



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL APPLICATION NO 117 OF 2019**

**TAJ MALL LIMITED.....APPLICANT**

**VERSUS**

**COBRA SECURITY COMPANY LIMITED.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant's Notice of Motion application dated and filed on 21<sup>st</sup> March 2019 was brought pursuant to the provisions of Section 1A, 1B, 3A, 63(e), 79G and 79 of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the Law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. Spent.**

**3. THAT there be a stay of execution of the Judgement and Decree entered against the Applicant on the 7<sup>th</sup> December 2018 in Milimani CMCC No 3181 of 2014 pending the hearing and determination of the appellant's (sic) appeal preferred therefrom.**

**4. THAT this Honourable court be pleased to grant a further extension of the time within which to file the Memorandum and Record of Appeal.**

**5. THAT this Honourable Court do make any such further orders and issue any relief it may deem just to grant in the circumstances.**

**6. THAT costs of the application be provided for.**

2. Its Written Submissions were dated 15<sup>th</sup> May 2019 and filed on 16<sup>th</sup> May 2019 while those of the Respondent were dated 21<sup>st</sup> May 2019 and filed on 22<sup>nd</sup> May 2019.

3. The parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPLICANT'S CASE**

4. The Applicant's present application was supported by the Affidavit of its Managing Director, Ramesh Gorasia, that was sworn on 21<sup>st</sup> March 2019.

5. It contended that through its previous advocates, M/S Mungai Kalande & Co Advocates, it filed an application seeking a stay of execution of the Judgment and Decree of the Learned Trial Magistrate, Hon K.I. Orange SRM. It entered into a consent with the Respondent for the application to be allowed and for it to file its Memorandum and Record of Appeal within fourteen (14) days.

6. It stated that its previous advocates did not release its file to it in good time and as a result it was not able to file the said Memorandum and

Record of Appeal. It was its averment that the delay was not deliberate but that the same had been occasioned by circumstances that were beyond its control and those of its new advocates, now on record.

7. It asserted that its advocates had informed him that they would be able to file the said Memorandum and Record of Appeal within seven (7) days and therefore urged this court to allow its application because it was just and fair to so do.

### **THE RESPONDENT'S CASE**

8. In response to the said application, the Respondent's Head of Operations, Stephen Thuku Njoroge, swore a Replying Affidavit on 5<sup>th</sup> April 2019. The same was filed on 6<sup>th</sup> April 2019.

9. The Respondent's stated that the Applicant did not call any witness to testify in its case which was evidence that it had been extremely dilatory in the conduct of the proceedings in the lower court and ought to have pursued its case more diligently. It was also emphatic that the Applicant had never contested its claim and hence the appeal could not be rendered nugatory.

10. It contended that the Applicant did not explain why it never met the deadline as per the consent that was recorded by them. It pointed out that the Applicant did not adduce any evidence to demonstrate what efforts it took to obtain the file from its previous advocates or to apply for the certified copy of the judgment and proceedings.

11. It also averred that the Applicant had not demonstrated what substantial loss it would suffer if its application was not allowed, it had not even indicated its willingness and readiness to furnish security which were conditions it had to meet before it could be granted an order for stay of execution pending appeal.

12. It therefore urged this court to dismiss the Applicant's present application with costs to it.

### **LEGAL ANALYSIS**

13. The Applicant submitted that it was required to file the Memorandum of Appeal and Record of Appeal within fourteen (14) days of the consent it and the Respondent recorded on 26<sup>th</sup> February 2019. It stated that its current advocates were, however, unable to secure the file from its previous advocates in good time to enable them file the aforesaid documents within the stipulated time. It was its prayer that it should then be given time within which to file its aforesaid documentation.

14. It contended that it filed the present application within reasonable time and asked this court to excuse its advocate's mistake. In this regard, it relied on the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR** where it was held that blunders will continue being made and that just because a party had made a mistake does not mean that he should not have his case heard on merit.

15. On its part, the Respondent argued that the decision whether or not to extend time within which an appeal can be filed was discretionary. It pointed out that before the court could grant such an order, it had to consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application was allowed and the prejudice the respondent would suffer if the said application was allowed. In this regard, it relied on the case of **Paul Wanjohi Mathenge vs Duncan Gichane Mathenge [2013] eKLR** where the aforesaid holdings were made.

16. It was its argument that the Applicant herein filed the present application over two (2) months since the recording of the consent and that the explanation for not having filed the Appeal on the ground that its current advocates had not obtained the file from its previous advocates was not a good reason for not having filed the Memorandum of Appeal and Record of Appeal.

17. It placed reliance on the case of **Andrew Kiplagat Chemarungo vs Paul Kipkorir Kibet [2018] eKLR** where it was held that the law does not set aside the maximum and minimum period of delay and all that was required was for the delay to be satisfactorily explained. It was categorical that it was not sufficient that a party blames his advocates for the omissions.

18. It further submitted that the Applicant had little chance of succeeding on appeal because it had never controverted being indebted to it and that it (the Applicant) failed to call a witness to prosecute its Counter-claim. It was its averment that the Trial Court could not therefore have been faulted for having arrived at the conclusion that it did. It was therefore its submission that the Applicant had not demonstrated that it had met the threshold of being granted an extension to file an appeal out of time.

