



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO.E07 OF 2021**

**ANASTASIA OKUMU WERE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NYAOGA SIANGO.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**TRANSEAST LIMITED.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The court has been called upon to determine the Defendant/Applicant's **Notice Of Motion** application dated **26<sup>th</sup> January, 2021** which seeks the following prayers:-

**a) Spent;**

**b) That this Honourable Court be pleased to extend time and grant leave to the applicants to lodge a Memorandum of Appeal out of time against the Judgment by Honourable Hon. E.K Makori, delivered in Mombasa PMCC No.1123 of 2011;**

**c) Spent;**

**d) That the Honourable Court be pleased to stay execution of the Judgment in Mombasa PMCC No.1123 of 2011, pending the hearing and determination of the intended appeal.;**

**e) That the memorandum of appeal annexed to this application be deemed to be duly filed within time;**

**f) Spent;**

**g) That this Honourable Court be pleased to issue any other orders that it may deem fit, just and expedient in the interest of justice;**

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

2. The application is based on 15 grounds on its face and supported by the **affidavit** of **Pauline Waruhiu**, the Legal Counsel at the Defendant's insurers. She has deponed that Judgment was delivered in the absence of the Defendants/Applicants and/or their advocate on **2<sup>nd</sup> October, 2019** in favour of the Plaintiff/Respondent for the sum of Kshs.402,850.50. That it was not until **29<sup>th</sup> December, 2020** when the Defendants obtained a copy of the Judgment and two months later filed the present application. As such, it is argued that the delay exhibited is not inordinate and has been explained. That, the intended appeal which is highly arguable will be rendered nugatory if stay is not granted. The Appellants further contend that the Respondent would be unable to repay the decretal sum in the event that the appeal succeeds thus they will suffer substantial loss and inability to recover the decretal sum.

3. The Plaintiff/Respondent has opposed the application by virtue of the **Replying Affidavit** sworn on the **6<sup>th</sup> April, 2021** and filed on **12<sup>th</sup> April, 2021**. Her case is that the present case is a series of files to which **CMCC No.589 of 2010** was applied as the test suit and later on, liability determined in the ratio on 25% : 75% in favour of the Plaintiff. She has however averred that the Defendants/Applicants were notified of the Judgment and even offered to settle the decretal sum in instalments vide a letter dated **20<sup>th</sup> November, 2020**.

4. The Parties then filed written submissions to fortify the averments in their pleadings. I have had the benefit of reading through the

submissions and the authorities relied on and find they are a replica of the averment in the affidavit by either party.

### **Analysis and Determination**

5. After perusing all the pleadings and the submissions filed by the parties in this case, as well as the authorities relied on, I find only two (2) issues distil for determination. They are as follows;

*a) Whether the delay in filing the Appeal has been explained, and*

*b) Whether the Applicants have made a case to warrant stay of execution of the trial court's Judgment.*

6. As regards the issue on leave to file an appeal out of time, **Section 79G** of the **Civil Procedure Act** provides that:

***“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”***

7. My understanding of what is to be considered in an application for extension of time is that the whole period of delay should be declared and explained satisfactorily to the Court. In any event, whether or not to extend time for filing an appeal, is an exercise of a court's discretion which should be based on reasons and not on whims or caprice.

8. From the reading of **Section 79G** of the **Civil Procedure Act**, the matters to be taken into account in deciding whether to grant an extension of time are; *the length of the delay; the reason for the delay; the chances of the Appeal succeeding if the application is granted; and the degree of prejudice to the Respondent if the application is granted.*

9. Applying the above principles to this particular case, Judgment by the trial court and subject of the intended appeal was delivered on the **02<sup>nd</sup> October, 2019** and the present application filed on **21<sup>st</sup> January, 2021**. The application has therefore been filed after a period of about One (1) year and three (3) months after the delivery of the Judgment.

10. **Section 79G** of the **Civil Procedure Act** requires that before the Court enlarges the time for filing an appeal, the Applicant must satisfy the court that he had good and sufficient cause for not filing the same in time. In the case of **Alibhai Musajee –vs- Shariff Mohammed Al-Bet Civil Appeal No.283 of 1998**, the Court of Appeal held that whereas the **Civil Procedure Act** allows for extension of time for filing an Appeal, if good and sufficient cause is shown, failure to act does not constitute a good or sufficient cause.

