



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

MISC. APPL. NO. 194 OF 2018

BLUE NILE E. A. LTD.....PROPOSED 1ST APPELLANT/APPLICANT

LYDIA GODE YUSUF.....PROPOSED 2ND APPELLANT/APPLICANT

-VERSUS-

MABATI ROLLING MILLS LTD.....RESPONDENT

RULING

1. This ruling relates to a Notice of Motion Application dated 23rd April 2018, brought under the provisions of Section 1A, 1B, 3A, and 6 of the Civil procedure Act, Order 42 Rule 6, Order 45 Rule 1 of the Civil Procedure Rules 2010, and all other enabling provisions of the law. The Application is supported by an Affidavit dated 23rd April 2018, Sworn by Lydia Gode Yusuf, the proposed 2nd Applicant.

2. The Proposed Appellants(herein “the Applicants”), are seeking for orders that;

- a) *That pending hearing interpartes, the Honourable Court Hon. Obura (Mrs) PM in CMCC 7422 of 2016, be pleased to issue a stay of Execution of the Judgment/Ruling delivered on 31st January 2018 and all consequential orders thereto;*
- b) *That pending the hearing of this Application interpartes, there be and it is hereby ordered by way of an injunction restraining the Respondents and their agents, auctioneers or any other person acting on their behalf from towing, carrying away goods belonging to the Applicant;*
- c) *That upon hearing of the Application herein, the Honourable Court be pleased to grant leave to and enlarge time for the Proposed Appellants to Appeal against the Judgment/Ruling of the Honourable Court Hon. Obura (Mrs) PM in CMCC 7422 of 2016, out of time on terms and conditions to be stated.*
- d) *That upon hearing of the Application herein, the Honourable Court be pleased to set aside the Judgment of the Honourable Court Hon. Obura (Mrs) in CMCC 7422 of 2016 , all dated 31st January 2018, and all consequential orders thereto and the warrants of attachment dated 13th April 2018, pending the hearing and determination of the Appeal.*
- e) *That upon hearing of the Application herein, the Honourable Court be pleased to lift the warrants of attachment all dated 13th April 2018, in furtherance of the Judgment of the Honourable Court Hon. Obura (Mrs) PM in CMCC 7422 of 2016 all dated 31st January 2018.*
- f) *That upon hearing of the Application herein, the Honourable Court be pleased to order the Executive Officer responsible for CMCC 7422 of 2016, to supply the proposed Appellants with certified copies of the impugned Ruling/judgment and the proceedings therein.*
- g) *That costs for this Application be provided for.*

3. The Application arises from proceedings in CMCC No. 7422 of 2016, Mabati Rolling Mills vs Bluenile EA Ltd and Another, filed on 28th October 2016, where the Respondent was the Plaintiff and seeking for orders of:-

(a) payment of Kshs. 12,848,338.26;

(b) payment of interest at 2% per month from 7th May 2016;

(c) costs of this suit; and

(d) such further or other orders as the Court may deem fit and just to grant against the Applicants, who were the Defendants therein.

4. The Applicants allegedly filed a Defence comprising of general denials and admitting the debt. As a result, the Respondent applied for judgment on admission and in the alternative the Defence be struck out. The parties filed and exchanged submissions on the Application. The ruling thereon was delivered on 31st January 2018 by the Honourable Court, whereby the Statement of Defence was struck out and the Application allowed with costs as prayed.

5. Following the ruling, the Respondent extracted the Decree for execution. Upon making an Application for execution by attachment of movable property, warrants of attachment were given to ICON Auctioneers on 13th April 2018 for execution. It is against this background that the Applicants moved this Court.

6. The Applicants aver that on 30th January 2018, the Honourable Court reserved the Application for ruling and stated that the same would be given on Notice. However, the Notice was never served upon them or their Advocates as per procedure. Neither were they served with a copy of the decree.

