



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

MISC. APPLICATION NO. 49 OF 2019

AWALE ABDINUUR.....APPLICANT

VERSUS

SHREEJI ENTERPRISES LIMITED.....RESPONDENT

RULING

1. By Notice of Motion dated 7/2/2019 the applicant seeks the following orders:-

(1) *Spent*

(2) ***THAT this Honourable Court be pleased to extend/enlarge time within which to file and serve a Memorandum of Appeal out of the prescribed time.***

(3) ***THAT the defendants/applicants' draft Memorandum of Appeal annexed herein be deemed properly filed and served upon payment of court filing fees.***

(4) ***THAT this Honourable Court be pleased to order stay of execution and all consequential orders arising therefrom pending the hearing and determination of this application.***

(5) ***THAT this Honourable Court be pleased to order stay of execution and all consequential orders arising therefrom pending the hearing and determination of the applicants' intended appeal.***

(6) ***THAT costs of this application be in the cause.***

2. The serve as supported by the grounds on the face of the motion and the affidavit sworn by Awale Abdinuur on 6/2/2019.

3. The same is opposed via affidavit sworn on 12/2/2019. The applicant case is captured in the affidavit of Awale Abdinuur sworn on 6/2/2019 in which the applicant avers that, the Judgement in this matter was delivered 8/11/2018 in favour of the plaintiff/respondent herein.

4. That the time within which to file and serve a Memorandum of Appeal has since lapsed. The delay in filing an appeal was due to the judgement being delivered in applicant advocate's absence and/or without their notice. The non-attendance by my advocates for judgement was occasioned by an erroneous recording of the judgement date in their office diary resulting in judgment being delivered in their absence.

5. Thus the aforestated absence during judgement, made applicant not have sufficient time to lodge his Memorandum of Appeal in compliance with relevant Court of Appeal Rules. The inadvertent absence during judgement resulted in the delay and/or failure in requesting certified copies of judgement and proceedings from the lower court.

6. Also due to the foretasted inadvertent delay, applicant did not have sufficient time to lodge a Memorandum of Appeal in compliance with relevant Court of Appeal Rules. The delay in filing and serving Memorandum of Appeal was not at all intentional on applicant part or the advocates. The delay is not inordinate. There is a high and probable likelihood that execution may issue at any time if the orders sought herein are not granted.

7. The applicant avers that he has an arguable appeal that raises triable issues thus the need to allow the determination of intended appeal on merit and that any execution herein will render same intended appeal nugatory. The applicant is willing and ready to deposit half of the decretal sum as security in court or in the joint account in the name of both advocates as may be directed by the Honourable Court.

8. The applicant is apprehensive that, the respondent is not a person of means and may not be able to refund the decretal amount should the

filed appeal succeed. Thus he stands to suffer irreparable loss and/or harm if the orders sought herein are not granted. There is no prejudice whatsoever or at all that shall be visited upon the plaintiff/respondent if the orders sought herein are granted.

9. The respondent case is captured on paragraph 4 – 13 of affidavit of Dhaval Soni sworn on 12/2/19. He avers that, it is true as stated in paragraph 2 and 3 of the affidavit in support that judgement in the matter before the lower court, being *SRMS COURT AT MAKINDU CIVIL SUIT NO. 186 OF 2016*, was delivered on 8th November, 2018 wherein the Plaintiff was awarded a total sum of Kshs. 3,489,262.40/= in damages, interest and costs.

10. But it is also true that the period of 30 days which the Applicant is allowed to file an appeal lapsed on 8th December, 2018. The contents of paragraphs 4 to 10 are not true and are meant to mislead this court. The Applicant participated throughout the proceedings before the lower court the 28th June, 2018 when the defence case was closed and a judgement date was fixed.

11. The Applicant's advocate was present. Initially the lower court set the Judgement dated for the 25th October, 2018 but on the said date the court deferred it to the 8th November, 2018. In the extract of the Applicant's advocates' diary attached to the supporting affidavit it is clear that they had diarized the matter on the 25th October, 2018 but did not attend court.

