



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 110 OF 2020**

**ALRONET INVESTMENT LIMITED.....APPELLANT**

**VERSUS**

**PAUL STIMA.....RESPONDENT**

**RULING**

1. Through a Notice of Motion application filed on 14th August, 2020 premised on the provisions of Sections 79G, 1A, 3, and 3A of the Civil Procedure Act and Order 42(6), 50(6) and 51(1) (sic) of the Civil Procedure Rules and all enabling provisions of the law, the applicant seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That this court be pleased to order stay of execution of the ruling and decree issued on 24<sup>th</sup> April, 2020 by Hon. J.M. Nyariki, RM (Mombasa), pending the hearing and determination of the applicant's appeal;

(iv) That this court be pleased to grant the applicant leave to appeal out of time; or

(v) That alternatively this court be pleased to direct that this appeal be deemed to have been properly filed; and

(vi) That costs of the application be provided for.

2. The application is anchored on the grounds on the face of it and in the affidavit of Robert Rapamo, sworn on 13<sup>th</sup> August, 2020.

3. On 4<sup>th</sup> September, 2020 the respondent filed a replying affidavit sworn on 2nd September, 2020 to oppose the application. Both Counsel filed and relied on their written submissions to support their cases.

4. In the applicant's submissions filed on 28<sup>th</sup> September, 2020 by the applicant's Counsel, Mr. Magolo, stated that by a loan agreement dated 28th May, 2018 executed by both the applicant and the respondent, the latter agreed to loan the respondent the sum of Kshs. 2,500,000/=. It was further stated that the applicant agreed to pledge as security for the loan their motor vehicles registration Nos. KBV 145U lorry and KCK 167N, a Toyota Hilux pickup. It was also stated that it was agreed by the parties that the motor vehicles were capable of satisfying the loan.

5. It was submitted that a transfer was duly signed with a clear understanding that in case of default, property in the vehicles would pass to the respondent, as the vehicles were security for the loan. Mr. Magolo stated that the applicant issued 4 post dated cheques to the respondent and advised him to await the confirmation of availability of funds before banking the same, but the respondent went ahead and banked them before he was told to do so by the respondent.

6. The applicant's Counsel contended that the motor vehicles had been in the respondent's possession since the execution of the contract and that the respondent could have sold the vehicles after the expiry of the loan period. It was also contended that the respondent had been using the motor vehicles ever since they were put in his possession.

7. It was indicated that before filing the suit, the respondent made a complaint to the police alleging that money had been obtained from him fraudulently and with false pretences, as a result of which the applicant's director was charged. It was stated that the applicant was of the

view that failure to inform it of the Judgment which was delivered by the lower court was another tactic used by the respondent.

8. It was submitted that the respondent filed a suit in the lower court which sought payment or in the alternative, the transfer of the motor vehicles. That the respondent then filed an application before the lower court dated 27th August, 2019 seeking to strike out the applicant's defence and for Judgment to be entered as prayed in the plaint, but the ruling was not delivered as scheduled due to the outbreak of corona virus (sic).

9. It was also indicated that on 11<sup>th</sup> August, 2020 the applicant's Counsel was surprised to receive a letter enclosing a decree indicating that the matter had been decided on. That on perusal of the court file, they realized that there was a ruling dated 24<sup>th</sup> April, 2020 which was delivered in their absence.

10. The applicant's Counsel cited the case of **James Wangalwa & another v Agnes Naliaka Cheseto** [2012] eKLR, where the court outlined the prerequisites of an order given under the provisions of Order 42 rule 6 of the Civil Procedure Rules.

11. It was submitted that the applicant stands to suffer substantial loss due to the fact that a decree has already been extracted by the respondent, who is on the verge of executing the same.

12. On the issue of security, it was stated that the applicant had already offered security by way of motor vehicles registration Nos. KBV 145U and KCK 167N, which have been in the possession and are being used by the respondent.