7. That although the Proclamation Form alleges to have been issued pursuant to a Decree dated 31st January 2018, that cannot be the case if indeed on the 30th of January 2018, the Honourable Court reserved the ruling to be delivered on notice.

8. Further, that payments were made to the Respondent from the 1st July 2016 to 1st November 2016, as enumerated in the statement of account, way after the 7th May 2016. Thus the Respondents were obligated to disclose this to the Honourable Court, that they have been receiving payment long after the case was filed, since such material fact would then have raised a triable issue on the taking of accounts to determine the veracity of the claim as pleaded and any outstanding amounts if at all.

9. Having failed to disclose to the Court the subsequent payments between the 22nd July 2016 and 1st November 2016, it would be illegal and unsafe for the Respondent to reap from such illegalities. Therefore, the Honourable Court should have set aside any such consequential orders.

10. That from the foregoing, the Applicants suspect that there must be some elements of fraud which the Honourable Court is bound to investigate and arrest to avoid a miscarriage of justice.

11. The Applicants argued that the interest awarded by the Honourable Court as prayed for in the Plaint as at 7th May 2016 was not available to the Respondent as the 1st Proposed Applicant had made subsequent payments to the Respondent as exhibited herein and therefore the Respondents were bound to amend their Plaint to avoid misdirecting the Honourable Court on the amounts due and payable and on the interest payable if at all. That the enforcement of the decretal sum will occasion an unfair prejudice to the Applicants and illegal enrichment to the Respondents and Auctioneers.

12. Further the Auctioneers have proclaimed goods whose value is way above the estimated value that this will cause undue hardship that cannot be compensated by way of damages. That the intentional undervalue of the properties without providing a basis for the same is based on ulterior intention of selling them at throw away prices to the great detriment of the Applicants herein.

13. That the decretal sum of Kshs. 18,543,013.26 and Auctioneer's commission of Kshs. 1,854,301.32, are also colossal sums. Similarly the properties proclaimed are the Proposed 1st Applicant's stock and tools of trade which may be wasted and/or dissipated immediately upon attachment and sale.

14. It was further argued that the two Companies herein have conducted several transactions between the two companies involving a lot of money including dealing with a sister Company to the Respondent called Insteel. Therefore the relationship between the 1st Proposed Applicant and the Respondent is so complex that it cannot be resolved in a summary manner, as intended by the decision of the Honourable Court. Therefore, it is in the interest of justice that the Honourable Court order stay of the judgment and/or decree and all consequential orders and varies the Judgment to avoid a miscarriage of justice.

15. However the Respondent opposed the Application and argued that it is almost 3 months from the date of the delivery of the Ruling, to the date of proclamation that the Applicants now come before the Honourable Court to seek for the stay of execution and extension of time to Appeal. That the Applicants claim not to have been aware of any Ruling date until proclamation was done, but that allegation that the Applicants were not aware of the Ruling date is a misleading statement. That the 2nd Applicant is guilty of perjury by making false statements under oath.

16. The Respondent stated that it is not true that the Ruling date was to be delivered on notice. The date was issued in an open Court in the presence of both Counsels for the Respondents and the Applicants. So for the Applicants to say that they were not served with a ruling date is because they had knowledge of the said date. That in fact, on 1st December 2017, the Respondents received a letter dated 30th November 2017, from Messrs Guandaru Thuita & Company Advocates, informing them of a mention on 23rd November 2017, in CMCC No. 7422 of 2016. The purpose of the mention was to confirm filing of submissions by the Parties and take a ruling date. The letter also advised the

Respondent of the Ruling date scheduled for 31st January 2018.