11. In this case, the Applicants have explained the delay in filing an appeal as having been caused by the fact that the Judgment was delivered in their absence and that of their advocate and that they only came to obtain a copy of the Judgment on the **29<sup>th</sup> December, 2020** and thereafter moved aptly by filing the instant application within two (2) months. They have also raised the challenges caused by the restrictions put in place due to the covid-19 pandemic which led to the scaling down of physical operations of courts.

12. I have looked at the Judgment and it is apparent that the same was delivered in the absence of the Appellants and/or their advocates. I find that there is no indication if any notice of delivery thereof was sent to the respective Advocates for the parties, although there was representation for the Respondent. I have also taken judicial notice of the period when the said judgment was delivered and the effects of the covid-19 pandemic on court operations. I am convinced that the Applicant has offered a plausible explanation for the delay in filing an appeal within time and consequently granted them leave to file their appeal out of time.

13. The second order that has been sought in the application which is the second issue for determination is that of stay of execution pending appeal. Under **Order 42 rule 6(1)** of the **Civil Procedure Rules**, the principles to be considered before granting the said order are outlined as follows: First, *it is that the application for stay must be filed without unreasonable delay*. On this principle the Applicants reiterate that the delay was majorly caused by the fact that Judgment was delivered in their absence and the challenges brought about by the covid-19 pandemic that hampered court operations. Having established from the copy of the Judgment that indeed the same was delivered in the absence of the Applicants' advocate with no indication that notice was ever issued to the parties and having taken judicial notice of the challenges caused by the covid-19 pandemic, I find that the delay has satisfactorily been explained.

14. The second principle to be considered is whether the applicant will suffer substantial loss if the order for stay is denied. On this, the Appellants have argued that the Plaintiff/Respondent is of unknown means so that if the decretal sum is paid, then the Applicants may be unable to recover the same in case the appeal is successful. The Respondent on the other hand, has not given any answer or rebuttal to the fears expressed by the Applicants with regard to the recovering the decretal sum in the event that the Appeal succeeds. It was stated by the Court of Appeal in the case of **Kenya Shell Ltd –vs- Kibiru [1956] KLR 410**, that if an applicant alleges difficulties in recovery of the decretal sum, it rests on the Respondent to show that he would be able to effect a refund. In this case the Respondent has not shown that she is not a person of straw or has the ability to repay the decretal sum. Having failed to do so, I find that Applicants have satisfied this court that they are likely to suffer substantial loss or hardship in recovery of the decretal sum in the event that the appeal succeeds.

15. The third principle is the requirement for the provision of security for the due performance of the decree. The Applicants have offered to furnish security in the form of a bank guarantee. In my view, what security should be offered is an issue for the court to determine but not that of the parties. What is necessary is for the applicant to show the willingness to comply with directions of the court in providing the security as the Applicants herein have done.

16. That having been said, it is trite that the grant for stay of execution pending appeal is discretionary and should be exercised in manner that balances the interests of the Appellant/Applicants against those of the Respondent. The Appellants' right to appeal as well as the Respondent's right to enjoy the fruits of a successful litigation have to be kept in equilibrium. This could fairly be achieved by directing the Applicant to deposit the entire decretal sum in a joint account in the names of the advocates for the parties.

17. Consequently, the prayer for stay of execution is hereby allowed, but with conditions.

**Disposition**

18. The upshot of my finding therefore is that, the following orders do issue;

*a) The Applicants be and are hereby granted leave to file an appeal and it is directed that the intended appeal be filed within thirty (30) days from today's date.*

*b) Stay of execution of the Judgment delivered on 2/10/2019 in Mombasa P.M.C.C No. 1123 of 2011 and all consequential orders thereof are hereby granted on condition that the Appellants/Applicants do deposit the sum of Kshs.302,137,137.50 in an escrow interest earning account to be opened and held by the advocates for both parties within 30 days from the date hereof.*

*c) Failure to comply with the conditions in orders (a) and (b) above, the stay orders granted shall automatically lapse.*

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF OCTOBER 2021**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

**NO APPEARANCE FOR AND BY EITHER PARTY**

**COURT ASSISTANT - GITONGA**