



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 3 OF 2019

EDWARD JOSEPH NGARACHU.....PLAINTIFF/RESPONDENT

VERSUS

BROOKSIDE DAIRY LIMITED.....DEFENDANT/APPLICANT

RULING

1. By way of **Notice of Motion** dated **7th April, 2021**, the Applicant has moved this court seeking the following orders that: -

1. Spent;

2. THAT this Honourable Court be pleased to extend time within which to file the Notice of Appeal and the Notice of Appeal filed out of time on the 19th March, 2021 and served on the 24th March, 2021 be deemed as properly filed and served.

3. THAT there be stay of execution of the Judgment and Decree of the Honourable P. J Otieno entered on 26th February, 2021 pending the hearing and determination of the Appeal.

4. THAT the costs of this Application do abide the result of the intended Appeal.

2. The Application is brought under **Article 159** of the **Constitution of Kenya**, **Section 3(2)**, **3A & 3B**, all of the **Civil Procedure Act**, **Section 7** of the **Appellate Jurisdiction Act**, and **Cap 9** of the Laws of Kenya.

3. The **Motion** is supported by the grounds presented on its body and the **Affidavit of Jacqueline Hinga**, the Applicant's Group Legal Officer. She has averred that Hon. P. J. Otieno on the **26th February, 2021** delivered a Judgment that awarded the Respondent Kshs. 2, 100,00/= together with costs plus interest for a claim of wrongful termination.

4. **Ms. Hinga** has deponed that the Applicant became aware of the delivery of the judgment on the **1st March, 2021** and it was on the same date that their appointed Advocates wrote a letter dated 1st March, 2021 and requested for a certified copy of Judgment.

5. She averred that after the judgment was delivered by Hon. P. J. Otieno who was transferred from Mombasa High Court to Meru High Court, a factor that contributed to a delay in obtaining judgment at the Registry. That the whereabouts of the file were not clear and they thought the judge moved with the file to Meru to correct typographical errors.

6. It has been deponed that the Applicant received a copy of the Judgment on the **16th March, 2021** where after a conclusive review of the judgment was done and a Notice of Appeal was filed on the **19th March, 2021** and the same was served on the Respondents on the **24th March, 2021**.

7. The Applicant contends that the Honourable Judge erred in awarding the damages of **Kshs. 2, 100,000/=** to the Respondent for alleged wrongful termination in lieu of any contract in place between the parties.

8. It has deponed that a conclusive decision to Appeal was issued by the Applicants to their Advocates on the **31st March, 2021** and thereafter a request for typed proceedings was made.

9. It was the Applicant's averment that they are aware that the statutory period to put in an Appeal lapsed on the **12th March, 2021** and thus it is necessary for the intervention of the Court to deem the Notice of Appeal filed on **19th March, 2021** as being properly on record.

10. The Applicant has stated that it is ready and willing to furnish any such security as may be determined by this Honourable Court. This is because, if stay of execution pending the determination of the Appeal is not issued, the Respondent will proceed to execute the decree which will make the intended Appeal nugatory.

11. The Applicant has also stated that the delay of seven (7) days in filing the Notice of Appeal was not inordinate, hence the same is excusable and that the application herein was filed at the earliest opportunity.

12. Lastly, the Applicant has urged this court to allow the application dated 7th April, 2021 in the interest of justice.

13. In response, the Respondent filed a Replying Affidavit sworn by **Edward Joseph Ngarachu** on the **20th April, 2021** where he stated that he is aware that the Judgment was delivered virtually on the **26th February, 2021** in presence of both Advocates on record and that the Applicant lodged its Notice of Appeal on the **22nd March, 2021** when it to have filed the same 14 days from the **26th February, 2021** as provided under the Court of Appeal Rules.

14. It has been stated by the Respondent that the Honourable Judge's transfer is not a plausible reason for delay in lodging the Notice of Appeal. Furthermore, the matter had been concluded by the time the trial judge was transferred to Meru.

15. **Mr. Ngarachu** has deponed that the Notice of Appeal was lodged without proper instructions from the Applicant to Appeal the decision of the trial judge.

16. The Respondent has averred that it is futile to raise issues of typed proceedings at this stage just as it is futile to delve into the merits of the intended Appeal.

17. It is the Respondent's averment that the court should not grant stay of execution as he is entitled to enjoy fruits of the Judgment delivered on the **26th February, 2021**.

18. The Respondent has stated that the Notice of Appeal is fatally defective for not only being out of time but also for the reason that it does not specify the part of the Judgment complained of as required by the Court of Appeal Rules.

