



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. E087 OF 2021**

**CENTURY MICROFINANCE BANK LTD.....APPELLANT/APPLICANT**

**VERSUS**

**ERICK KOMBE NDZAI.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is the notice of motion dated 25<sup>th</sup> February 2021 where the appellant/applicant seeks the following orders:

*(i) Spent*

*(ii) Spent*

*(iii) That the appeal filed herein be admitted out of time.*

*(iv) That there be a stay of execution of the trial court judgment and decree dated 11/02/2021 pending the hearing and determination of the appeal.*

*(v) That the costs of this application be in the cause.*

2. It is premised on the grounds on its face plus the two affidavits by Florence Muchiri sworn on 25<sup>th</sup> February 2021 and 12<sup>th</sup> March 2021 respectively. The main ground is that the judgment was not communicated to them by the advocates. It only came to their attention when they were served with a decree, a warrant of attachment and a 7-day proclamation notice on 15<sup>th</sup> February 2021. The bank premises was then visited by the auctioneer on 24<sup>th</sup> February 2021 with an intention to execute by attachment (FM1a-c).

The bank is said to be willing to offer security for performance if granted the leave to appeal.

3. The deponent is the chief executive officer of the applicant. She depones that they only received a copy of the judgment via email on 18<sup>th</sup> February 2021 (FM2). The same was delivered without notice and in the absence of the parties (FM3).

4. It is averred that the counterclaim in the applicant's defence has not been addressed in the judgment, same to their oral and documentary evidence. The rest of their complaints are addressed in the memorandum of appeal filed herein (FM4).

5. She blames their former lawyers *Muri Mwaniki Thige Kangemi LLP advocates* for the lapse that led to their delay in filing the appeal. She confirmed their willingness to offer security for stay of execution while indicating how an execution would have an impact on the bank.

6. The 1<sup>st</sup> respondent filed a replying affidavit sworn on 10<sup>th</sup> March 2021 opposing the application. He depones that the applicant's counsel was notified of the judgment vide a letter dated 10<sup>th</sup> December 2020 (EKN-1). There was a delay of over 8 months in filing this application as judgment was delivered on 20<sup>th</sup> May 2020.

7. He further deponed that the applicant had instructed its advocates in the primary suit to go in for settlement and a letter to that effect written to his advocate (Letters EKN 2(a) & (b). He avers that the application is an afterthought meant to delay him from enjoying the fruits of the judgment.

8. He depones that besides promising to give security the applicant has not made any offer of the security and/or how it will be released. He adds that the process of execution is already on, and the applicant will not suffer any substantial loss.

9. The applicant in its supplementary affidavit through its chief executive officer avers that their then Advocates only communicated to them about the judgment vide a letter dated 27<sup>th</sup> January 2021 which was received on 23<sup>rd</sup> February 2021 (FM1F). A request for the judgment was made to the Executive Officer Chief Magistrate's court on 7<sup>th</sup> January 2021 but it took long to be delivered to them (FM3F). She further depones that the 1<sup>st</sup> respondent was in a rush to execute the judgment without serving the same and a decree on the applicant. That since the 1<sup>st</sup> respondent is unemployed it is him to satisfy the court of his ability to refund the money in the event of a successful appeal.

10. In arguing the application Mr. Odhiambo for the applicant told the court that an ex parte judgment was delivered on 20<sup>th</sup> May 2020 and a decree extracted on 11<sup>th</sup> February 2021, and the applicant was not aware of all this. Its counsel's contention that liability ought to have been apportioned. He relied on the following cases to support his submission:

(i) **Resia Ene Nasotokini & 3 others v Stephen Ndungi Kinyanjui & anor [2020] eKLR.**

(ii) **Equity Bank Ltd v Richard Kerochi Ayiera [2020] eKLR.**

11. Its his contention that the applicant will be prejudiced if the prayers are not granted. Further that the respondent has not demonstrated that he is able to pay back the money if he is paid. That the circumstances prevailing in terms of Covid19 favour the appellant/applicant.

12. In response Mr. Ayieko for the 1<sup>st</sup> respondent submitted that the applicant has not explained any substantial loss to be suffered if stay pending appeal is not granted. An intended execution is not substantial loss and there is nothing to show that the 1<sup>st</sup> respondent is a man of straw. Its his submission that the applicant has not shown that payment of the sum would cause them a loss.

13. Its his further submission that the applicant has not tendered any security and has generally not met any of the conditions for grant of stay of execution. On grant of leave to file appeal out of time he submits that the delay in filing the application is inordinate, as a judgment advice was sent to the applicant's counsel. He argues that miscommunication with their counsel should not have a negative impact on the respondents' entitlement.

14. Counsel contends that this application is an afterthought since the applicant had sought to pay the decretal sum by instalments.

15. In a short response Mr. Odhiambo submitted that there is willingness by the applicant to comply with any conditions to be given. He argues that a period of 2 months is not inordinate delay and counsel's mistakes should not be visited on the client. On the proposal to pay he submitted that there was a counter offer and so no proposal was reached.

16. The 2<sup>nd</sup> respondent did not file any response to the application. M/s Komo for the 2<sup>nd</sup> respondent informed the court that they were not opposed to the application which they supported together with the supporting affidavit.

17. I have considered the application, the grounds, affidavits, submissions and the cited authorities. The applicant seeks two main orders namely:

(i) Leave to file appeal out of time.

