



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISC APPLICATION NO. E.848 OF 2020

SHADES HORTICULTURE LTD.....APPLICANT/INTENDED APPELLANT

VERSUS

HYDRO WATER WELL (K) LIMITED.....RESPONDENT

RULING

APPLICATIONS

There are two Applications for the court's determination: Both applications have been filed by the Applicant one dated **17th July 2020**, whereas the other is dated **24th August 2020**. The Applicant's applications are supported by the affidavits of Ashutosh Mishra sworn on **13th July 2020** and **24th August 2020** respectively. The Applicant's application is opposed by the Respondent through the Replying Affidavits sworn by Nikhil Rajesh Salva on **17th September 2020** and Ajay Shah on **2nd June 2020**.

1st Application

The Applicant filed a Notice of Motion Application dated **13th July 2020** for orders; -

1. That the court extends time and grant leave to the applicant to lodge an appeal out of time and file a memorandum of appeal out of time against the Ruling and Order of Hon. A. M. Obura delivered on 25th February 2020 in Nairobi CMCC No. 4489A of 2012.
2. That the court grants *ex-parte* a stay of execution of the decree and judgment of 2012 and all subsequent proceedings in Nairobi CMCC No. 4489A herein.
3. That the courts grant a stay of execution of the decree and judgment and all subsequent proceedings in **Nairobi CMCC No. 4489A**.

The Application is based on the grounds; -

- a. The Applicant realized that the matter proceeded *ex- parte* when he was served with a proclamation on **26th March 2019**. The Applicant immediately filed an application seeking inter alia the setting aside of the *ex- parte* judgment as well as re-opening of the Respondent's case for *denovo* hearing in order to grant an opportunity to the applicant to defend itself.
- b. On **7th October 2019** the **Hon. E. K. Usui** delivered a ruling on the Applicant's Application dismissing the Applicant's Application after making a finding that the Applicant had not complied with **Order 9 of the Civil Procedure Rules**.
- c. The Applicant's incoming and outgoing advocates had indeed filed a consent in compliance with **Order 9 rule 9** and which consent the Hon Magistrate stated she had not seen in the court record.
- d. On **25th February 2020**, the **Hon A. M. Obura** delivered a ruling dismissing the Applicant's Application for review after finding that there was no error apparent on the face of the record

e. The Applicant opted to Appeal against the said ruling and subsequently wrote a letter dated **28th February 2020** requesting for typed proceedings ruling and the order of the court. Before the Applicant could get a response to from the court in order to prepare and file a Memorandum of Appeal within the statutory time; the National Council for Administration of Justice issued a press statement suspending court operations because of Covid-19.

f. The Respondent herein instructed Auctioneers to execute the decree in **Nairobi CMCC 4489A** and the Auctioneers proclaimed the Applicant's property. The Applicant stands to suffer immense loss and substantial damage if the auctioneers proceed with the execution of the decree.

RESPONDENT'S RESPONSE

The Respondent responded to the above mention Application through the Replying Affidavit of Ajay Shah dated **21st July 2020**. The Respondent opposes the Applicant's Application by stating that; -

i. The Application lacks basis in law and fact but is also an abuse of the court process.

ii. The matter was scheduled for hearing on **26th November 2018** but the Applicant did not appear to defend its case despite being fully aware of the same. Consequently, on **1st March 2019** the court entered judgment in favour of the Respondent. Being aggrieved by the decision of the court, the Applicant filed Notice of Change of Advocates accompanied with an Application dated **1st April 2019** that sought orders of fresh hearing of the case and the said Application was dismissed for lack of merit.

iii. The Applicant then filed another Application dated **18th November 2019** seeking a review of the ruling. The court dismissed the Applicant's Application due to lack of merit and vacated the interim orders granted on **20th November 2019**, which ruling was delivered in the presence of both parties contrary to the assertions of the Applicant.

iv. Thereafter, the Applicant filed the instant Application seeking leave to file an appeal out of time and stay of execution of the judgment delivered on **1st March 2019**.

v. The Applicant's Application seeking an enlargement of time to file the intended appeal out of time has not adduced any sufficient and good cause considering that three months have lapsed. An application for stay of execution pending appeal ought to be made without delay and there ought to be a deposit or furnished security.

vi. That the Application has not only been made late but also the Applicant has not showed readiness to furnish any such security and it can only be construed that it is just a delaying tactic by the Applicant.

vii. Respondent prays that the Application be dismissed with costs.