19. In respect to the orders sought for a stay of execution of appeal pending appeal, it reiterated that the Applicant's present application was not filed in good time. It added that the Applicant had not demonstrated that it would suffer substantial loss if the said application was not allowed as prayed or indicated its willingness to furnish security for the due performance of such decree as would be ultimately be binding upon it. It submitted that the decree herein was a money decree and consequently, it ought to be allowed to enjoy the fruits of its judgment.

20. It placed reliance on the cases of **Sankale Ole Kantai t/a Kantai & Co Advocates vs Housing Finance Co (K) Limited [2014] eKLR**, **George Odinga Oraro vs Eric Gor Sungu [2013] eKLR**, **John Mwangi Ndiritu vs Joseph Ndiritu Wamathai [2016] eKLR** and **Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] eKLR** to buttress its arguments.

21. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:-

**“No order for stay of execution shall be made under subrule (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**

**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”.**

22. This means that an applicant has to demonstrate:-

**a. That he will suffer substantive loss if the order of stay was not granted;**

**b. That he had filed his application for a stay of execution timeously; and**

**c. That he was willing to provide security.**

23. 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.

24. Both the Applicant and the Respondent entered into a consent on 7<sup>th</sup> December 2018. Bearing in mind that the present application was filed on 11<sup>th</sup> February 2019, it could be said that it was filed without unreasonable delay. Indeed, a delay of about two (2) months could not be said to have been inordinate. In that regard, the Applicant had satisfied one of the conditions of being granted an order for a stay of execution pending appeal.

25. Having said so, it did not demonstrate that it was willing and ready to deposit security for the due performance of the decree to be appealed from as would be binding on it or that it would suffer substantial loss in the event its application was not allowed as prayed. It was its case and had to satisfy the court that it had met all the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules.

26. Notably, the Respondent addressed itself to both issues of extension of time to file an appeal out of time and the prayer for the stay of execution pending appeal. However, the Applicant only addressed itself to the issue of extension of time to file an appeal out of time. It did not submit on why it should be granted an order for stay of execution pending appeal. To assume that the Applicant still wished to pursue the prayer for stay of execution pending appeal would definitely prejudice the Respondent as it would seem that the court would be prosecuting the case on behalf of the Applicant. The court ought not to descend into the arena of the dispute because it is expected to be a neutral arbiter in the dispute.

27. In the absence of any indication that the Applicant was still keen on pursuing the said prayer for an order of stay of execution pending appeal and the lack of demonstration of the two (2) other pre-requisites under Order 42 Rule 6(2) of the Civil Procedure Rules, this court was not persuaded that it should grant the Applicant the said order. The mandatory compliance of Order 42 Rule 6(2) of the Civil Procedure Rules was well demonstrated in the case of **Magnate Ventures vs Simon Mutua Muatha & Another [2018] eKLR**.

28. Turning to this issue of extension of time, this court noted that the Applicant was required to file its Memorandum of Appeal and Record of Appeal by 15<sup>th</sup> January 2019. Time had stopped running from 21<sup>st</sup> December 2018 until 18<sup>th</sup> January 2019 as contemplated in Order 50 Rule 4 of the Civil Procedure Rules.

29. This court was of the opinion that the Applicant’s explanation that its previous advocates had not released the file to its current advocates was not entirely an unreasonable explanation when a party is changing advocates to act for it. However, as the Respondent observed, the Applicant ought to have demonstrated what efforts it had made into getting its file from the previous advocates.

30. Be that as it may, taking into consideration that the Applicant filed the present application without undue delay, it was the considered view of this court that it ought to be given an opportunity to have its Appeal heard on merit. This was despite the Appellant having failed to call a witness to prove its counter-claim or having failed to properly submit in this matter.

31. Indeed, 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.

32. Notably, while Section 75 A of the Civil Procedure Code provides for the period of thirty (30) days for an aggrieved party to lodge an appeal, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act.

33. Order 50 Rule 6 of Civil Procedure Rules 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:**

**Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.**

34. Accordingly, having considered the parties’ respective Written Submissions and the case law they each relied upon, this court came to the

firm conclusion that while the Applicant had not demonstrated that it should be granted an order for stay of execution pending appeal, it could not be denied an opportunity to appeal against the decision that aggrieved it. This court was satisfied that the Applicant would suffer great prejudice if it was denied an opportunity to fully present its Appeal to be heard on merit.

**DISPOSITION**

35. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application that was dated and filed on 21<sup>st</sup> March 2019 is hereby allowed in terms of Prayer Nos (3) therein in the following terms:-

**1. The Applicant is hereby directed to file and serve its Memorandum of Appeal within fourteen (14) days from today i.e. by 13<sup>th</sup> December 2019.**

**2. The Applicant is hereby directed to file and serve its Record of Appeal within forty five (45) days from today i.e. by 29<sup>th</sup> January 2019.**

**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 its Record of Appeal as aforesaid.**

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

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

36. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2019**

**J. KAMAU**

**JUDGE**