REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 496 OF 2019

NATIONAL COMMUNICATION SECRETARIAT.....APPELLANT/APPLICANT

-VERSUS-

WILMAR CLEANERS.....RESPONDENT

RULING

1. The appellant/applicant in the present instance brought the Notice of Motion dated 9th July, 2019 supported by the grounds presented on its face and the facts deponed to in the affidavit of *Juliana Yiapan.* The applicant sought for the following orders in its Motion:

> *(i) Spent.*
>
> *(ii) THAT this Honourable Court be pleased to grant the applicant an extension of time to file and serve the memorandum of appeal and record of appeal against the whole ruling delivered on 28th May, 2019 by Honourable D.A. Ocharo (Senior Resident Magistrate) in CMCC NO. 8049 OF 2016.*
>
> *(iii) Spent.*
>
> *(iv) THAT the ruling delivered on 28th May, 2019 be set aside.*
>
> *(v) THAT this Honourable Court be pleased to stay all proceedings in CMCC NO. 8049 OF 2016 pending the hearing and determination of the intended appeal.*
>
> *(vi) THAT costs of the application be provided for.*

2. In her supporting affidavit, the deponent asserted that the applicant had previously filed an application before the Chief Magistrate's Court dated 31st July, 2018 seeking *inter alia* to have the default judgment and warrants of attachment set aside.

3. The deponent stated that thereafter, the respondent lodged an application dated 13th February, 2019 in which it sought for a Garnishee Order Nisi against the applicant, which application was certified as urgent and the Garnishee Order Nisi was granted pending interparties hearing.

4. It was the deponent's contention that its application of 31st July, 2018 was slated for ruling on 8th May, 2019 but on the said date, the Honourable Magistrate was away on leave and parties were informed that the ruling would be delivered on notice.

5. The deponent went on to state that the ruling was eventually delivered on 28th May, 2019 in the absence of service of a ruling notice and it is not until much later on that the applicant came to learn that the ruling had in fact been delivered and which ruling the applicant is aggrieved by and desires to lodge an appeal against.

6. On behalf of the applicant, the deponent contended that the intended appeal raises arguable grounds and further, that the applicant is apprehensive that any further proceedings in the suit will likely prejudice it.

7. In opposing the Motion, *William Malingu* swore a replying affidavit on behalf of the respondent averring *inter alia*, that there has been a delay by the applicant in bringing the Motion. The deponent further averred that the applicant has not met the threshold to warrant an extension of time to file its memorandum of appeal.

8. It was the deponent's assertion that the appeal does not raise any arguable grounds since the ex parte judgment was regularly entered and

further, that the applicant has not demonstrated that the appeal will be rendered nugatory if the order for stay sought is not granted.

9. Juliana Yiapan rejoined with a supplementary affidavit in which she annexed a copy of the impugned ruling.

10. The Motion was canvassed through written submissions, with the applicant submitting that according to the provisions of **Section 79G** of the **Civil Procedure Act**, where an appeal from a subordinate court to the High Court has not been filed within the prescribed 30 days, such appeal can be admitted out of time where sufficient reason has been shown. According to the applicant, sufficient cause has been shown in the present instance as stated in the application and supporting affidavit.

11. More specifically, the applicant drew this court's attention to the case of **Josephine Njoki Mwangi v Housing Finance Company of Kenya Ltd [2014] eKLR** where the Court of Appeal laid out the principles to be considered in determining an application seeking an order for stay of proceedings.

12. On the principles of length and reasons for delay, it was the applicant's argument that the delay in bringing the Motion is not inordinate and is excusable and explainable since the applicant only came to learn of the ruling upon perusing the lower court file on 3rd July, 2019 and that immediately thereafter, the applicant applied for typed and certified copies of the proceedings and ruling.

13. As concerns the possible chances of success of the appeal, the applicant submitted that in making its ruling, the trial court did not consider vital constitutional provisions on the right to fair hearing.

14. The applicant further submitted on the principle relating to prejudice by contending that whereas no prejudice will befall the respondent if the orders sought are granted, the applicant will suffer due to the fact that it represents the public interest and the suit in question will have a bearing on tax payers' monies.

