



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 559 OF 2019

SEYANI BROTHERS AND CO LIMITED.....APPELLANT

VERSUS

WINDOW PLUS (E.A) LIMITED.....RESPONDENT

RULING

1. In its Notice of Motion application dated 18th December 2019 and filed on 19th December 2019, the Appellant sought an order for extension of time to enable it comply with the order of 17th October 2019 in which it had been directed to deposit a sum of Kshs 683,298/= in court as security. Its said application was supported by the Supporting and Supplementary Affidavits of its Managing Director, Hirji K Seyani that were sworn on 17th December 2019 and 6th February 2020 respectively.

2. It contended that the aforesaid sum could not be deposited into a joint interest earning account due to non-co-operation of the Respondent but that it was always ready and willing to deposit the same into court. It stated that it did not deposit the said amount into court as its Managing Director had to leave the country to seek medical attention.

3. In its Supplementary Affidavit that was sworn on 6th February 2020, the Appellant averred that on 19th December 2019, it was granted a temporary order for stay of execution on condition that it deposited the aforesaid sum which it duly did. It denied that it was awoken from slumber following the proclamation of its goods by the Respondent and contended that its present application was coincidentally filed on the same date that the auctioneers went to proclaim its goods. It therefore urged this court to enlarge time within which to deposit the said amount into court to avoid execution proceedings against it by the Respondent.

4. In opposition to the said application, on 21st January 2019, the Respondent's Managing Director, Sang Chul Kim swore a Replying Affidavit on behalf of the Respondent herein. The same was filed on 22nd January 2020. He also swore a Further Replying Affidavit on 21st February 2020. It was filed on 26th February 2020.

5. The Respondent termed the present application as lacking in merit, full of *mala fides*, misconceived and an abuse of court process. It was emphatic that the Appellant had not advanced any justifiable grounds for extension of time because the Appellant's Managing Director was in the country during the thirty (30) days period the Appellant had been granted to deposit the aforesaid sum of money and that even if he had left the country, there was no evidence that he had gone to seek medical attention as its Managing Director had contended.

6. It thus urged this court to dismiss the present application and direct that the Appellant be ordered to pay it the decretal sum of Kshs 1,367,215.81 because it was a market leader in window blinds and car tinting and therefore had it financial capacity to repay the Appellant the decretal sum should its appeal succeed.

7. In support of its application, the Appellant relied on the cases of **Linda Bomu vs Kiluwa Limited [2020] eKLR** and **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others [2014] eKLR** where the common thread was that extension of time is not an automatic right but that the court exercises its unfettered discretion judiciously to determine whether or not the extension should be granted.

8. On its part, the Respondent submitted that whereas the court has unfettered discretion to grant an order of extension to do a certain act, the Appellant herein had not demonstrated that it was deserving of being granted the said extension. In this regard, the Respondent placed reliance on the cases of **Essar Telecom Ltd vs Joseph Odongo Okumu [2018] eKLR** and **Beatrice Munene vs Molly Wangui Gitahi [2018] eKLR** where the courts declined to grant extension of time as the applicants therein had not advanced good reasons why they had not complied with the time lines that had been given by the courts.

9. 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.

10. 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...”

11. 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**.

12. Evidently, the Appellant did not comply with the order of 17th October 2019 to deposit the sum of Kshs 683,298/=. It was a limited liability company whose activities were not hinged on its Managing Director being within the jurisdiction. There was no evidence that he was the sole signatory of the company's bank account and that nothing could be transacted in his absence. It did not therefore proffer a good explanation for the delay.

13. On 19th December 2019, Thurania Jaden J granted a temporary stay of execution on condition that the Appellant deposits the said sum within fourteen (14) days from that date. It deposited the said sum on 23rd December 2019.

14. This latter order by Thurania Jaden J has not been set aside and/or vacated either by the High Court or the Court of Appeal. Whereas the Appellant did not proffer a good explanation why it did not comply with the order of 17th October 2019, it had subsequently complied with another order to deposit the said sum. Further, the court did not see what prejudice the Respondent suffered in the late deposit of the sum of Kshs 683,298/= by the Appellant herein which could not be compensated by costs. The Appellant could also be ordered to pay the auctioneers fees.

15. As the Respondent was clearly entitled to execute when the Appellant failed to comply with the order of 17th October 2019, auctioneers fees were payable by the Appellant herein. This court saw the letter dated 9th January 2020 by M/S Immediate Auctioneers to the Respondent's advocates showing that their charges were Kshs 79,671/=. As none of the parties addressed this court on the same, it could not for a fact determine that these were the actual auctioneers' charges.

16. In view of the fact that the Appellant complied with the order of 19th December 2019, this court thus came to the conclusion that it ought to exercise its unfettered discretion in its favour but on certain conditions.

DISPOSITION

17. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 18th December 2019 and filed on 19th December 2019 was merited and the same is hereby allowed in terms of Prayer No (2) subject to the following conditions:-

1. THAT the Appellant shall pay to the Respondent throw away costs in the sum of Kshs 30,000/= within thirty (30) days from the date of this Ruling.

2. THAT the Appellant shall pay the Auctioneers charges within thirty (30) days from the date of this Ruling; the same to be taxed if not agreed.

3. Either party is at liberty to apply.

4. Costs of the application will be in the cause.

18. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of September 2020

J. KAMAU

JUDGE