APPLICANT'S APPLICATION - 2ND APPLICATION

The Applicant further filed a Notice of Motion Application dated **24th August 2020** for orders that; -

i. The court grants ex- parte stay of the order issued on **22nd July 2020** directing the Applicant to deposit an amount in court or in a joint interest earning account of the advocates of the parties half of the decretal sum in **Milimani CMCC 4489A**.

ii. The court reviews, varies and/or sets aside the order issued on **22nd July 2020** directing the Applicant to deposit in court or in a joint interest earning account of the advocates held of the decretal sum.

The Application is based on grounds that; -

1. The decretal amount was **Kshs.2,307,060.43** and half of the amount is **Kshs.1,153,530.22**.

2. That the Applicant is completely unable to raise the said sum of **Kshs.1,153,530.22**.

3. That the Applicant is still reeling from effects of Covid-19 which resulted in the Company incurring losses because it could not export flowers and thus they all withered.

4. That the Applicant prays that the orders directing it to deposit half the decretal amount as foretasted be reviewed and/or set aside.

RESPONDENT'S RESPONSE

The Respondent responded to the above-mentioned application through the Replying Affidavit of Nikhil Rajesh Salva dated **17st September 2020**. The Respondent opposes the Applicant's application by stating that; -

I. The Applicant is deliberately delaying execution of judgment by filing numerous applications and is guilty of laches as he has not provided any reason for filing of the application after the expiry of the period granted by the court for providing security.

II. That the allegation that the Applicant has been out of business since January 2020 is an afterthought as there is no evidence before the court to support the same and the applicant has been aware of the decree since 2019.

III. Further the Applicant is misleading the court by stating that it cannot raise the half the decretal amount as it has movable assets which it can use as collateral to raise the deposit required and/or dispose the same as a sign of its willingness to comply with court orders.

IV. Further, the Applicant has only attached one statement of account yet it has clearly demonstrated that it operates other bank accounts and failure by the applicant to attach the same shows that it is not candid on its financial status.

V. The Respondent stands to suffer irreparably in the event the orders sought are granted as the chances of recovering the decretal sum will be slim and the application be dismissed with costs.

APPLICANT'S SUBMISSIONS

The Applicant submitted a singular issue for determination: -

Whether the Applicant is entitled to extension of time to lodge its Appeal out of time?

The Applicant submits that before admission of an appeal out of time the court needs to be satisfied that there was a good and sufficient cause for not filing the appeal on time. In addition, the power to grant leave extending the period of filing an appeal out of time is discretionary and must be granted on a case by case basis.

In exercising the said discretion, the court is guided by several factors. In Mwangi vs Kenya Airways Limited [2003] eKLR C.A gave the following factors to be considered in deciding whether or not to extend time to lodge an appeal.

i. The period of delay

ii. The reason for the delay

iii. The arguability of the appeal

iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted.

The Applicant submits that the delay of about 4 months was not so inordinate. The delay is attributed to the fact that the court file could not be located in the registry because the court operations were suspended because of Covid-19.

The Applicant's advocates could not get a copy of the Ruling in order to prepare and lodge the appeal out of time. Further, that when structures were put in place for electronic filing by court, the Applicant was still not in receipt of a copy of the Ruling. On **13th July 2020**, the Applicant managed to get a handwritten copy of the Ruling and immediately filed this application together with a draft Memorandum of Appeal.

It is the Applicant's submission that the intended appeal is arguable and that the Respondent has not provided any evidence of the prejudice it is likely to suffer if leave to appeal out of time is granted.

The Applicant prays that the Application be allowed for the Memorandum of Appeal to be filed out of time.

RESPONDENT'S SUBMISSIONS

The Respondents submit on two issues; -

Whether the court ought to grant leave to the applicant to extend the time and grant leave to the applicant to lodge an appeal and file a memorandum of appeal out of time?

The Respondent relied on the case of First American bank of Kenya limited vs Gulab P. Shah & 2 others Nairobi HCCC No.22555 of 2000 [2002] I EA 65 as cited in the case of Joseph Mbenga v Mainingi Charles & another [2018] eKLR where the court set out the factors to be considered in deciding whether or not to grant such an application and these are; -

i. The explanation for the delay if any.

ii. The merits of the contemplated action whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice.

iii. Whether or not the respondent can adequately be compensated or costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favor of the Applicant.

The subject Ruling was delivered on 25th February 2020 and going by Section 79G of the Civil Procedure Act, the Applicant herein had up to the 25th March 2020 to file an appeal if need be. The instant application was filed on 14th July 2020 which is over 3 months and 17 days from the due date.

