both liability and quantum, it is clear that the issue for concern is more on quantum than liability. While it is not the duty of this court to look into the merits of the said appeal at this stage, it is however clear that even if the intended appeal is successful, it will not rob the respondent of all its case on liability. This, coupled with the fact that the respondent is entitled to enjoy his judgment, is a strong case for some payment being made to the respondent as the balance is secured.

11. To that end the application before the court is allowed in the following terms;

- a. The applicant shall within fourteen (14) days pay half the decretal sum to the respondent.

b. The remaining half of the decretal sum shall be secured by the applicant depositing the same on an interest earning joint account in the names of the advocate's parties within fourteen (14) days.

DATED AND DELIVERED AT MACHAKOS THIS 1ST DAY OF DECEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

M/S Mutinda holding brief for Sila for respondent

No appearance for applicant

Court Assistant – Mr. Munyao