17. The Applicants having filed their submissions on 27th December 2017, it was impossible to retrieve the Court file without knowing the status of the file as is required at the registry. That under those conditions, even without attending court, the Applicants should have been prudent enough to follow up on the Court proceedings. That Counsels for the Respondents have always filed the Court attendances when they attend Court and when they attended Court on 23rd November 2017 for the mention, Counsels for both parties were present. The said Court attendance sheet indicates that Mr. Ochieng was holding brief for Mr. Thuita for the Plaintiff, now the Respondent herein and Ms. Serem holding brief for Mr. Wangira for the Defendants, the Applicants herein. Therefore the Applicants cannot come this late in the day when the Respondent is about to taste the fruit of its litigation to deny it of its right in the name of not being aware of a date which they were aware of.

18. The Respondent further averred that the Application made by the Applicants is an abuse of the Court process as it is bad and unknown in law and has no legal basis. That ground one (1) of the Applicant's application is misleading the Court that pre-trials had to be done before hearing the Application on judgment on admission and striking out. Further, the Applicants are seeking the setting aside of judgment in a Miscellaneous Application, a prayer that is misconceived as granting it would amount to concluding the proposed Appeals. Even then the Appeals from the Magistrates Courts are not filed in the Commercial Division of the High Court but with the Civil Appeals Division. Further, the prayer for supply of proceedings is unnecessary as there is no evidence that the Applicant applied for the same and was denied.

19. It was argued that the Applicants have not followed the proper procedure as provided by the law in filing the Application. Neither have they obtained leave in the Court of first instance, to file the Appeal, nor did the Applicants seek for stay of execution in the Trial Court before invoking the jurisdiction of this Honourable Court.

20. That in any event, the High Court can only entertain the Application or issue orders for stay when there is in existence an Appeal which is not the case herein and were the Applicants acting in good faith, they would have even suggested an amount to deposit as security for costs pending the hearing of this Application. Therefore, they are undeserving of such orders.

21. The Respondent further submitted that, it is not true that the Respondent has been collecting money in the course of the suit in the subordinate lower court. That as a matter of fact, the 1st Applicant has on several occasions issued unpaid cheques to the Respondent and that the issue was raised in the Plaint and the Application dated 31st January 2017. That the Applicants are now trying to amend their omissions by presenting fresh evidence in this Application which had not been presented in the lower Court, which evidence points to unpaid cheques made to the Respondent and does not add value to this Application.

22. The Respondents stated that the Bank statements presented by the Applicants only show unpaid cheques and amounts that had been taken into account before the filing of this suit. No amounts of money were paid in to the Respondent's accounts and if that were so, the same should have been raised with the Trial Court. The Applicants also admitted to be receiving bounced cheques from their clients.

23. Therefore, the Applicants are guilty of concealment and deception as they have deliberately failed to attach the Plaint, Admission letters, and other documents in their Application, and that had the Applicants intended to continue with the good business as alleged, they would have been prudent enough to endeavor to pay the outstanding debt owed to the Respondent herein.

24. The Respondent dismissed the issues of the Auctioneers understating value of goods as neither here nor there since if the Applicants do not want goods sold at those prices, they should pay to avoid loss. Further that the Decretal sum and interest as well as the Auctioneers' costs are reasonable and have been fairly tabulated. Be that as it were, should any orders be granted or extended herein, may it be ordered that the Applicants deposit the entire Decretal sum in Court.

25. The Respondent in addition filed grounds of opposition dated 10th May 2018, reiterating the averments in the Replying Affidavit and arguing that the Commercial and Admiralty Court Division of the High Court lacks Administrative Appellate jurisdiction to entertain the Application or an Appeal from a Magistrate's Court. That the Application should be dismissed on the grounds that it does not meet the threshold of Order 42 of the Civil Procedure Rules, inter alia that:-

(i) There was inordinate delay in filing the said application dated contrary to Order 42 Rule 6(2) (a).

(ii) The Respondents have not deposited security for costs or even suggested of depositing such security.

26. It was submitted that Order 45 Rule 1 of the Civil Procedure Rules, cited only gives power to the trial Court and not any other court to entertain the Application as herein. Therefore this Court has no power/or jurisdiction to grant prayer (b) sought, as the Magistrate's name is not a party to this case and cannot be directed on what to do or not do in proceedings that she is not privy to.