13. Mr. Magolo submitted that the present application was filed soon after the applicant received a letter on 11<sup>th</sup> August, 2020 enclosing the decree. That the said letter disclosed that the matter had been decided on and the respondent was awaiting execution.

14. In regard to the application for leave to appeal out of time, Mr. Magolo relied on the case of **Joseph Kakomo Mbenga v Maingi Charles & another** [2018] eKLR, on the principles to be considered. It was submitted that on perusal of the lower court file, it was established that the ruling was delivered by way of email. The applicant's Counsel stated that he never received the said email forwarding the said ruling. Further, that since 24th April, 2020 the respondent never made a demand for payment until 11<sup>th</sup> August, 2020.

15. It was contended that the court process was being abused because at the time the application for extension of time was being made, the warrants of attachment were awaiting the Hon. Magistrate's signature. Mr. Magolo stated that on realizing the foregoing, the applicant immediately moved to court on 13<sup>th</sup> August, 2020 and filed the present application as well as a memorandum of appeal.

16. On the merits of the intended appeal, it was submitted that the ruling which gave rise to the decree dated 22<sup>nd</sup> July, 2020 granted the orders sought by the respondent in its Notice of Motion dated 27th August, 2019.

17. It was contended that by entering Judgment as prayed in the plaint, the lower court granted Judgment on alternative prayers which should never be the case. The applicant's Counsel cited the case of **National Bank of Kenya v Samuel Nguru Mutonya** [2019] eKLR, to illustrate that a court cannot grant the main and the alternative relief at the same time in a blanket form. It was thus argued that the Hon. Magistrate erred in granting alternative prayers and as such, the applicant's appeal had high chances of success.

18. As to the issue of whether the prejudice that the respondent may suffer can be adequately compensated with an award of costs, it was stated that the respondent had in its custody 2 vehicles for the applicant, which were adequate to cover the debts. It was submitted that since the said vehicles were in the custody of the respondent, security had been given. It was also submitted that the respondent can be adequately compensated with costs.

19. The law firm of Cootow & Associates filed written submissions on 24<sup>th</sup> September, 2020. In the said submissions it was stated that Order 42 rule 6 of the Civil Procedure Rules sets out 3 prerequisites that must be met and the key word in the said provisions is the word "and", which connotes that the 3 conditions must be met simultaneously. The case of **Elijah B. Wamburi & 2 Others v Joshua Wilson Muthioma & 6 Others** [2020] eKLR, was relied on to support the said submission.

20. It was stated that the applicant in its submissions did not mention that it would suffer substantial loss if stay of execution orders were not granted. The case of **Joseph Gachie T/A Joska Metal Works v Simon Ndeti Muema** [2012] eKLR, was relied on where the court stated that in an application for stay of execution, the applicant should show the damages it would suffer if the order was not granted.

21. The decision in **Kenya Shell Limited v Kibiru** [1986] KLR 410 was also cited to demonstrate that substantial loss is the corner stone for granting an order for stay of execution.

22. It was contended that there was inordinate delay in the filing of the present application as the ruling by Hon. Nyariki, RM, was delivered on 24<sup>th</sup> April, 2020 and the application herein was filed on 14<sup>th</sup> August, 2020 which was 3 months and 19 days later. It was stated that the applicant failed to give a plausible explanation to elucidate the delay in filing of the application. The case of the **County Government of Nyeri v Benson Warui & Another** [2020] eKLR, was relied on to illustrate that an application similar to this one was dismissed for a delay of 3 months.

23. On the issue of deposit of security for due performance as a prerequisite, it was submitted that the applicant had not offered any security for due performance, which is supposed to be a show of good faith. The case of **Equity Bank Ltd v Taiga Adams Company Ltd** [2006] eKLR, was relied on to show that security for due performance is a mandatory requirement in such an application.

24. In regard to the application for leave to appeal out of time, the respondent's Counsel opposed the same on the ground that the applicant

failed to explain properly the delay in the late filing of the appeal. It was also stated that the period of 3 months and 18 days taken to file the appeal herein was inordinately long.