15. Further to the foregoing, the applicant argued that it has satisfied the threshold for granting an order for stay of execution espoused under **Order 42, Rule 6(2)** of the **Civil Procedure Rules** while citing a variety of authorities, including the case of **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR** which elaborated on the three (3) principles, with emphasis on the principle on substantial loss.

16. In the end, the applicant urged this court to exercise its discretion in allowing the application.

17. The respondent too filed written submissions restating that the delay in filing the application is both inordinate and inexcusable given that ruling notices are ordinarily posted in the Kenya Law Website hence the applicant cannot be heard to argue that it was not notified of the date of delivery of the ruling. In this regard, the respondent argued that the applicant did not show any steps taken in following up on the ruling between the time of its delivery and the present Motion, placing reliance on the holding by the Court of Appeal in **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR** that leave to file an appeal out of time ought not to be granted where the delay is too inordinate and inexplicable.

18. It was also argued by the respondent that the appeal does not raise any arguable grounds since the application on which the impugned ruling is premised was argued on merit.

19. The respondent further submitted that it is entitled to the fruits of its judgment and the present application is a mere attempt at delaying the inevitable and in the process prejudicing the respondent. The respondent cited *inter alia*, the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** where the Court of Appeal reaffirmed the principles to do with extension of time while laying emphasis on the principle that extension of time by the courts is purely discretionary and is therefore not an entitlement of any party.

20. It was the respondent's further submission that the applicant is not deserving of an order for stay of execution and/or proceedings since it has not met the required threshold under **Order 42, Rule 6(2)** of the **Civil Procedure Rules**, more so the principle on substantial loss.

21. I have dutifully considered the grounds featuring on the face of the Motion; the affidavits both supporting and resisting the same; and the rival written submissions placed before me.

22. It is noted that the application sought for three (3) substantive prayers. To begin with, the prayer to do with the setting aside of the impugned ruling cannot be considered at this stage since the said ruling is the subject matter of the intended appeal. I will therefore not consider prayer (iv) of the Motion. In the same manner, I observed that the parties presented arguments on a stay of execution; upon my perusal of the prayers sought in the Motion, I established that the prayer for stay of execution was only sought at the interim stage and not as a substantive prayer. It therefore follows that this court would have no basis on which to consider such prayer at this stage.

23. That said, I will now address my mind to the prayer which concerns itself with extension of time to appeal. **Order 50, Rule 5** of the **Civil Procedure Rules** gives courts the power to extend the time required for the performance of any act or the taking of any proceedings under the Rules.

24. In determining whether the applicant should be granted an extension of time to lodge the memorandum and record of appeal, I am led by the principles brought out in the Supreme Court case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** and echoed in **Josephine Njoki Mwangi v Housing Finance Company of Kenya Ltd [2014] eKLR** quoted by the respondent and applicant respectively.

25. On whether the application has been made without undue delay, it is not in dispute that there has been a delay of close to two (2) months from the time of delivery of the ruling in question and filing of the Motion. In the court's view, such delay cannot be deemed undue or

otherwise inordinate.

26. This brings me to the question on whether the delay is excusable. I have taken into account the explanation given by the applicant concerning the apparent lack of communication of the date of delivery of the ruling. From the account given by the respondent, it is undisputed that the ruling was to be delivered on notice, though the manner in which such notice was to be made was not clearly brought out by the parties. In view of this, it is plausible that the applicant was unaware when the ruling was scheduled for delivery hence I find the explanation behind the delay to be reasonable and excusable.

27. As concerns the principle relating to prejudice, it is apparent from the application that an ex parte judgment was entered in favour of the respondent and against the applicant. It is thus obvious on the one part that the respondent has every right to realize the fruits of its judgment. In this sense, it stands to be prejudiced if the orders sought are granted.