19. Finally, the Respondent has averred that the Notice of Appeal and the Intended Appeal are an afterthought should be struck out and this Application dismissed with costs.

Directions of the Court

20. Directions were taken that the application be canvassed by way of

written submissions. The Applicant's submissions are dated **24th May 2021** and filed on the **28th May, 2021**. The Respondent did not file any submissions. The Applicant indicated that it would rely on its written submissions while the Respondent indicated he would rely on his Reply as filed.

The Applicant's Submissions

21. The Applicant submitted that it is alive to the law that a Notice of Appeal ought to be filed within 14 days of delivery of the judgment and served upon the Respondent within 7 days of filing pursuant to **Rule 75(1)** and **Rule 77(1)** of the **Court of Appeal Rules**. It is thus the Applicant's submission that their statutory period lapsed on the **12th March, 2021** for a judgment that was delivered on the **26th February, 2021**. After Judgment the Notice of Appeal was filed on **19th March, 2021**.

22. It has been submitted that from the **12th March, 2021** to the **19th March, 2021** it amounts to a 7 days delay that is not inordinate and is excusable as was held in the case of **Aviation Cargo Support Limited –vs- St. Mark Freight Services Limited [2014] eKLR**.

23. According to the Respondent, the judgment on the **26th February, 2021**, the Judgment was delivered in summary and that by a letter dated 1st March, 2021 the Applicant's Advocate requested for a certified copy of the Judgment which was only given to the Applicant's Advocate on the **16th March, 2021** who then forwarded it to the Applicant for further instructions.

24. The Applicant has also stated that after it received the judgement being a Limited Company, there are several stakeholders involved before a decision is made on any given matter. It thus took time before a decision to Appeal was arrived at and the said instructions were forwarded to the Advocates on the **31st March, 2021**.

25. Further, the Applicant has stated that its Advocates filed the Notice of Appeal on the **19th March, 2021** out of abundance of caution not knowing when they would receive proper instructions to Appeal and that the said delay is thus not inordinate but excusable.

26. The Applicant has urged the court to be guided by the Court of Appeal decision in the case of **Next Generation Communication Ltd v George M. Kirungaru [2015] eKLR**, on extension of time with regards to a Notice of Appeal after the prescribed 14 days.

27. On Stay of Execution, it has been submitted that the same is provide for under **Order 42 Rule 6 (2) of the Civil Procedure Rules** and one is required to satisfy the court on substantial loss, show that their application has been brought without undue delay and the willingness

to offer security for the due performance of the decree or order of Court.

28. On substantial loss, the Applicant has stated that they were condemned to pay **Kshs. 2, 100,000/=** plus interest, which is a colossal amount and which if paid to the Respondent whose financial standing is unknown to them, the Applicant cannot confirm whether the Respondent will be in a position to refund the same. Reliance has been placed on the case of **JOHNSON MWIRUTI MBURU vs SAMUEL MACHARIA NGURE**[2004] eKLR to justify grant of stay of execution where there is possible inability to pay back the decretal sum by the Respondent.

29. On the issue of delay in bringing the application herein, it has been submitted that the Applicant's Advocates received instructions to institute Appeal proceedings on the **31st March, 2021** and thus the application was filed before court without undue delay on the **7th April, 2021**.

30. The Applicant submitted that it is ready and willing to offer security on the terms as may be imposed by this Honourable Court and thus it is befitting that they be accorded protection from execution by the grant of the orders of stay pending the hearing of the Appeal.

31. Lastly, the Applicant has submitted that it has an arguable Appeal which is evidenced by the draft Memorandum of Appeal, its case being that the Honourable Judge erred in law and in fact by awarding a manifestly high award in the sum of **Kshs. 2, 100,000/=** as loss of income together with costs and interest to the Respondent. The argument is that the finding was not commensurate with the evidence which was tendered for the court's evaluation and that award on damages was excessive and erroneous given the circumstances of this case.

Analysis and Determination

32. After perusing all the pleadings filed in this case and the written submissions by the parties herein, I find that the issues for determination are as follows:-

i) Whether the Court can extend time to the Applicant to file a Notice of Appeal out of time.

ii) Whether this court can issue stay of execution of the Judgment delivered on the 26th February, 2021 pending the hearing and determination of the Appeal

i) Whether the Court can extend time to the Applicant to file a Notice of Appeal out of time

33. The Defendant/Applicant has sought leave to file a Notice of Appeal and that the Notice of Appeal filed out of time on the **19th March, 2021** and served on the **24th March, 2021** be deemed as properly filed.