27. That when there is a Decree in existence, execution can only be restrained by an order of stay of execution and prayer (c) for an injunction is misplaced and lacks any legal basis in the circumstances. Similarly, the High Court lacks jurisdiction to enlarge time for filing of an Appeal as the same should have been sought from the trial Court. Further, prayer (c) cannot be granted as sought as doing so would be tantamount to determining the purported proposed Appeal and there will be nothing left for the Appeal Court to determine and finally prayer (g) is misconceived as copies of documents can upon payment be obtained from the trial Court without the necessity of a Court order and in any event, no attempt has been shown to have been made and supply of the documents denied.

28. In response to the Replying Affidavit and grounds of opposition, the Applicants filed a Supplementary Affidavit dated 20th June 2018, sworn by Lydia Gode Yusuf, the Legal officer of the Company herein. She deposed that the Applicant's Appeal is arguable with high chances of success. That the evidence of payment made after filing of the suits was not presented to the Trial Court for consideration and the fact that there was a guarantee, which was purported to have been executed by the Applicant, was not considered. The decision to summarily

decide the case with a defence on record was draconian as it deprived the Applicants of the right to defend the claim against it. The Applicants reiterated that as per the averments in the supporting Affidavit, they will abide by any Court conditions with regard to the deposits of security in the form of a Bank Guarantee. In relation to the Warrants of attachment, it was reiterated that the value of the attached goods is not indicated while the indicated approximations are not backed up by any valuation and that the Honourable Court has the inherent powers to grant the prayers as sought.

29. The parties disposed of the Application by filing submissions which I have considered herein. The Applicant submitted that the mistake of the Counsel should not be visited on the Client. The case of; Philip Chemweno & Another vs Augustine Kubende (1982-88) KR 103, was cited where the Court stated:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits...The Court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

30. That lack of courtesy on the part of the Respondent’s Counsel to inform the Applicants of the ruling and serve them with a copy of decree allegedly dated 31st March 2018, though the proper date is 5th April 2018 also contributed to this matter. That under Order 21 Rule 8 of the Civil Procedure Rules, it is mandatory to forward a decree to the other party for approval and/or amendment within a specified period. That had that been done, the Applicant would not have suffered prejudice.

31. It was argued that, that the Respondent’s claim was for a liquidated sum and if the Court were to find otherwise on the Appeal, they can be compensated in damages but by striking out the statement of defence, filed by the Applicant, the Court drove the Appellants from the seat of justice to unknown territories and caused it to suffer economic hardship. The right of Appeal is a Constitutional right and a cornerstone of the rule of law. The case of; APA Insurance Ltd vs Michael Kinyanjui Muturi (2016) eKLR was cited.

32. The Applicant reiterated that it will suffer substantial loss if the Appeal is allowed in that, the decretal sum of Kshs. 18,543,013.36, and the estimated Auctioneer’s Cost of Kshs. 1,854,301.32 is colossal amounts. If paid, it may not be easily recovered as the financial wherewithal of the Respondent is unknown. Further, the goods attached are original machinery whose value on the open market for new brands is very high, and the same and the motor vehicles have been well maintained, even then, they form the stock of the 1st Appellants, which if sold shall eternally cripple the operations and obligations of the creditors and families of the employees.

33. Finally, the Applicants submitted that the decree is defective as the Magistrates Court granted prayer (2) of the Application, that is to strike out the Defence and yet the decree relates to an order issued that Judgment was entered on “admission”. Further, the certificate of costs attached has no basis as no costs have been taxed. That if the stay of execution is not granted, the intended Appeal will be rendered nugatory; yet the intended Appeal is not frivolous. The loss that will result cannot be compensated in damages.