The Respondent reiterates that both parties were present at the time of delivery of the Ruling and any assertions by the Claimant to the contrary are false. Furthermore, the letter dated 28th February 2020 annexed to the Applicant's application as Annexure 6 raises the question as to why the Applicant would be requesting for typed proceedings if already it was not aware of the outcome of the ruling.

Is the respondent bound to suffer prejudice if the application to appeal out of time is allowed?

The case was filed in 2012 and the Respondent has been unable to execute judgment for 8 years and any further delay would occasion a miscarriage of justice.

It is also the Applicant's submission that if prejudice is to be suffered the same can be compensated by an award of damages. In the event that the Respondent succeeds in the determination of the appeal it is unlikely that the Applicant will pay for costs or damages as shown by his failure to deposit half the decretal amount as ordered by court.

Whether the court ought to issue an order granting a stay of execution of the decree, judgment and all subsequent proceedings in Nairobi CMCC No. 4489A?

The Respondent submits that there has been an unreasonable delay by the Applicant of close to three months in filing the instant Application and as such the Application ought not to be considered by the court. In the case of Focin Motorcycle Company Limited vs Ann Wambui Wangui & Another [2018] eKLR it was stated; -

“Where the applicant proposes to provide security as the applicant has done it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground for stay”.

Bearing in mind that the case is nearing its 9th year where a valid court decree has already been entered, it would be unfair to the Respondent for the court to allow such an application from the Applicant without the provision of adequate security.

The Court ought not to entertain the Application for not only failing to file the same after a considerate delay but also the deliberate disobedience of a court order by failing to provide adequate security as directed by the court.

ANALYSIS AND DETERMINATION

Issues for determination are; -

- 1. Whether the applicant should be granted leave to extend time and leave to leave to lodge an appeal and file a memorandum of appeal out of time?**
- 2. Whether an order should be issued to grant a stay of execution of the decree, judgment and all subsequent proceedings in Nairobi CMCC No. 4489A?**
- 3. Whether an order of stay should be issued to grant a stay, review, vary and/or set aside the order issued on 22nd July 2020 requiring the Applicant to deposit half the decretal amount?**

The Court has been called upon to determine the prayer on extension of time and leave to file an appeal out of time. Under the provisions of **Order 50, Rule 6 of the Civil Procedure Rules**, the courts have power to enlarge the time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has expired. It therefore follows that whether to extend time is a matter of judicial discretion.

In Equity Bank Limited v Richard Kerochi Ayiera [2020] eKLR Njuguna LJ. stated; -The discretionary power of the courts was reaffirmed by the Court of Appeal in the case of Leo Sila Mutiso v Rose Hellen Wangari Mwangi - Civil Application No. Nairobi 255 of 1997 (unreported) cited by the applicant, when it held that:

“It is now well 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 considers 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.”

The Applicant filed this application on 14th July 2020 while the subject Ruling was delivered on 25th February 2010 which was over three months out of the required thirty days as provided by Section 79G of the Civil Procedure Act.

As to the principles to be considered in exercising the discretion whether or not to enlarge time in First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65 supra

The explanation if any for the delay.

The Applicant avers that the delay to file the Memorandum of Appeal on time was occasioned by the suspension of court operations because of Covid-19 pandemic. The Respondent rebuts this by stating that the Judiciary in an effort to ensure continuity in dispensation of justice implemented electronic means for parties to file their documents on **23rd April 2020** and also attend court matters.

This Court takes judicial notice of the fact that it is true and a fact that Court operations came to an abrupt halt in March 2020 due to Corvid19 pandemic. The Courts literally shut down for 2 months; March & April 2020. Thereafter, limited access and operations commenced and skeleton staff working in shifts to ensure social distancing were in place. In the circumstances, the Applicant's challenge to obtain a copy of the Ruling is real and possible. Even if the Applicant was present, during reading of the Ruling, it had to obtain a certified copy to lodge an appeal. Due to these unforeseen circumstances, even at the Respondent's inconvenience, the Applicant is not to blame. I find the explanation for delay to file the appeal plausible and exercise judicial discretion to file appeal out of time; 30 days from date of delivery of the Ruling.

a. Whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice.

The Respondent avers that the Applicant is attempting to frustrate its efforts of realizing the fruits of its judgment. This is based on the fact that the Applicants application dated 18th November, 2018 was dismissed due to lack of merit and the interim orders vacated.

The Applicant on the other hand states that it stands to suffer immense loss and substantial damage if the Auctioneers proceed with the execution of the decree.

In Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & another [2018] eKLR Ngugi J. observed;

“Our case law has now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour”.

b. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the applicant?

