



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC APPL. NO. 17 OF 2017

TIPILIKWANI MARA CAMPAPPLICANT

VERSUS

BENARD OMUCHENYA ALUKHABA.....RESPONDENT

RULING

1. The applicant's application is made pursuant to sections 1A, 1B, 3, 3A, 63(e), 79G and section 95 of the Civil Procedure Act (Cap 21) Laws of Kenya and Order 42 Rule 6(1) of the 2010 Civil Procedure Rules.

2. The applicant has sought the following orders from this court

1. That this application be certified urgent, which is now spent.

2. That the applicant be granted extended time to appeal out of time to this court, against the order and judgement dated 7/3/2017 in *SPMC No. 84/2015 (Narok), Benard Omucheny Alukhaba v. Tipilikwani Mara Camp*.

3. In the alternative to prayer 2, this court be pleased to grant the applicant leave to file the draft appeal against the said judgement.

4. That the court be pleased to stay the execution of the above judgement and decree pending the hearing and determination of this application and the appeal.

5. That costs of this application be provided for.

3. The application is supported by 15 grounds which are set out on the fact of the notice of motion. The application has set out the following major grounds in support of the application. In ground 1, he has stated that there is desirous of filing an appeal against the judgement and decree of the trial court in the above case, but was unable to do so due to his inability to get copies of the judgement, decree and proceedings in time. Secondly, the applicant has stated that the delay in filing the appeal was occasioned by the fact that the applicant was waiting to be furnished with a copy of the judgement of the above case, which he has stated that the award in the sum of Shs.300,000/= was inordinately high.

4. Fourthly, the applicant has also stated that unless stay is granted, he will suffer substantial loss.

5. The appellant has stated that his intended appeal raises issues with a high likelihood of success.
6. The applicant has also stated that unless a stay is granted, the intended appeal would be rendered nugatory. He has also stated that he is prepared to abide by a reasonable order for the furnishing of security as may be made by this court.
7. Finally, he has stated that he has made this application without undue delay.
8. Caren Jaguga, has deponed to an 18 paragraphs affidavit in support of the applicant's application. The application has converted into affidavit form the g rounds in support of his application which I do not need to repeat.
9. The respondent has filed a 12 paragraphs affidavit in opposition to this application. In that affidavit, the respondent has deponed to the following major matters. He has set out the history of the case during the trial process that the respondent did not appear in court of 7/3/2017, when both parties were required to appear and confirm that they had filed their written submissions. He has further averred that the respondent did not prove his case on a balance of probabilities. He has also further averred that the amount of general damages less 20% contributory comes to Shs.322,400/- which is reasonable. And finally, he has averred that this application is unmerited, frivolous, vexious and is a delaying tactic. And for those reasons, he urges the court to dismiss it.
10. Both counsel have filed rival written submissions, which I have fully considered.
11. In the light of the affidavit evidence, the submissions of both counsel and the applicable law, I find the following to be the issues for determination.
 1. Whether or not the application has made out a case for the grant of an order for leave to appeal out of time.
 2. Whether or not the application has made out a case for the grant of order of stay pending the hearing and determination of the application and the appeal.
 3. Who should bear the cost of this application

Issue No. 1

12. I have considered the evidence in support of the grant of leave to appeal out of time and that of the respondent in opposition to it. I find that the right of appeal is guaranteed by section 65 of the Civil Procedure Act. This is subject to the applicant filing his appeal within the stipulated time of 30 days. In this regard, I find that the applicant was unable to file his appeal within the stipulated time, because he was unable to get the typed record from the trial court. In this regard, the annexed documentary evidence showing that he had asked for those proceedings in time. In the circumstances, the delay in filing his application and the intended appeal have been explained adequately. In the circumstances, I grant prayer 2 of his notice of motion by extending the time within which to file the appeal out of time and leave to file the draft appeal.

13. Issue No. 2

The affidavit evidence of the applicant is that unless stay of execution is granted, his pending Civil Appeal No. 17 of 2017, between the applicant and the respondent would be rendered nugatory. It is

therefore necessary to preserve the subject matter of the intended appeal. This would enable the applicant fully exercise his right of appeal. However, it is necessary to impose conditions in terms of security as required by Order 42 of the 2010 Civil Procedure Rules. In the circumstances, the applicant is hereby required to deposit in court Shs.50,000/- within 45 days failing which this order would lapse.

14. I therefore grant prayer 4 of the applicant's notice of motion namely an order to stay the execution of the judgement and decree pending the hearing and determination of this application and the intended appeal.

15. Issue No. 3

The applicant has succeeded in his application. It will therefore have the costs of this application.

Ruling delivered in open court this 27th day of November, 2017 in the presence of Mr. Yenke holding brief for Ms Shinana for the applicant and in the absence of the Respondent.

J. M. Bwonwonga

Judge

27/11/2017



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