REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC.APPLICATION NO. E009 OF 2021

BONITO HOTELS.....APPELLANT/APPLICANT

-VERSUS-

DENISE KIBISU.....RESPONDENT

RULING

This ruling relates to the applicant's Notice of Motion dated 8th January, 2021 seeking the following orders;

> ***1. Spent***
>
> ***2. THAT this Honourable Court be pleased to allow the applicant to appeal the ruling in Milimani Commercial Case No. 1770 of 2019 delivered on the 10th February 2020 out of time.***
>
> ***3. THAT this Honourable Court be pleased to order a stay of execution of the ruling delivered on 10th February, 2020 pending the hearing and determination of the intended appeal.***
>
> ***4. THAT costs of the application be in the cause.***

The application is supported by the affidavit of ***Alfred Agengo***, the General Manager of the applicant's Company, sworn on 8th January, 2021. The respondent opposed the application via a Notice of Preliminary Objection dated 11th February, 2021 to which the applicant filed a Relying Affidavit sworn on 15th May, 2021 by Alfred Agengo.

The basis for the application is that the applicant is aggrieved by the ruling of Hon. D.M. Kivuti delivered on 10th February, 2020 in Milimani Commercial Court Case No. 1770 of 2019 without its knowledge now wishes to prefer an appeal against the whole ruling. Secondly, the applicant contends that the delay was occasioned by an oversight on the part of its advocate and hence not inordinate; that, the appeal has very high chances of success as it raises triable and weighty issues. Lastly, the Applicant avers that although the Respondent is on the verge of instituting execution proceedings, he shall not suffer any prejudice if the application is allowed. The deponent reiterates the grounds of the application and maintains that it only became aware of the ruling on 2nd September 2020 when they were served with a copy of the ruling indicating that the same was delivered on 10th February, 2020.

The Preliminary Objection by the Respondent seeks to have the present application struck out for the reasons that;

> ***1. The Notice of Motion dated 8th January, 2021 is incompetent, misconceived and devoid of any merit as the requirements of Order 36 of the Civil Procedure Rules were clearly met by the facts of the case.***
>
> ***2. The applicant having acknowledged receipt of the judgment Notice dated 9th September 2020, cannot come back to seek to appeal long after the deadline date of 2nd October, 2020.***
>
> ***3. The application has no good and sufficient cause for not filing the appeal within time.***
>
> 4. ***The application amounts to a fishing expedition and that the delay of nearly 3 months is inordinate.***

The Preliminary Objection;

In support of the Preliminary Objection the Respondent states that all the legal threshold set out in the **Mukisa Biscuit Manuafacturing Co. Ltd vs West End Distributors Ltd(1969) EA 696** has been met. With regards to the first ground of the Preliminary Objection, it is argued

that the facts of the lower court suit met all the requirements for Summary Judgment under Order 36 Rule 1 hence the present application ought to be dismissed. The respondent has singled out the letter dated 21st November, 2018 from the applicant's General Manager referred to by the lower court which admitted the liquidated claim as defined in the Black's Law Dictionary.

In opposition, the Applicant contends that the Preliminary Objection raised has not met the legal threshold identified in the Mukisa Biscuits Case (Supra) including; that the Preliminary Objection must raise a pure point of law, there is demonstration that all the facts pleaded by the other side are correct; and lastly there is no fact that needs to be ascertained. Citing the case of **Attorney General & Another v Andrew Maina Githinji & Another [2016]eKLR,** the applicant asserts that all the three ingredients raised in the case of **Mukisa Biscuit Case (Supra)** must be present before a Preliminary Objection can be sustained.

The applicant further argues that the procedure for summary judgment under Order 36 of the Civil Procedure Rules, 2010 is an issue that requires tendering of evidence. Counsel relied on the case of **Oraro v Mbajja [2005] eKLR** where J.B. Ojwang J. (as he then was) held that;

> **"I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that *"where a Court needs to investigate facts, a matter cannot be raised as a preliminary point."***

Application for Leave to file appeal out of time and stay of execution:

The applicant submits that its application seeking to file an appeal out of time is meritorious and that this court has unfettered discretionary powers to grant the orders as prayed. In support, the applicant cited the case of **Mohammed v Joseph Mugambi & 2 Others, Civil App. No. 332 of 2004(unreported)** cited with approval in the case of **Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015]eKLR** where J. Mohammed, J.A. identified some factors that the court would consider in such a circumstance. They include the period of delay, the reasons thereof, chances of success of the appeal succeeding if the application is granted, the degree of prejudice to the respondent, effect of delay on public administration and lastly, the importance of compliance with time limits.

The applicant in admitting delay in filing the appeal states that it was caused by an oversight in interpreting the timelines for lodging necessary documents on the part of the advocate and that in the interest of justice, it should not be penalized for the mistake of counsel as was held by Murgor. J.A in the case of **Robert Njuguna Kamau & Another v Kirika Kamungu [2015]eKLR.** On whether the appeal has high chances of success, the Applicant submits that the Memorandum of Appeal raises triable issues which will be rendered nugatory if execution proceeds. Additionally, the applicant while relying on the case of **JMM V PM[2018]eKLR** acknowledges the right of a successful party to enjoy the fruits of his judgment but argues that the respondent will not suffer any prejudice if stay of execution is granted as the application is not frivolous.

