



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC CIVIL APPLICATION NO 706 OF 2019**

**CHASE BANK (K) LIMITED.....APPLICANT**

**VERSUS**

**CONNIX INDUSTRIES LIMITED.....RESPONDENT**

**RULING**

1. In its Notice of Motion application dated 6<sup>th</sup> November 2019 and filed on 7<sup>th</sup> November 2019, the Applicant sought an order for stay of execution of the judgment in **Milimani CMCC No 7806 of 2014** that was delivered on 24<sup>th</sup> September 2019 pending the hearing and determination of the appeal herein and leave to file its appeal out of time. It's said application was supported by the Affidavit of its advocate, Henry Macharia, that was sworn on 6<sup>th</sup> November 2019.
2. As the order of the parties in the aforesaid application was incorrect, the court directed the Applicant to file an amended notice of motion. This was done on 10<sup>th</sup> December 2019. The said Amended Notice of Motion was supported by the Affidavit of the said Henry Macharia. The same was sworn on 9<sup>th</sup> December 2019
3. The Applicant stated that it was aggrieved by the entry of judgment in favour of the Respondent against it for the sum of Kshs 9,666,433/= and wished to appeal against the same. It said that it was unable to procure a copy of the judgment on time on account that the same was being typed, proof read, signed and certified. It pointed out that it obtained a copy of the said judgment six (6) days after it was due to file its Memorandum of Appeal.
4. It was its contention that it was necessary to obtain a copy of the same to decide the best legal opinion and/or avenues available to it to the intended appeal. It stated that it had an arguable appeal with overwhelming chances of success and because the delay in filing its appeal was inadvertent and not intended, it ought to be given an opportunity to ventilate its intended appeal on merit.
5. It averred that it would suffer substantial loss if the Respondent executed against it and further that the Respondent would not be able to reimburse it the decretal sum in the event it was successful in its intended appeal. It added that it had filed its application without unreasonable delay and that it was willing to abide by any conditions that would be set by the court for the grant of the orders it had sought. It therefore urged this court to allow its application as had been sought.
6. In opposition to the said application, the Respondent's Director, Ketan Shah swore a Replying Affidavit on behalf of the Respondent herein on 26<sup>th</sup> November 2019. The same was filed on 27<sup>th</sup> November 2019.
7. The Respondent averred that the present application lacked merit and was an abuse of the court process as the Applicant had filed a similar application which was dismissed on 4<sup>th</sup> November 2019 on account of its non-attendance when the same had come up for hearing. It asserted that there was material disclosure of the application that was filed in the lower court and that in any event, the Applicant did not need certified copies of the judgment for it to file a Memorandum of Appeal.
8. It contended that the Applicant had failed to demonstrate what substantial loss it would suffer if it paid it the entire decretal sum pending the hearing and determination of its intended appeal. It stated that it was a big company that had been in existence since 1989 and would therefore be able to refund the Applicant the decretal sum in the event the intended appeal was successful.
9. It pointed out that the Applicant had not offered any security and the present application had not been brought without unreasonable delay. It said that the court ought to balance the interests of the parties and not deny it the fruits of its judgment and thus asked this court to dismiss the said application with costs.
10. In support of its case, the Applicant relied on the cases of **Co-operative Bank of Kenya Limited vs Banking Insurance & Finance**

Union (Kenya) Limited [2015] eKLR, Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others [2013] eKLR amongst several cases while the Respondent placed reliance on the case of Kenya Shell Limited vs Benjamin Karuga Kabiru & Another [1986] eKLR.

11. In respect of the first issue of whether or not the Applicant should be granted leave to file an appeal out of court, this court noted that Section 79G of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that an appeal has to be lodged within thirty (30) days from the date of delivery of the decision to be appealed.

12. Having said so, this court took cognisance of the fact that every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.

13. It is for that reason that Section 79 G of the Civil Procedure Act provides that an appeal can be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not having filed his appeal within the prescribed time. A similar conclusion was arrived at by Odunga J in Dilpack Kenya Limited vs William Muthama Kitonyi [2018] eKLR.

14. Further, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows: -

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed...”**

15. Having said so, the extension to file an appeal out of time is not a matter of course. The court has to consider certain factors before allowing an application for extension to file an appeal out of time. These are the period of delay, the reason for the delay, the chances of the appeal succeeding and/or the arguability of the appeal and the prejudice that would be suffered by a respondent if the said application for leave to file an appeal out of time was granted as was held in the case of Mwangi vs Kenya Airways Limited (2013) KLR.

16. As was rightly pointed out by the Respondent, the Applicant did not require certified copies of the judgment to have filed an appeal. It could have filed a holding memorandum of appeal and subsequently amend the memorandum of appeal after obtaining the requisite documents. It did not say that its advocates were not in court at the time of the delivery of the Judgment to have made it impossible for them to have known what the contents of the judgment were.

