REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 212 OF 2004

DANIEL NJOROGE MBUGUA.....1ST PLAINTIFF/RESPONDENT

USHA MORJARIA .....2ND PLAINTIFF/RESPONDENT

VERSUS

JOHN MUTHEE NGUNJIRI T/ TANGO AUCTIONEERS &

GENERAL MERCHANTS.....1ST DEFENDANT/APPLICANT

ECTA (K) LIMITED.....2ND DEFENDANT

RULING

1. The Respondent herein brought a suit against the Applicant and another in this Court. He succeeded in his suit against the Applicant. Judgment was entered against the Applicant for Kshs. 1,544,108/- on 31/01/2012.

2. The Applicant was aggrieved by that decision. He timeously filed a Notice of Appeal to the Court of Appeal through his advocates, Nancy Njoroge & Co. Advocates. It turns out, however, that the advocates failed to perfect that appeal by failing the Record of Appeal out of time.

3. Meanwhile, the Applicant had sought, and been granted stay of execution of the judgment in this Court. The Court heard brief arguments and allowed the application for stay but did not proffer reasons for its decision. It permitted a stay of execution pending appeal on condition that the Applicant paid Kshs. 750,000/- into Court.

4. On 20/02/2020, the Applicant's advocates withdrew the Notice of Appeal at the Court of Appeal upon challenge by the Respondent's Counsel who pointed out that it was incompetent since the Record of Appeal had not been filed within time. The Court endorsed the withdrawal and issued an order marking the Appeal to it by the Applicant as duly withdrawn.

5. The Applicant responded in three ways:

a. First, the Applicant filed a new Notice of Appeal at the Court of Appeal dated 27/02/2020.

b. Second, the Applicant filed an Application dated 06/03/2020 at the Court of Appeal seeking an extension of time to file an Appeal against the judgment herein.

c. Finally, the Applicant filed the present Application. The Application is dated 06/08/2020.

6. The Application herein seeks the following prayers

7. The Application is opposed. The Respondent filed grounds of opposition. The Application was argued by way of Written Submissions.

8. It is imperative to deal with a preliminary issue before delving to the substantive issues presented. The Respondent raised a technical objection to the competency of the Application based on the fact that the Application was filed by the Applicant's new firm of advocates who came on record after judgment in the matter had been entered and without leave of the Court.

9. The Respondents vociferously argue that the Application is bad in law for non-compliance with Order 9 Rules 9 and 10 of the Civil Procedure Rules. The Respondent argues that Order 9 Rule 10 does not save the Application because although the Application contains a

prayer seeking leave for the law firm of Mirugi Kariuki & Co. Advocates to come on record because the Application has not been served on the former advocates yet there is no evidence to show that the previous law firm had notice or knowledge of the present application.

10. I have waved off this technical objection based on a consent dated 31/07/2020 signed by both Mirugi Kariuki & Co. Advocates and Nancy Njoroge & Co. Advocates in which the latter consents to the former coming on record for the Applicant.

11. The basic question presented in this Application is whether an applicant can approach the High Court for an order for stay of execution of judgment in such circumstances. The circumstances are that there is no extant appeal on record at the Court of Appeal. Instead, what is on record is a Notice of Appeal which was filed more than eight years – to be specific eight years and 27 days – after judgment was entered. This makes the Notice of Appeal, as per Rule 75(1) and (2) of the Court of Appeal Rules, eight years and 13 days late. However, the Applicant has filed an application to extend time to file that Notice of Appeal out of time.

12. Does the High Court have jurisdiction to grant stay of execution in such circumstances?

13. The Applicant insists that Order 42 Rule 6 of the Civil Procedure Rules are applicable and that they give the Court the power to grant the stay of execution. The Applicant spends most of its submissions attempting to persuade the Court that he meets the conditions stipulated in Order 42 Rule 6.

14. Order 42 Rule 6 is in the following terms:

> *6. (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 sub-rule (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* Civil Case No. 212 of 2004 Page 4*(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*.

15. There is no question that the Rule only applies once there is an appeal in place. Is there an appeal in place in the present case?

16. Rule 75(1) and (2) of the Court of Appeal Rules, 2010 provide as follows:

> *(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the Superior Court.*
>
> *(2) Every such notice shall, subject to Rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.*

17. Judgment in this matter was entered on 31/01/2012. The extant Notice of Appeal was filed on 27/02/2020. It is obvious that the Notice of Appeal was, as stated above, 8 years and 13 days late. The Applicant is acutely aware of this. That is why he has filed an Application to be permitted to file that Notice of Appeal out of time. That Application has, however, not been determined yet.

18. Without the determination of that Application for the Notice of Appeal to be deemed to have been filed timeously, can it be said that there is an appeal pending at the Court of Appeal? The answer is obviously in the negative. There is no appeal in existence. All that is there is an application which, if allowed, will create the appeal.Civil Case No. 212 of 2004 Page 519. If there is no appeal pending before the Court of Appeal, can this Court grant a stay of execution pending appeal? It most certainly cannot issue such a stay under Order 42 Rule 6. By its terms the Order only empowers the Court to grant stay of execution when an appeal is pending before the higher Court.

20. Can the Court, then, issue a stay under its inherent jurisdiction? There is no doubt that there are times when a Court can seize upon its inherent jurisdiction to prevent substantive injustice to temporarily stay the execution of a judgment or the doing of certain actions.

21. I am not persuaded, though, that this is an appropriate case for the exercise of this inherent jurisdiction which is only exceptionally invoked. There are two reasons for this reluctance. First, the appropriate Court to have approached with the present Application given the circumstances should have been the Court of Appeal. This is because the application for extension of time lies in that Court and not this Court. It is that Court, therefore, which is best suited to calibrate all the factors needed in determining whether to grant a prayer and on what conditions after due consideration of its docket.

22. Second, while the Court will not hesitate to invoke its inherent jurisdiction to grant stay in exceptional circumstances, the exceptionality must be self-evident in terms of the substantive injustice to be forestalled by the prayers for stay. Differently put, the application must be so obviously dripping with the potential for substantial injustice that the Court's only recourse to remaining true to its calling as a beacon of justice is to resort to its inherent jurisdiction.

23. There is no such "dripping with potential for substantial injustice" in this case. While there is an obligatory sparse paragraph in the Supporting Affidavit of the Applicant stating that the Applicant is "not aware of the Respondent's means and/or financial standing", there is

nothing else that gives the Court a glimpse to the drastic injustice the Applicant is likely to suffer if the Court does not act in exceptional fashion to rescue it. Indeed, the potential justice of the case seems to run in the opposite direction: the Respondent has had a judgment in his favour for more than eight years; and for more than eight years he has been unable to enjoy the fruits of that judgment. Yet, now the Applicant would like the Court to invoke its inherent jurisdiction to delay the enjoyment of the fruits of that judgment for some inordinate time into the future.

24. **Suffice it to say that this Application must fail. It is hereby dismissed with costs**.

25. Orders accordingly.

Dated and delivered at Nakuru this 12th day of November, 2020

JOEL NGUGI

JUDGE