34. **Section 7** of the **Appellate Jurisdiction Act, CAP 9**, provides :-

Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

35. Extension of time is a discretionary and a very powerful tool which should be exercised with abundant caution, care and fairness. The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 Others** [2014] eKLR lay down the following general principles to guide the courts in applications for extension of time: -

“...This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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...*”

36. The Defendant/Applicant has explained the reason for the delay to be that it secured a copy of the certified copy of the Judgment on **22nd March, 2021** and being a Limited Liability Company, all stakeholders had to be informed, whereby instructions to Appeal were granted on the **31st March, 2021**, when they found that the same had already been filed out of caution by its appointed Advocates on the **19th March 2021** and it is thus seeking that the same be admitted out of time.

37. The Judgment of the Court was delivered on the **26th February, 2021** and the Notice of Appeal was filed on the **19th March, 2021**. There was been a seven (7) days delay which I find is not inordinate and the same has been sufficiently explained.

ii) Whether this court can issue stay of execution of the Judgment delivered on the 26th February, 2021 pending the hearing and determination of the Appeal

38. Stay of Execution pending appeal is provided for under **Order 42 Rule 6 (1) and (2)** of the **Civil Procedure Rules, 2010** which provides: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

39. The above Rule thus provides that before a court can grant an order of stay of execution pending hearing and determination of the Appeal, it must be satisfied that there is proof of substantial loss to be suffered by the Applicant; the application was made without unreasonable delay and that the Applicant is ready to provide such security as the court may impose.

40. On substantial loss, it is the Defendant/Applicant submitted that the decretal amount of **Kshs. 2,100,000/=** was colossal and that the Plaintiff/Respondent financial position or standing is unknown to them and thus cannot confirm whether he will be in a position to refund the same if the intended Appeal succeeds.

41. In the case of **Ujagar Singh –vs- Runda Coffee Estates Limited [1966] EA 263** it was held: -

“It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful.”

42. The Defendant/Applicant has raised the concern of the Plaintiff/Respondent being unable to pay the decretal amount in case they succeed on Appeal. As held in case of **Ujagar Singh (Supra)** the burden to prove whether he can refund the said money is on the Plaintiff/Respondent to show his capability to refund the decretal amount in case the Intended Appeal is successful.

43. The Plaintiff/Respondent did not respond to whether he can be able to refund the said amount if the Defendant/Applicant succeeds in Appeal. Thus, this Court finds that the Defendant/Applicant has proved that it will suffer substantial loss if the Plaintiff/Respondent is paid the decretal amount as he has not shown how he intends to refund the same in case the intended Appeal is successful.

44. On whether the Application was filed without undue delay, the Judgment of this Court was delivered on the **26th February, 2021** and the Application herein was filed on the **14th April, 2021**. There has been a one (1) month and 8 days delay in bringing the Application herein, which the Defendant/Applicant stated was occasioned by the delay by the court in issuance of the Judgment as they only received a certified copy on the **22nd March, 2021** and instructions from their client on the **31st March, 2021**. I find the reason herein sufficient and the said delay explained to satisfaction.

45. The other requirement for Stay of Execution is the willingness of the Applicant to offer security for the due performance of the judgment and decree. The Defendant/Applicant herein has stated unequivocally that it is ready and willing to offer security on any terms a may be imposed by this Honourable Court.

46. In view of the above findings, it is evident that the Appellants have fulfilled all of the requirements for stay of execution pending appeal

to be granted being that it will suffer substantial loss, the delay is duly explained and it is ready and willing to provide security for costs for the settlement of the Judgment as directed by this court.

47. The upshot is that the application dated **7th April, 2021** be and is hereby allowed and the following orders issue:-

a) The Applicant's prayer for the extension of time within which to file an appeal is allowed and the Notice to Appeal filed on 19th March, 2021 be deemed as being properly on record.

b) There be Stay of Execution pending appeal on the condition that: -

a) The Defendant/Applicant do pay the Plaintiff/Respondent half of the decretal amount that being Kshs.1,000,000/=.

b) The other half being Kshs.1,100,000/= be deposited in a joint interest earning account in the name of both Advocates of the parties herein.

c) Orders (a) and (b) above be complied with within forty (45) days of the date of the Ruling hereof.

d) Failure by the Applicants to comply with (a) and (b) above, its application dated 7th April, 2021 shall stand dismissed with costs to the Plaintiffs/Respondents.

It is so ordered.

SIGNED, DATED 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