17. Its advocates ought to have pursued instructions from it as they knew the consequences of not filing an appeal out of time. This court took the view that the said advocates ought to have been more diligent in handling this matter.

18. Be that as it may, it would, however, be punitive to punish the Applicant for the mistakes of its advocates. Indeed, it is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. In the case of Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

19. Notably, the decision the Applicant intended to appeal against was delivered on 24<sup>th</sup> September 2019. The period of filing an appeal expired on 23<sup>rd</sup> September 2019. The initial application for stay of execution pending appeal was filed on 7<sup>th</sup> November 2019. A period of two (2) months could not therefore be said to have been inordinate.

20. Weighing the Applicant’s right to have its dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent’s fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicant if it was denied an opportunity to ventilate its Appeal on merit.

21. Turning to the issue of an order for stay of execution pending appeal, the Applicant submitted that it had met the conditions set out in Order 42 Rule 6(1) of the Civil Procedure Rules, 2010. On its part, the Respondent submitted that the money decree would not be rendered nugatory and further, that it would be able to refund the Applicant the decretal sum in the event it was successful on its intended appeal.

22. Before considering whether or not there was merit in the Applicant’s application for an order of stay of execution pending appeal, this court took the view that it could grant the said order notwithstanding that the said order was not granted by the lower court. This is because the order for stay of execution could either be granted by the court from which an appeal was being preferred from or by the court to which an appeal was preferred.

23. Indeed, Order 42 Rule 6 of the Civil Procedure Rules provides as follows: -

**“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 (emphasis court), 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.”**

24. Notably, before a court can grant an order for stay of execution, it has to be satisfied that the applicant had demonstrated the conditions that have been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. The said conditions are as follows: -

- a. **That substantial loss may result unless the order is made.**
- b. **That the application has been made without unreasonable delay.**
- c. **Such security as the court orders for the due performance of the decree has been given by the applicant.**

25. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

26. The decretal sum herein was Kshs 9,666,433/=. It was a colossal amount of money. Whereas the Respondent had contended that it was a big company that had been in existence since 1989, there was no guarantee that in the event the Applicant was successful in its intended appeal and it had paid the Respondent the said decretal sum pending the hearing and determination of the appeal, there would be litigation before the Applicant recovered its monies. In the mind of this court, that amounted to substantial loss.

27. In the case of G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR, this very court held as follows:

**“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”**

28. In the absence of proof that the Respondent would be able to refund the Applicant the decretal sum without any hardship, this court was thus satisfied that the Applicant would suffer substantial loss. The Applicant had thus satisfied the first condition of being granted a stay of execution pending appeal.

29. Turning to the issue of filing the application without undue delay, this court had already determined that the present application was filed without undue delay. The Applicant had therefore satisfied the second condition of being granted an order for stay of execution.

30. Although it did not specifically state any amount for security, the Applicant had indicated that it was willing to abide by any conditions for the grant of the order for stay of execution pending appeal and hence it had demonstrated that it had complied with the third condition of being granted an order for stay of execution pending appeal.

31. An application for stay of execution pending appeal could not be rendered fatally defective due to failure by an applicant to state that he was ready, able and willing to provide a particular amount of security for the reason that the court could itself order such security for the performance of a decree or order as would be binding on such applicant.

32. Accordingly, as the duty of the court was to do substantive justice to parties, this demanded that the Applicant be granted conservatory orders as it prosecuted its intended appeal.

## **DISPOSITION**

33. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Amended Notice of Motion application dated 9<sup>th</sup> December 2019 and filed on 10<sup>th</sup> December 2019 was merited and the same is hereby allowed in terms of Prayer No (2) and (4) therein in the following terms: -

- 1. The Applicant is hereby directed to file and serve its Memorandum of Appeal within fourteen (14) days from the date of this Ruling.**
- 2. The Applicant is hereby directed to file and serve its Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.**
- 3. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Applicant comply with the timelines within which to file their Record of Appeal as aforesaid.**
- 4. There shall be a stay of execution of the decree in Milimani CMCC No 7806 of 2014 Connix Industries Limited vs Chase Bank (K) Limited & Another that was delivered on 24<sup>th</sup> September 2019 on condition that the Applicant shall deposit into an interest earning account in the joint names of its counsel and counsel for the Respondent the sum of sum of Kshs 9,666,433/= within thirty (30) days from the date of this Ruling.**
- 5. For the avoidance of doubt, in the event, the Applicants shall default on Paragraph 33(4) hereinabove, the conditional stay of execution shall automatically lapse.**

**6. Either party is at liberty to apply.**

**7. Costs of the application will be in the cause.**

34. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of June 2020**

**J. KAMAU**

**JUDGE**