(ii) Stay of execution pending the hearing of the intended appeal.

18. There are many decisions on the issue of extension of time. In the case of **County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR** the supreme court reiterated that extension of time was an exercise of discretion and identified the following as the principles that a court should consider in exercising such discretion.

These are:

***1. 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;***

***2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***

***3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***

***4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***

***5. Whether there will be any prejudice suffered by the respondents if the extension is granted;***

***6. Whether the application has been brought without undue delay; and***

***7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."***

See also **Mwangi v Kenya Airways Ltd [2003] KLR**; **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others SC Application No. 14 of 2014; [2014] eKLR**.

19. There is no dispute that the impugned judgment was delivered on 28<sup>th</sup> May 2020 in the absence of both parties. There was no notice to the parties as had been directed by the court on 30<sup>th</sup> January 2020. There is evidence of communication in form of a letter by the respondents counsel informing the applicant of the delivery of the judgment. This letter is dated 10<sup>th</sup> December 2020 (FM3a) addressed to the then counsel for the applicant. By this time, the time for filing appeal had run out. The 1<sup>st</sup> respondent has not told the court when he learnt of the delivery of the judgment because it took his advocates about seven (7) months to act on the said Judgment.

20. The applicant has produced a letter [FM1] dated 27<sup>th</sup> January 2021 and received on 23<sup>rd</sup> February 2021 from its then advocates. The contents are clear, to the point that the advocate was responding after receiving the letter dated 10<sup>th</sup> December 2020 from the 1<sup>st</sup> respondent's counsel.

Prior to this, the applicant had been served with documents (MFIa-c & 2) and even visited by the auctioneer between 15<sup>th</sup> February 2021 – 24<sup>th</sup> February 2021. It only received a copy of the judgment on 18<sup>th</sup> February 2021.

21. There being no notice issued by the court for the delivery of the judgment (no wonder both parties were absent) the court should have made an order for the parties to be notified of such delivery and/or served with copies of the judgment at their own cost. Owing to what has been stated and which remains uncontroverted in the poor communication of the delivery of the judgment I find that there is no inordinate delay by the applicant exhibited.

22. I have also seen a copy of the plaint and the applicant's defence and counterclaim in Milimani CMCC No. 4792 of 2018. The judgment delivered on 28<sup>th</sup> May 2020 mentions nothing about the counterclaim, and that is one of the applicant's grievances which needs to be addressed in the intended appeal.

23. After considering all the happenings in this matter plus the memorandum of appeal I am not able to say that the appeal is not arguable. Arguability does not refer to high probability of success. I find that the applicant has demonstrated that it has plausible grounds to be urged in the appeal. I have not seen any demonstration of any prejudice the 1<sup>st</sup> respondent will suffer if the applicant is granted an opportunity to exercise his right under Section 79(G) of the Civil Procedure Act by appealing the lower court decision.

24. I therefore allow the request to extend time for filing an appeal. The memorandum of appeal dated the 25<sup>th</sup> February 2021 and filed on the same day shall be deemed as having been filed within time.

25. On the next issue of stay of execution Order 42 Rule 6(2) Civil Procedure Rules provides:

***“(2) No order for stay of execution shall be made under subrule (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 orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

26. From what I have already stated above, the application was filed without unreasonable delay. On substantial loss, the applicant has argued that being a bank, any activities of execution would cause panic among its customers and this would result in it losing the said customers. The respondent is of the view that this explanation is just a storm in a cup of tea and is not sufficient to demonstrate any substantial loss, to the applicant. He therefore opposes any stay of execution. Counsel submitted that there was nothing produced to show that the 1<sup>st</sup> respondent is a man of straw.

27. From the pleadings and the impugned judgment, it has been shown that the 1<sup>st</sup> respondent was the applicant's general manager before the incident complained of. His services were terminated hence the claim for general damages is based on the applicant's complaints. The 1<sup>st</sup> respondent has not stated anywhere in his replying affidavit that he is in a position to refund the decretal sum if paid in the event of a successful appeal. See **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & anor [2006] eKLR**.

28. I have also taken into account the submission that the applicant expected liability to be shared at 50:50. This means it would have been ready to pay damages at 50% of course depending on the damages to be awarded on appeal.

29. I have considered all these arguments and I find that the court has the duty to protect the interests of both parties. The principal sum is Kshs 3,004,200/= plus costs and interest which is yet to be settled. The 1<sup>st</sup> respondent will not be completely locked out of the enjoyment of the fruits of the judgment in light of the submission on the 50:50 liability.

30. The upshot is that the notice of motion dated 25<sup>th</sup> February 2021 is hereby allowed in terms of prayers (iii) and (iv) with the following orders being made:

(a) The memorandum of appeal dated 25<sup>th</sup> February 2021 is deemed as having been filed within time.

(b) There shall be stay of execution of the judgment delivered on 28<sup>th</sup> May 2020 on the following conditions:

(i) The applicant to pay the 1<sup>st</sup> respondent the sum of Kshs 800,000/= through his advocate within 7 days.

(ii) The balance to be secured by a bank guarantee from a reputable bank to be filed within 14 days. Failure to comply will lead to automatic lapse of the stay of execution.

(c) Costs of the application shall await the outcome of the appeal.  
Orders accordingly.

**Delivered online, signed and dated this 30<sup>th</sup> day of June, at Nairobi.**

**H. I. ONG'UDI**

**JUDGE**