The Respondent argues that a party seeking stay of execution pending appeal ought to make the application without delay and deposit or furnish security as the court may direct. The Applicant has not intimated to the court of its readiness to furnish any such security. Therefore, in fairness to both parties' if the Applicant does not furnish security, then the right of the Respondent to fruits of its judgment shall be prejudiced and the loss cannot adequately be compensated by damages.

Whether the court ought to issue an order granting a stay of execution of the decree, judgment and all subsequent proceedings in Nairobi CMCC No. 4489A?

The court, in RWW vs. EKW [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

The issue of stay of execution is the subject of the 2nd Application by the Application, where conditional stay of execution and right to appeal was based on furnishing of security.

In the cases of Kenya Tanzania Uganda Leasing Co. Ltd vs Mukenya Ndunda & another [2013] eKLR and Antione Ndiaye vs African Virtual University [2015] eKLR, an Applicant's right of appeal against the judgement of the trial court has to be balanced against the respondent's right to enjoy the fruits of his judgment which should not be taken away, and where the right is postponed, it can only be upon adequate security for the due performance of such decree or order as may ultimately be binding on the applicant. It is the Respondent's conclusion therefore that the order for deposit of security is in line with **Order 42 Rule 6(2)(b)** of the Civil Procedure Rules, 2010.

The Applicant avers that it is unable to raise the sum of **Kshs.1,153, 530.22** due to huge losses the company has incurred because it could not export the flowers as a result of Covid 19 pandemic. On the other hand, the Respondent's claim arose way before the onset of Corvid 19 pandemic; suit filed in 2012 and the Applicant ought to have made efforts to settle the uncontested debt before challenges arose due to Corvid 19 pandemic.

In the case of Lochab Brothers Ltd vs Lilian Munabi Nganga & 2 Others [2007] eKLR Kaburu Bauni J. held as follows; -

“There are no good reasons for court to set aside the orders by the trial court to deposit the decretal sum. The respondent has a judgement which has not been set aside. He needs to secure the same and the best way is by way of deposit of the decretal sum. Applicant cannot hide behind a blank allegation that its business is facing financial problems. If the appeal fails, and I am not saying it will, he still would have to pay”.

The provision of security is a fundamental requirement for the grant of stay of execution of a judgment pending appeal as provided by **Order 42 Rule 6(2)(b) of CPR, 2010**. It is thus, in line with the said provision, the court’s discretion to order the deposit of security that it considers reasonable and just in the circumstances.

A review of a decree or order premised on **Order 45 Rule 1 of CPR 2010** can only occur where the Applicant shows there is new and important evidence that was not available at the time the decree was granted or that there is a mistake or error apparent on the face of the record or for any other sufficient reason. The Applicant does not base his application on the ground that there is new and compelling evidence that was unknown to him at the time of hearing of the application that gave rise to the orders he now seeks to review. The Applicant has not demonstrated sufficient reason to have the order of ½ decretal sum he deposited to be reviewed. His application cannot therefore succeed on that ground.

In the matter of **Jeff Bondist Lusiki v Morris Shauri Kazungu [2017] eKLR Korir J. held; -**

“The Applicant bases his application on the ground that he cannot raise the decretal amount. That is not a ground for review. The conclusion is that this application has no merit. The same is dismissed with costs to the Respondent”

See Also; **Absalom Dova vs. Tarbo Transporters [2013] eKLR,**

DISPOSITION

- 1) In light of the above, the 1st Application for the Notice of Motion dated 13th July 2020 is granted that the Applicant made plausible reasons for not appealing on time due to circumstances by Courts closure due to Corvid 19 pandemic.
- 2) The 1st application is allowed only to the extent of; the Applicant is granted 30 days from date of delivery and release of Ruling to file appeal out of time.
- 3) The Applicant has not established sufficient grounds to warrant the court to review, vary and/or set aside the order issued on 22nd July, 2020 directing the Applicant to deposit in court or in a joint interest earning account of the Advocates of the parties half the decretal sum in Milimani CMCC No. 4489A.
- 4) The stay of execution pending appeal is conditional to furnishing of security as imposed by the Trial Court otherwise it is not granted.
- 5) The 2nd Application for review of the Court Order by the trial Court on furnishing security is dismissed.
- 6) Each party to bear its own costs.

DELIVERED SIGNED DATED IN OPEN COURT ON 15TH FEBRUARY 2021 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

SHERWIN NJOROGI ADVOCATES FOR THE APPLICANT – N/A

MWANIKI GACHOKA & CO. ADVOCATES FOR RESPONDENT –N/A

COURT ASSISTANT - TUPET