28. On the other part, I have looked at the correspondences and documentation annexed to the supporting affidavit and I have noted that the same support the applicant's argument that it has ties to the government. I have also looked at the decree and I have established that whereas the same does not involve a colossal amount as such, it is apparent that the applicant did not participate at the hearing of the suit and now stands aggrieved by the decision to decline to set aside the default judgment. This court must therefore weigh the rights of the respondent to execute its judgment against the rights of the applicant to be heard on appeal. In my view, the applicant stands to suffer a graver degree of prejudice if denied the opportunity to challenge the ruling on appeal since it will be locked out of the seat of justice.

29. There also arises the principle to do with whether the applicant has an arguable appeal. As earlier noted, the trial court dismissed the applicant's Motion wherein it sought for various orders, including an order to set aside the default judgment. Upon my perusal of the grounds of appeal in the draft memorandum of appeal annexed to the Motion, I noted that the same are challenging the analysis of the trial court coupled with the argument that the trial court did not take into account the averments made by the applicant and the relevant legal provisions to do with the setting aside of default judgments. Having considered the same, this court is drawn to the conclusion that the intended appeal does raise prima facie arguable issues.

30. Drawing from the interpretation taken in **Nicholas Kiptoo Arap Korir Salat** (*supra*) cited hereinabove, this court is very much alive to the fact that extension of time is in no way an entitlement of any party; rather, it is an equitable remedy to be granted at the judge's discretion. In the present instance, I have already established that the application was brought without undue delay and with a reasonable explanation to back it up. I have also concluded that there exists an arguable appeal and I have weighed the prejudice that will be suffered by the respective parties. In view of the foregoing, I am satisfied that it would be in the interest of justice to allow the applicant an opportunity to be heard on its appeal.

31. I will now address my mind to the second prayer to do with a stay of proceedings. The principles surrounding a stay of proceedings have been discussed in a vast array of cases, some of which the parties have quoted in their submissions. I have also considered the same principles as aptly discussed by the Court of Appeal in **UAP Provincial Insurance Company Limited v Michael John Becket [2004] eKLR** thus:

> ***"In order for the applicant to succeed in an application for stay of proceedings pending appeal it is necessary for the applicant to satisfy the court, firstly that the pending appeal is an arguable one, which is not frivolous, and secondly that if the stay of proceedings is not granted the appeal when ultimately heard will be a futile exercise…"***

32. Moreover, the High Court in advancing the above position as relates to the granting of a stay of proceedings held the following in the case of **William Kamunge & 2 others v Muriuki Mbithi [2016] eKLR**:

> ***"…it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously"***

33. I am satisfied that the first and second principles relating to the expeditious filing of the application and whether the applicant has an arguable appeal have already been addressed under the first prayer and there is no need for me to restate my findings.

34. Turning to the third principle on expeditious disposal of cases vis-à-vis proper use of judicial time, there is no question that the suit was essentially concluded and an ex parte judgment entered. Being guided by the arguments made by the parties, it is apparent that there is a pending application which was brought by the respondent before the trial court on Garnishee proceedings. Given that the intended appeal relates to the default judgment entered against the applicant, it follows that the outcome of the appeal will have a direct bearing on the Garnishee proceedings which are part and parcel of the execution process by the respondent. It would therefore only be a practical and proper use of judicial time to have the parties deal with the appeal first before undertaking any further proceedings before the lower court.

35. This brings me to the principle on whether denying the order for a stay of proceedings would deem the appeal a futile exercise. In my view, this principle closely relates to the one I have just addressed; it would be of no use to the parties to participate in the appeal while simultaneously engaging in proceedings before the lower court. In the circumstances, I am satisfied that the appeal would be rendered futile if the order for a stay of proceedings is declined.

36. The upshot is that the Motion succeeds in terms of prayers (ii) and (v) and the following orders are made consequently:

> **a) The applicant is hereby granted leave to file and serve its memorandum and record of appeal within 21 days hereof.**
>
> **b) There shall be a stay of all further proceedings in Nairobi CMCC No. 8049/2016 until the intended appeal is heard and**

determined, which stay shall only subsist upon the applicant's compliance with order (a) above.

c) Costs of the Motion to abide the outcome of the appeal.

Dated, signed and delivered at NAIROBI this 20th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant/Applicant

……. for the Respondent