



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

MISC. NO. 75 OF 2017

(CORAM: J. A. MAKAU – J.)

ACACIA VENTURES LTD.....APPLICANT

VS

PATRICK WAFULA MARUTI AND

ALICE NALIAKA ZEBEDAYO (suing as personal representative of the

Estate of ALEX JUMA WAFULA (deceased).....RESPONDENT

RULING

1. The Applicant **ACACIA VENTURES LTD** through a Notice of Motion dated 21st December 2017 pursuant to **Order 42 Rule 6, Order 50 Rule 6 of Civil Procedure Rules, 2010, Sections 3A, and 79(a) of Civil Procedure Act** seeks the following orders: -

(i) That this application be certified as urgent, service thereof be dispensed with and the same heard forthwith and ex-parte in the first instance and be fixed for inter-partes hearing thereafter.

(ii) That pending the inter-partes hearing and determination of this application or further orders of the court, this Honourable court be pleased to issue an order of stay of further execution of the judgment and decree in UKWALA SRMCC No. 95 of 2014.

(iii) That upon grant of prayers (i) and (ii) above, this Honourable court be pleased to grant leave to the Applicant to file an appeal out of time against the judgment delivered in UKWALA SRMCC No. 95 of 2014 and the resultant decree.

(iv) That upon grant of prayer (iii) above, this Honourable court be pleased to issue an order of stay of further execution of the judgment and decree in UKWALA SRMCC No. 95 of 2014 pending the hearing and determination of the Applicant's intended appeal.

(v) That the costs of this application be provided for.

2. The Application is based on the grounds on the face of the application thus: -

(i) That the Respondents, having obtained judgement/decree against the Applicant in UKWALA SRMCC No. 95 of 2014 have already commenced the execution process by taking out warrants

of attachment and sale of the Applicant's movable property thereby proclaiming the latter's motor vehicle registration number KBU 762 S, Isuzu Bus among other movable property in satisfaction of the said judgment and the resultant decree.

(ii) That the Applicant, being aggrieved and dissatisfied with the said judgment delivered in UKWALA SRMCC No. 95 of 2014 seeks to appeal against the said decision.

(iii) That the statutory period within which the Applicant was required to appeal has since lapse.

(iv) That the intended appeal raises triable issues of fact and law and thus, has an overwhelming chance of success.

(v) That the delay in filing the appeal was occasioned by the Applicant's advocates' inability to procure a copy of the judgment from the trial court.

(vi) That the delay as indicated above is inadvertent and thus, excusable and not occasioned by the Applicant.

(vii) That the Respondents/Decree-Holders are persons of unknown financial means and accordingly, should the decretal amount be paid to them, it is not guaranteed that the same shall be recovered should the intended appeal succeed.

(viii) That should execution be permitted to further proceed, it will render the substratum of the intended appeal nugatory thereby visiting irreparable damage/loss upon the Applicant.

(ix) That the Applicant is ready and willing to abide by all conditions imposed by this Honourable Court for the due performance of the trial court judgment/decree including depositing the entire decretal amount in a joint interest-earning account as security pending the hearing and determination of the intended appeal.

(x) That this application has been made without undue delay and in the interests of justice.

(xi) That in the foregoing premises, this application ought to be allowed ex-debito justiciea.

3. The Application is further supported by a supportive affidavit by Pauline Wariuhu, a Claims Director of Directline Assurance Company Limited dated 20th December 2017 and all annexed affidavits thereto.

4. The Application is opposed. The Respondent in opposing the application relies on Replying Affidavit by Patrick Wafula Maruti, the 1st Respondent, dated 15th January 2018.

5. The Parties counsel filed and exchanged written submissions in support of their rival positions. The Applicant's counsel filed submissions on 5th March 2018 whereas the Respondents' counsel filed theirs on 14th March 2018. I have considered the pleadings, the supporting affidavit and annexures and the respective opposing parties affidavits and the relevant law, the issues for consideration are therefore as follows: -

(a) Whether the applicant has met the conditions set for granting of leave to appeal out of time?

(b) Whether the Applicant has satisfied conditions for granting of stay of execution pending hearing and determination of the Applicant's appeal?