In opposing the application, the respondent urges the court to find that the delay has been inordinate and an abuse of the court process thus inexcusable. This he attributes to the failure by the applicant to show sufficient cause for the eleven (11) months delay despite being notified of the ruling in September, 2020. The respondent has sought to rely on the case of **Seraphine Nyasani Menge v Rispah Onsase[2018]eKLR** where J.M. Mutungi J. in dismissing an application seeking leave to file an appeal out of time held that no sufficient cause was raised to show why the appeal was not processed within time. Similarly, in the case of **Alibhai Musajee vs Shariff Mohammed Al-Bet, Civil Appeal No. 283 of 1998** and in **Berber Alibhai Mawji V Sultan Hasham Lalji & 2 others [1990-1994]EA 337** where the court held that failure to act does not constitute a good or sufficient cause. While in the case of **Livingstone Muchiri v Dickson Kimani Chege & Another [2020]eKLR** Justice Chepkwony held that although cases belong to litigants and even though they appoint advocates on their behalf, they have a duty to monitor progress of their cases.

Analysis and determination;

The issues for determination by this court are two-fold:-

> *i) Whether there is a competent Preliminary Objection before this court.*
>
> *ii) Whether the Applicant has satisfied the conditions precedent to granting of an order of extension of time to file an appeal and order of stay of execution pending appeal.*

The law with regards to Preliminary Objection has been settled in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696**, This case has since been endorsed by the Supreme Court of Kenya in the case **Hassan Ali Joho & another v Suleiman said Shahbal & 2 others, Petition No. 10 of 2013, [2014]eKLR** where the Court held thus:

> **"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration … a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion'."**

Further, the Supreme Court in **Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others, Application No. 50 of 2014, [2015] eKLR** stated that;

> **"[15] Thus a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."**

The crux of the present Preliminary Objection is that the application before the Court is incompetent, misconceived and devoid of any merit as the requirements of Order 36 of the Civil Procedure Rules were clearly met before the lower court. Additionally, the Respondent raises issue with the explanation advanced by the Applicant for the delay in filing the present application. Summary judgment and the procedural law pertaining to the same is provided for under Order 36 Rule 1 of the Civil Procedure Rules 2010 and states; -

> ***(1) In all suits where a plaintiff seeks judgment for—***
>
> ***(a) a liquidated demand with or without interest; or***
>
> ***(b)the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,***
>
> ***where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.* 8.**

A perusal of the Memorandum of Appeal reveals that the Applicant intends to challenge the ruling of 10th February, 2020 by the lower court which struck out the applicant's defence and entered a summary judgment in favour of the Respondent. This is an issue that the Appeal court is tasked to determine through analysis of evidence by both parties so as to ascertain the truth since the facts are clearly contested. Similarly, the ground that the Applicant has no good and sufficient cause for not filing the appeal within time and that the three (3) months delay is inordinate is a matter that can only be heard and determined by this court after hearing the application. It is my finding that the respondent's Notice of Preliminary Objection is not proper as it does not raise any pure point of law, I find guidance in the Supreme Court decision in the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR,** the court held inter alia;

> **"[19] The objector casts blame at the applicant for being indolent, and guilty of latches. Such a charge comes at an inapposite moment, as the Court can only resolve it while hearing the application itself, for extension of time. Thus, such a charge makes no valid ground for raising a preliminary objection. It is to be noted, besides, that delay is a factual issue, that calls for a tendering of evidence. The same is true as to the question whether or not the intended appeal will be rendered nugatory—and such are matters for consideration during the hearing of an application for extension of time."**

I do find that the preliminary objection cannot settle the dispute. It is hereby dismissed. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

> **Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**
>
> **Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.**

Some of the factors to be considered by the court while exercising its discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**. They include the following:

> i) The period of delay;
>
> ii) The reason for the delay;
>
> iii)The arguability of the appeal;
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> iv)The degree of prejudice which could be suffered by the if Respondent the extension is granted;
>
> v)The importance of compliance with time limits to the particular litigation or issue; and
>
> vi) The effect if any on the administration of justice or public interest if any is involved.

The Ruling was delivered on 10th February, 2020. The applicant contends that it became aware of the Judgment on 2nd September, 2020 following a Notice of Judgment served by the Respondent. The present application was filed 8th January, 2021, two (2) months after the lapse of the 30 days stay of execution granted by the trial court. The delay has been attributed to an oversight on the part of its advocate in interpreting the rules on lodging the necessary court documents. Although this oversight has not been explained and/or evidenced, this court is of the view that in the interest of justice, a counsel's mistake should not be visited on a party. In the case of **CFC Stanbic Limited versus John Maina Githaiga & Another [2013] eKLR** the Court of Appeal made the following observation:

> **"On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time**

once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant. This Court is guided by the case of LEE G MUTHOGA V HABIB ZURICH FINANCE (K) LTD & ANOTHER, CIVIL APPLICATION NO. NAI 236 OF 2009, where this Court held:

"It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight."

In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel."

On the second limb of the application, the applicant is seeking stay of execution pending the hearing and determination of the intended Appeal which application invokes the discretionary powers of the court which must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

"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."

The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

Substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence, the applicant has not demonstrated the substantial loss they will suffer should the court disallow their prayer for stay. The only evidence before this court is a Judgment Notice dated 2nd September, 2020 from the Respondent notifying them of the judgment. In the case of **Macharia T/A Macharia & Co. Advocates vs East Africa Standard [2002] eKLR** Kuloba J. as he then was held that an applicant's ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful it will be rendered nugatory. The applicant has failed to convince this court that it will suffer substantial injury that will irreparably damage the applicant's position in case the appeal is successful. The Applicant's application dated 8th January, 2021 partly succeeds. Leave is granted to the applicant to file an appeal against the ruling of the trial court as prayed in prayer two (2) of the application. The Memorandum of appeal to be filed within 14 days hereof.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY,2021.

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S.J. CHITEMBWE

JUDGE