25. The respondent's Counsel opined that the intended appeal stood no chances of succeeding as the applicant admitted that it was indebted to the respondent in the sum of Kshs. 3,250,000/=.

26. On the issue of prejudice being suffered by the respondent, it was submitted that two years had gone by since the loan was advanced to the applicant but it had failed to make good the payment. It was stated that no justifiable reason had been given to warrant the failure of repaying the loan.

27. It was submitted that by filing the appeal, the applicant wanted to deny the respondent the fruits of his successful litigation. This court was urged to dismiss the application in its entirety.

## **ANALYSIS AND DETERMINATION**

28. The issues for determination are-

**(i) If the applicant should be allowed to file an appeal out of time; and**

**(ii) If stay of execution should be granted.**

### **If the applicant should be allowed to file an appeal out of time.**

29. The affidavit sworn on 13th August, 2020 in support of the present application stated that the ruling for the application which had been filed in the lower court by the respondent was not delivered on the scheduled date, following the outbreak of the covid-19 pandemic. It further stated that no communication was ever made to them with regard to the pending ruling.

30. From copies of the proceedings attached to the applicant's affidavit, the ruling was to be delivered on 13<sup>th</sup> April, 2020. The copy of ruling attached to the respondent's affidavit indicates that the ruling was instead delivered on 24<sup>th</sup> April, 2020. The applicant's affidavit indicated that the delivery of the said ruling was done through email. I note that in the replying affidavit filed by the respondent in the lower court, the email address for J.O. Magolo & Co. Advocates is given as [info@magoloadvocates.com](mailto:info@magoloadvocates.com) and [Magolojared@yahoo.com](mailto:Magolojared@yahoo.com). If the ruling was sent to one of the above email addresses, it should have been received by the said law firm.

31. The email forwarding the said ruling was not attached to the respondent's affidavit to confirm that it was sent to both the Counsel on record for the parties. I therefore give the applicant the benefit of the doubt. There is a possibility that they became aware of the ruling on 11th August, 2020 through the letter sent to their law firm by the respondent's Counsel.

32. In the case of Nicholas **Kiptoo Arap Korir Salat v IEBC & 7 Others** [2014] eKLR, the Supreme Court laid out the following underlying principles for courts to consider when exercising its discretion to extend time –

***(i) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;***

***(ii) The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***

***(iii) As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***

***(iv) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.***

***(v) Whether there will be no prejudice to be suffered by the respondents if the extension is granted;***

***(vi) The application should have been brought without delay.***

***(vii) In certain cases, like election petition, public interest should be a consideration for extending time."***

33. Bearing in mind the above decision and taking into account that it is possible that the applicant's Counsel did not receive a copy of the ruling delivered on 24<sup>th</sup> April, 2020 through email, my finding is that there was no inordinate delay in filing the present application.

34. On the aspect of the appeal succeeding, the applicant did not deny that it is indebted to the respondent. In its statement of defence dated 11th July, 2019 it admitted its indebtedness. In paragraph 5 of the affidavit in support of the present application, the applicant acknowledged the loan agreement whereby the respondent loaned their company Kshs. 3,250,000/=.

35. The respondent's affidavit filed on 4<sup>th</sup> September, 2020 disclosed that the applicant gave the respondent 4 post dated cheques for the sum of Kshs. 2,500,000/= which were dishonored on presentation to the bank. He further deposed that the applicant refused to transfer the 2 motor vehicles which had been given to the respondent as security.

36. The deponent further stated that on 20<sup>th</sup> July, 2018 parties executed an addendum to the loan agreement totaling Kshs. 3,750,000/= where the applicant undertook to settle the initial loan amount, including interest, which came to the sum of Kshs. 3,250,000/=. The amount of Kshs. 3,750,000/= included a penalty fee of Kshs. 500,000/= for the overdue loan amount by 30th July, 2018. That the applicant issued the respondent with cheque No. 00782 for Kshs. 500,000/= which on presentation to the bank was not cleared for the reason that the applicant's account was frozen.

