



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

MISC. CIV. APPLI. 518 OF 2008

FRANCIS WAINAINA WANYOIKE.....APPLICANT

VERSUS

JOSEPH MBOI.....RESPONDENT

R U L I N G

1. Francis Wainaina Wanyoike, the applicant herein is aggrieved by the ruling and order made on 1st July, 2008, by a Senior Resident Magistrate in Thika CMCC No.40 of 2002. The applicant wishes to appeal against the order and ruling of the magistrate. He therefore applies for extension of time within which to file the memorandum of appeal. The applicant also prays for an order of stay of proceedings in Thika CMCC No.40 of 2002, pending the hearing and determination of his intended appeal.
2. The applicant explains that the ruling of the trial magistrate was not delivered on the 1st July, 2008 as scheduled, as the trial magistrate was not present in court. The applicant only came to learn of the ruling on the 18th August, 2008 through his advocate, who was informed that the trial magistrate had delivered the ruling on the 15th August, 2008. Thereafter, the applicant's advocate applied for a copy of the ruling and was surprised to note that the ruling was indicated as having been delivered on 1st July, 2008. The applicant therefore maintains that for the foregoing reasons, he was unable to file his appeal within the required 30 days from 1st July, 2008, the supposed date of delivery of the judgment.
3. Joseph Mboi, the respondent, has filed grounds of opposition in which he contends that the application is defective as it is premised on wrong provision of the law. The respondent further maintains that the application is vexatious, and only meant to delay the speedy disposal of the respondent's suit. The respondent has sworn a replying affidavit, in which he narrates the history of the proceedings.
4. Of note is the fact that *ex-parte* judgment was previously entered against the applicant as he failed to file any appearance or defence. That upon execution proceedings being initiated against the applicant by way of committal to civil jail, parties filed a consent letter on 26th January, 2005, in which the applicant agreed to liquidate the decretal sum in three installments, and further agreed that execution should issue in default of payment. The applicant did not comply with the consent recorded, and an order was issued for his committal to civil jail.

5. Thereafter, the applicant made an application seeking to set aside the *ex-parte* judgment. That application was allowed on 5th February, 2007, and the applicant ordered to file defence and counterclaim upon payment of the requisite fees. The applicant did not pay the requisite fees. Therefore, when the applicant applied to have the defence and counterclaim amended, the lower court dismissed the application for amendment holding that there was no valid defence and counterclaim on record. The respondent swears that the conduct of the applicant indicates that his intention in filing this application is only to delay the finalization of the suit in the lower court.

6. I have carefully considered the application. It is apparent that the applicant has not quoted Order XLI Rule 4, which empowers this court to grant orders for stay of proceedings pending the hearing and determination of an appeal. That however is a technical error which has not caused any prejudice to the respondent. In my view, the spirit of Order L Rule 12 of the Civil Procedure Rules, which requires the order, rule and or other statutory provisions, under which an application is brought to be stated, is that that requirement should not be a bar to the administration of substantial justice. Accordingly, I will overrule the objection in that regard and proceed to determine the application on merit.

7. With regard to the application for extension of time within which to file his appeal, the applicant has explained the circumstances in which the ruling of the court was delivered. Those facts have essentially not been disputed. It would appear that the date of delivery of the ruling was backdated, and that the ruling was delivered without notice to the parties. The respondent has dwelt on the merits of the applicant's appeal. However, it would be premature at this stage to go into the merits of the appeal. I find that the applicant has given a good explanation as to why his appeal was not filed within time. It is therefore only fair and just that he be given the opportunity to pursue his appeal.

8. As concerns the application for stay of proceedings, it is evident from the previous record of the proceedings, that the applicant has not exhibited seriousness in pursuing the speedy disposal of this matter. Moreover, the applicant has not satisfied this court that he is likely to suffer any substantial loss. Nor has the applicant shown that the execution of the decree in the lower court would render his appeal nugatory. Indeed, there is no evidence upon which this court can conclude that the respondent would not be able to pay the decretal sum should the applicant be successful in his appeal. Accordingly, I find no good reason to justify the stay of the proceedings in the lower court.

9. The upshot of the above is that I grant leave to the applicant to file and serve his appeal within 21 days from the date hereof. I reject the prayer for stay of proceedings. Costs of the application shall be in the appeal.

Orders accordingly.

Dated and delivered this 4th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Kabuta H/B for Ngunjiri for the applicant present

Advocate for the respondent absent

Erick – court clerk