12. Even where they did not attend court, the Applicant and its advocates had an obligation to follow up and find out if the judgement was delivered or not even without notice. That it is therefore clear that the Applicant has been indolent and has only taken action upon being prompted by the respondent's advocates' letter demanding payment.

13. The delay in filing the appeal is inordinate, with the time having lapsed on 8th December, 2018, over two months ago. The Applicant's conduct in the circumstances is not excusable. The Applicant has not satisfied the conditions for grant of stay as set out under *Order 43 Rule 6* of the Civil Procedure Rules.

14. There has been inordinate delay in bringing this application and the Applicant has not demonstrated what substantial loss he will suffer. The intended appeal is not arguable as stated in paragraph 12 of the affidavit in support. This is because the Applicant did not call any witnesses before the lower court, did not adduce any evidence and further did not file submissions when the court directed parties to exchange submissions.

15. The Plaintiff's evidence before the lower court was therefore uncontroverted and for that reason the appeal has no chances of success. The Respondent opposes the proposal for deposit of half of the decretal sum in paragraph 13 of the supporting affidavit as there is no basis for the deposit of half.

16. That in the event the Applicant is granted leave to appeal as sought, but which is opposed for the reasons given above, the Respondent prays the entire amount be released to it as it is capable of repaying the Applicant in the event the Applicant is successful on appeal. The Respondent is reputable company, operating a fleet of commercial motor vehicles, one of which was the subject of the suit before the lower court among other businesses.

ISSUES:

17. After going through the materials herein, I find issues are; ***whether the applicant has satisfied conditions for extension of time to appeal out of time? Whether the applicant has met the threshold for grant of stay of execution pending appeal? What is the order as to costs?***

Analysis and Determination:

18. On extension of time to appeal, our case law has developed a number of factors which aid our Courts in exercising the discretion.

19. Whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in ***Mwangi –vs- Kenya Airways Ltd [2003] KLR***. They include the following:

a. The period of delay;

b. The reason for the delay;

c. The arguability of the appeal;

d. The degree of prejudice which could be suffered by the Respondent is the extension is granted;

e. The importance of compliance with time limits to the particular litigation or issue; and

f. The effect if any on the administration of justice or public interest if any is involved.

20. The applicant has explained the mistake made by the advocate thus lateness in filing appeal by 2 months. Of course the advocate was negligent as after the delivery of judgement was postponed, the advocate never bothered to check the new scheduled date.

21. Taking to account the amount awarded was over Kshs.3 Millions, the content of memo of appeal vide draft annexed, the length of delay and the fact that the respondent does not demonstrate prejudice to be suffered by extension of time to file appeal, this court is inclined to

grant conditional orders as will be stated later.

22. On stay pending appeal application, in ***HCCA No.716 of 2003 Johnson Mwiruuti Mburu –vs- Samuel Macharia Ngure - Justice Nyamu*** held that a respondent's possible inability to pay the decretal amount was sufficient to justify grant of stay of execution pending appeal on the condition that the decretal amount be secured.

23. The respondent avers that the entire amount should be deposited with him as he is capable of refunding should the appeal succeed. It has not been demonstrated the financial ability to refund over Kshs 3 Million subject herein by the respondent.

24. If applicant succeeds in appeal, and respondent fails to refund the amount awarded, then the applicant will suffer substantial hardship.

25. However the applicant did not call witness to contest the respondent case. That does not stop the contest of the quantum. Thus the court is inclined to grant conditional stay.

26. Thus court makes the following orders;

i. Extension of time to file appeal granted provided the same is filed within 14 days from dates herein.

ii. Stay of execution pending appeal granted on condition that Kshs. 1.5 million is paid to the respondent within 45 days from dates herein.

iii. The costs Kshs. 10, 000/= to be paid to the respondent within same 45 days.

iv. In default of any of the above conditions (1, 2, and 3) application herein will stand dismissed with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

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C. KARIUKI

JUDGE