37. In the case of **Thuita Mwangi v Kenya Airways Ltd** [2003] eKLR, the Court of Appeal stated the following with regard to applications where leave to appeal out of time is sought –

***“For instance in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, Civil Application No. Nairobi 255 of 1997 (unreported), the court expressed itself thus:***

***“It is now well settled that the decision whether or not to extend time for Appealing is essentially discretionary. It is also well settled that in general matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the 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 the Application is granted.”*** (emphasis added).

38. The argument in the applicant's submissions that Hon. Nyariki, RM, granted the main and alternative prayer in the plaint is misleading. The decree extracted by Counsel for the respondent is clear and states-

*“It is ordered and decreed that the defendant Alronet Investment Ltd do pay the plaintiff the sum of shillings 3,750,000.00 only, with costs, and interest on the principal amount at the rate of (12%) per annum from 7th day of June, 2019 to the 24<sup>th</sup> of April, 2020. Principal amount ....Kshs. 3,750,000.00. Interest as above w.e.f 07/06/19 – 24/04/20 Kshs. 396,986.000. Decretal amount..... Kshs. 4,146,986.00*

*Dated this 2<sup>nd</sup> July, 2020.”*

39. Since the applicant issued the respondent with bouncing cheques and its bank account was later frozen, the respondent had no other means of recovering its loan.

40. In paragraph 14 of the applicant's affidavit, the deponent stated thus –

*“That as indicated in the decree the order of the court has altered the terms of the agreement and wants the appellant to pay the sum without dispute the fact that the respondent has the motor vehicles and the transfer forms duly signed.”*

41. It is common knowledge that transfer of motor vehicles is done online as stated by Counsel for the respondent. The applicant declined to effect online transfer of the motor vehicles which were deposited as security, by the applicant with the respondent. The respondent has therefore been unable to realize its security. It is apparent that the applicant has time and again put hurdles in the way for the respondent and has frustrated his efforts. As it stands, the respondent is stuck. He has not been paid the principal amount he is owed and the interest. He cannot also transfer ownership of the 2 motor vehicles which had been deposited as security.

42. It is common ground that motor vehicles depreciate fast. The value the 2 vehicles in the year 2018 cannot be the same value they have today. The decree is however clear that Hon. Nyariki, RM, granted the main prayer and not the alternative prayer. The authorities cited by the applicant's Counsel are not applicable in the circumstances of this case. The finding of this court is that notwithstanding the provisions of Article 48 of the Constitution on the right to be heard and Article 50 on the right to a fair hearing, it must not be forgotten that whoever comes to equity must come with clean hands.

43. Where it is apparent to an appellate court that an intended appeal is so hopeless that it is barely arguable, the court has the right to slam the brakes on such a litigant not to file and pursue a frivolous appeal which would be a sheer waste of the court's time. If this court was to grant the applicant leave to appeal out of time, it would occasion prejudice to the respondent by denying him the fruits of the lower court's decision.

44. In **Machira v East African Standard No. 2 [2002] KLR 63** it was held thus-

***“To be obsessed with the protection of an appellant or intending appellant in total disregard or mention of the so far successful party is to flirt with one party as crocodile tears are shed for the other, contrary to the principle for the exercise of a juridical discretion. The courts must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in court, which is to do justice in accordance with the law and to prevent abuse of the court process.”***

45. This court holds that the intended appeal is highly unlikely to succeed. I do agree with Counsel for the respondent that the intended appeal is frivolous and unmeritorious. I am not persuaded that the application for leave to appeal out of time should be granted. Having found so, the prayer for stay of execution falls by the wayside.

46. The upshot is that the application dated 13<sup>th</sup> August, 2020 is hereby dismissed. Costs are awarded to the respondent. It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 22<sup>nd</sup> day of January, 2021. Ruling delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Abwao for the applicant

Mr. Paul Magolo for the respondent

Mr. Oliver Musundi - Court Assistant.