



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 531 OF 2014

MABEL LIMITEDPLAINTIFF

VERSUS

AGRICULTURAL DEVELOPMENT CORPORATION....DEFENDANT

RULING

1. The plaintiff/respondent herein, Mabel Limited, sued the defendant/applicant seeking inter alia, both general and special damages for breach of contract. On 21st February 2019, this court, differently constituted, entered judgment for the respondent for the sum of Kshs 15 million general damages. The court also ordered for the release of all the respondent's farm machinery and equipment that had been detained by the defendant/applicant together with cost of the suit. At the delivery of the said judgment, the court granted the applicant 21 days stay of execution.
2. This ruling is in respect to the application dated 22nd March 2019 in which the defendants/applicant seeks orders for stay of execution of the judgment delivered on 21st February 2019 and for an order to extend time within which the applicant is to file and serve its Notice of Appeal.
3. The application is supported by various affidavits sworn between March and June 2019 and is premised on the grounds that there was a delay, on the part of the court, in supplying the applicant's advocates with the certified copies of the proceedings and judgment so as to enable them seek instructions from their client's board and that by the time they received they received the copies, the period for filing the Notice of Appeal had lapsed thereby necessitating the filing of the instant application for extension of time.
4. The applicant's case is that the orders sought in the application will not prejudice the respondent in anyway and that the applicant has an arguable appeal with overwhelming chances of success.
5. The plaintiff/respondent opposed the application through the replying affidavit of its Director **John Nganga Kimingi** who avers that the applicant's delay in filing the Notice of Appeal is not excusable and has not been explained through cogent reasons. The respondent's case is that the applicant is guilty of laches and is therefore not entitled to the orders sought in the application.
6. When the application came up for mention on 11th April 2019, this considered the submissions by counsel for both parties on the prayer for orders of temporary stay of execution pending the hearing of the application inter parties and granted the applicant stay on condition that it deposits the sum of Kshs 5 million in court.
7. On 26th April 2019 the applicant deposited the said sum of Kshs 5 million in court as security. The court then directed that the application be canvassed by way of written submission which the parties subsequently filed and which I have carefully considered.

Analysis and Determination.

8. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought.

Extension of time

9. The applicant attributed the delay in filing the Notice of Appeal on the delay, by the court, to supply it with the certified copies of the proceedings and judgment. The applicant submitted that it promptly applied and paid for the copies of proceedings and judgment as shown

in its annexures “SBK1” and “SBK2” being the application letter and payment receipt respectively.

10. The applicant explains that it was not until 11th March 2019 that its counsel was able to obtain a copy of the judgment from the respondent’s counsel by which time, the period for lodging a Notice of Appeal had already lapsed on 7th March 2019.

11. The respondent’s case on the other hand, was that the applicant’s explanation for the delay is not plausible.

12. My finding is that the applicant provided the court with a blow by blow account of the steps its advocates took, immediately after the impugned judgment was rendered on 21st February 2019, to secure certified copies of proceedings a judgment so as to enable them obtain instructions from their client, on whether or not to lodge an appeal.

13. I find that the explanation given by the applicant is plausible as it is not expected that the applicant’s advocates herein, could have filed a Notice of Appeal without their client’s instructions. In the case of Edward Njane Ng’ang’a & Another V Damaris Wanjiku Kamau & Another [2016] e KLR, under circumstances similar to the instant case, the court held as follows:-

“A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised.

The court went further, and stated that;

“the applicant has annexed to his supporting affidavit a letter dated 20th July, 2015 addressed to the deputy registrar of this court requesting for a certified copy of proceedings. Through a letter dated 22nd September, 2015 the applicant also applied for a certified copy of the order of the order in the decision/judgment hereto. There is evidence of payment of the documents requested.” (Our emphasis)

14. My finding is that in the circumstances of this case, the delay is not inordinate and has been satisfactorily explained.

Stay of execution

15. Order 42 Rule 6(2) of the Civil Procedure Rules (CPR) stipulates as follows:

2) 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.

16. The respondent submitted that the applicant did not demonstrate that it would suffer substantial loss unless the orders of stay of execution is granted. On its part, the applicant argued that it was evident, in the draft Memorandum of Appeal attached to the application, that the appeal is not frivolous and that it involves an award of a substantial sum of money made against a state corporation for which it is the Kenyan tax payer who will shoulder the financial burden.

17. In determining whether or not to grant an order of stay of execution pending appeal, this court takes cognizance of the fact that the applicant has already complied with this courts order of 11th April 2019 directing it to deposit the sum of Kshs 5 million in court as security.

18. To my mind, the compliance by the applicant, to deposit part of the decretal sum in court is a sign of commitment to the appeal process, a factor which this court cannot overlook in determining this application. This court is also alive to the fact that the respondent herein, as a successful litigant, is entitled to the fruits of its judgment in the same way that the applicant is also entitled to pursue its right to appeal. This scenario calls upon the court to balance the rights and interests of both parties.

19. As I have already noted in this ruling, the applicant has already demonstrated its commitment to satisfying the court’s decree by depositing the security of Kshs 5 million in court which cannot be said to be a small amount of money by any standards. From the draft Memorandum of Appeal, I am satisfied that the intended appeal is not frivolous as it involves a tidy sum of money to be paid by a state corporation that draws its money from the public coffers in which case, the public interest in this matter cannot be gainsaid.

20. Having regard to the findings and observations that I have made in this ruling, I find that it will be in the interest of justice to allow the instant application in the following terms:

1. There shall be a stay of execution of the judgment delivered on 21st February 2019 and all consequential orders pending the hearing of the intended appeal on the following conditions:

a. That the applicant shall within 45 days from todays date, deposit the sum of kshs 7 million (inclusive of the Kshs 5 million already deposited in court) joint interest earning account, to be held by the applicant and respondents

counsel, as security.

b. That the applicant shall file and serve the Notice of Appeal within 7 days from the date of this ruling.

c. That the applicant shall move with speed and in any event, within 30 days of the date hereof, to file the Memorandum of Appeal and the Record of Appeal so as to secure a date for the hearing of the appeal.

2. In the event of failure to comply with orders a) to c) hereinabove, the stay orders granted herein shall be vacated and the respondent shall be at liberty to make an appropriate application.

3. The costs of this application shall abide the outcome of the appeal.

Dated, signed and delivered in open court at Nairobi this 19th day of December 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Wamalwa for Kihungu for the defendant/applicant

Mr. Manda for plaintiff/defendant

Court Assistant – Sylvia