(a) Whether the Applicant has satisfied the conditions for granting leave to file appeal out of time?

6. Section 79G of the Civil Procedure Act provides as follows: -

“79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

7. In the instant application, judgment was delivered on 23/10/2015 as per annexure handwritten judgment (PW-1); the Applicant applied for the certified copy of the judgment on 7/11/2017 as per annexure (PW-2), paid for the procurement of the judgment on 8/11/2017 as per annexure (PW-3). That the Applicant has also attached draft Memorandum of Appeal annexure (PW-4) and urges the intended appeal raises triable issues of fact and law.

8. The Applicant was required to file his appeal within 30 days from 23/10/2017; he applied for the judgment in time and paid for the same and urges the delay was caused by failure to procure a copy of the judgment in time. The same was not released promptly to the Applicant’s counsel and as such the delay was not occasioned by the Applicant’s counsel. I have perused the draft Memorandum of Appeal and I note indeed it raises serious triable issues which cannot be wished away.

9. Having considered the Applicant’s ground for delay in filing the appeal in time and the grounds in opposition of granting leave; I am satisfied the law allows court to allow appeal to be filed out of time, if it is satisfied the applicant, has satisfied the court he had a good and sufficient cause for not filing the appeal in time and that his intended appeal is not vexatious or frivolous but raises triable issues. I have considered all parties affidavits and submissions and I find that the applicant has met the conditions for leave to be granted to file an appeal out of time. The delay is not inordinate as it was not occasioned by the applicant but by delay in being supplied with the proceedings and judgment in time.

(b) Whether the Applicant satisfied the conditions for granting stay of execution pending the hearing and determination of the applicant’s intended appeal?

10. **Order 42 Rule 6(2) of the Civil Procedure Rules** sets out the conditions under which stay of execution pending hearing and determination of the appeal should be satisfied before stay is made in favour of the applicant. **Order 42 Rule 6(2)(a)(b), 3, 5 and 6 of Civil Procedure Rules** provides: -

“6. (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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

11. The above-mentioned rule under which the application is made means that the rule is not specifically

restricted to stay of execution only where appeals have been filed only as it is clear application for stay of execution may be made informally immediately following the delivery of judgment or ruling (*see Order 42 Rule 5 and 6 of Civil Procedure Rules*).

12. The Applicant in the affidavit of Pauline Wariuhu urges the Respondents are persons of unknown financial means and should the decretal amount be paid to them, it is not guaranteed that the same shall be recovered should the intended appeal succeed. It is urged that should the execution which has been commenced as per annexures PW-3(a), PW1(b) and PW-1(c) be permitted to further proceed, it will render the substratum of the intended appeal nugatory thereby visiting irreparable damage/loss upon the Applicant. The Applicant urges that he is ready and willing to abide by all conditions that may be imposed by this court.

13. In the instant application, the Respondents have not controverted the contents of the affidavit of the applicant in respect of their being persons of unknown financial means; which means that the Respondents may not have substantial means to pay back the decretal sum if the intended appeal succeeds; notwithstanding that the Respondents are now successful litigants. In view of this, I find it prudent and reasonable to allow the application for stay of the execution conditionally; thus by ordering the decretal sum to be deposited in joint interest earning account as security pending filing, hearing and determination of the intended appeal.

14. The Upshot is that the application succeeds and I proceed to make the following orders: -

(a) Application for leave to file appeal out of time is granted; the intended appeal to be filed within 15 days from the date of this ruling.

(b) An Order of Stay be and is hereby granted subject to the following conditions being satisfied.

(i) The entire decretal sum be deposited in joint interest – earning account of the parties' advocates as security within the next 15 days from the date of this ruling pending filing, hearing and determination of the appeal which is to be filed as per order (a) above.

(ii) The Auctioneers charges be agreed upon between the parties within 21 days and be paid; in default the same be assessed by the Deputy Registrar of this Court.

(c) Costs of the application to the Respondents.

DATED AND SIGNED AT SIAYA THIS 20TH DAY OF APRIL 2018.

HON. J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

M/s Okuoyo: for the Applicant

Mr. Oyuko: for Respondent

HON. J.A. MAKAU

JUDGE