



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION CASE NO. 135 OF 2017**

**INTERGRATED PACKAGING.....APPLICANT**

**VERSUS**

**BENEDICT MUSYOKI MATHEKA.....RESPONDENT**

**RULING**

1. The Appellant/Applicant moved the court by way of a Notice of Motion dated the 28<sup>th</sup> day of March 2017 seeking orders that there be a stay of execution of the judgment and decree issued on the 15<sup>th</sup> day of April 2016 in CMCC No. 5037 of 2013, pending the hearing and determination of the Appeal. The Appellant has also sought the leave of the court to file Appeal out of time.

2. The application which is brought under Sections 1A, 1B, 3, 3A, 79G, 95 of the Civil Procedure Act and Order 42 Rules 1 and 2 of the Civil Procedure Rules, is premised on the grounds set out on the face of the same and its supported by the annexed affidavit of SALOME NGIYA who is one of the directors of the Appellant herein.

3. It is averred that whereas the judgment in CMCC No. 5037/2016 was delivered on the 11<sup>th</sup> day of April 2016 for a sum of Ksh.1,860,000/=, the Appellant was not notified of the said judgment by its Advocate until the 10<sup>th</sup> day of June 2016 when they were advised of the need to urgently make an application for stay pending Appeal.

4. That on the 23<sup>rd</sup> day of June 2016, the Appellant filed an application for stay of execution and review of the judgment but its advocate did inform them of the outcome of that application until the 17<sup>th</sup> day of March, 2017 when Auctioneers went to their premises and upon contacting their advocates they were informed he was not aware of the Auctioneers and he promised to revert. The Appellant latter learnt that an order had been obtained on 20<sup>th</sup> March, 2017 by a firm of Advocates which they had not instructed and its at that point that they instructed the firm of Wairegi Gatetuo & Company Advocates who filed the present application on their behalf. They have blamed their former advocate Ms Philip Muoka & Co. Advocates for the delay in filing the Appeal and has urged the court not to visit the mistake on them.

5. The application is opposed vide a replying affidavit filed on the 26<sup>th</sup> day of April 2017 and sworn by one Benedict Musyoka Matheka on 26<sup>th</sup> April 2017 wherein it is deponed that the application is misleading, defective, frivolous and an abuse of the court process in that after judgment was delivered, the Appellant filed an application for stay of execution on 23<sup>rd</sup> June, 2016 which was dismissed. It has also been deponed that after the said application was dismissed, the Appellant has continued to file other applications, which according to the Respondent, is a sign that the Appellant only intends to delay the matter and drag the process while he continues to suffer.

6. It has been averred that the issue of jurisdiction was not raised during the hearing of the matter and that the Appellant did not appeal after its application for review and stay of execution was dismissed by the Lower Court. The Respondent has contended that if the Appellant was dissatisfied with the conduct of his advocate, they ought to have complained to the Advocates Commission which option they have not explored. In the alternative, he has urged the court to order that half of the decretal sum be deposited in court and half be released to him to enable him seek further treatment and that the Appellant be orderd to pay the auctioneers charges.

7. The application was disposed off by way of written submissions. The Appellant has sought two main prayers which are; stay of execution and leave to appeal out of time. I will first deal with the stay of execution which is provided for under Order 42 Rule 6 (1) of the Civil Procedure Rules. The Rules have set three conditions that the Applicant is required to meet before the court can grant a stay. These are:-

- (a) The court must be satisfied that substantial loss may be suffered by the Applicant if a stay is not granted.
- (b) The application has been made without undue delay.
- (c) Security for due performance has been provided.

8. On substantial loss, the Appellant has submitted that it shall suffer substantial loss as the decretal sum is colossal and if the Appeal succeeds, the same will be rendered nugatory. It has also been contended that the Respondent has not demonstrated that he can refund the money in the event that the Appeal succeeds.

9. I have carefully perused the supporting affidavit in support of the application at hand and I have noted that nowhere in that affidavit has the Appellant deponed that the Respondent will not be in a position to refund the decretal sum should the Appeal succeed. Though the issue has been raised in the submissions, it is critical that the same be deponed to, because the financial capability of the Respondent to refund the decretal sum or not, has everything to do with proving substantial loss. The Appellant has alleged that the Respondent has not demonstrated his capacity of refunding the decretal sum should the Appeal succeed. In my view, the Respondent was under no legal duty to do so as the Appellant did not raise it in the supporting affidavit. The evidential burden only shifts to the Respondent once the issue is raised in the affidavit by the Applicant who is seeking a stay of execution pending Appeal.

10. Courts have stated times without number that prove of substantial loss is the cornerstone in an application for stay. I therefore find that the Appellant has failed to prove substantial loss.

11. On the issue of delay, the Appellant avers that the same was caused by its former Advocate who did not keep it posted of the developments in the matter.

12. As can be seen from the record, there is a delay of 11 months between delivery of the judgment and the filing of the present application. I note that after the current firm of Advocates was instructed, it moved with haste and filed the application herein. Though the Appellant has made very general statement blaming its former Advocate for the delay, which it has not substantiated, I am prepared to find that the delay though long has been explained and I so find.

13. On security, the Appellant has offered to deposit Ksh.300,000. To this extent, I find that it has satisfied this condition as there is no legal requirement that the security offered by the Appellant must be sufficient but rather it is the duty of the court to order the nature of security.

14. Of importance, however, is the fact that one of the grounds raised in the Appeal is that of jurisdiction and in particular whether the Lower Court had jurisdiction to try the matter. It is important that the Appellant be given a chance to file and prosecute its Appeal considering that the court has already excused the delay. In arriving at this decision, am content to cite the case of **Reliance Bank Limited (in Liquidation) and Southern Credit Limited** where the learned Judge laid down what to consider in application seeking leave to file an Appeal out of time which are:-

(a) The amount of delay, the reasons given for the delay and the bona fides of those reasons.

(b) The prospects of the Appeal.

(c) The degree of prejudice to the Respondent if the application is granted. I have also been guided by the decision of the court in **Edward Kamau & Another Vs Hannah Mukui Gichuki & Another (2015) eKLR** where it was held that the right of Appeal, is a constitutional right which is the cornerstone of the rule of law. To deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 48 of the constitution and also a denial of a right to a fair hearing guaranteed under Article 50 (1) of the constitution which right cannot be limited under Article 25 of the constitution.

15. In the premises aforesaid, I dismiss prayer 4 of the application but I allow prayer 3. The Appeal to be filed within 14 days from the date of this ruling.

**Dated, Signed and Delivered at Nairobi this 21<sup>st</sup> Day of June, 2018.**

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....*For the Applicant*

.....*For the Respondent*