34. However the Respondent reiterated that, the Application for stay of execution should have been made in the Trial Court, therefore the Appellants are in the wrong forum. Reference was made to Order 42 Rule 6 of the Civil Procedure Rules. That similarly under Section 75 of the Civil Procedure Act, as well as Order 43 of the Civil Procedure Rules, an Application for enlargement of time lies in the first instance to the Court making the order sought to be appealed from. The Respondent argued that the reasons why the Applicant by-passed the Trial Court raises suspicion and sheds the learned Magistrate and the Respondent in bad light.

35. That the provisions of order 45 Rule 1 of Civil Procedure Rules are only applicable in cases of review, where a party has discovered new and important facts or evidence that could not be produced by the party at the time when the decree was passed or on account of some mistake or error apparent on the face of the record. In the given circumstances the Court has no jurisdiction under order 45 Rule 1 Civil Procedure Rule to grant the prayers herein. Reference was made to three cases of; Abraham Lenauia Lenkeu –vs- Charles Katekeyo Nkaru [2016] eKLR, Speaker of the National Assembly –vs- Karume [2008] KLR 425, Anarita Kareme –vs- Republic No. 2 [1979] eKLR, and Section 79 G of Civil Procedure Act.

36. The Respondent submitted that the delay has prejudiced it in realizing the fruits of the judgment. Reference was made to the case of; Peter Kimandiu –vs- Land Adjudication Officer & 5 Others [2015]eKLR. As for security for costs, it was submitted that the offer of a Bank guarantee is an afterthought meant to bring the Court’s eyes from the Applicant’s intention to delay the case. The security offered is unacceptable and should the Court consider, any security then the entire decretal sum should be deposited in Court.

37. At the conclusion of the arguments by the parties herein, I have considered the entire Application in the light of the materials placed before the Court and find that the following issues arise for consideration:-

- a) whether the Application is competent;
- b) whether the Court has the jurisdiction to entertain this matter;
- c) whether, the Application has merit and/or whether the prayers sought can be granted; and
- d) who should bear the costs?

38. I shall consider the first two issues together. In that regard I find that, the Application has been brought under the provisions of Section 1A, 1B, 3A, and 6 of the Civil Procedure Act, Orders 42 Rule 6, 45 Rule 1 of the Civil Procedure Rules 2010. However, although the Applicant has cited the provisions of Order 45 Rule 1, of the Civil Procedure Rules which deals with review of decree or order, there is no prayer in the Application seeking for the same. Even then, the only Court that can review an order made is the trial Court. In this case the Subordinate Court. Therefore Order 45 of the Civil Procedure Rules cited is superfluous.

39. The Applicant further seeks for orders inter alia that; Leave be granted to enlarge time to file an Appeal out of time; there be a stay of execution of judgment dated 31st January 2018 and/or that the judgment be set aside and the warrants of attachment be lifted. Further that an Injunction order do issue to restrain the Respondent or its agent's, the Auctioneers from carting away its goods and finally they be supplied with copies of proceedings in CMCC 7422 of 2016.

40. In the same vein, the prayer seeking that, the Applicant be provided with copies of proceedings is not supported by any provisions of the law. I also find no basis of seeking for the same from an Appellate Court. As properly submitted by the Respondent, this is an Administrative issue. There is no evidence that the same has been sought for and denied. This Court does not supervise the Administrative functions of the Subordinate Court, the Judicial Officers therein and/or the Executive Officer attached thereto. I therefore decline to grant that prayer and rest the issue at that.

41. Be that as it were, I shall now consider the issues of the jurisdiction of the Court to grant the prayers for injunction herein. In this regard the Respondent submitted inter alia that; the prayer of an injunction is misplaced in view of the fact that there is a decree and therefore, the restraint of execution can only be through stay of execution. That the prayer to enlarge time for filing of an Appeal should have been sought for from the Trial Court. Finally that the grant of the prayer to set aside the Judgment will be tantamount to determining the Appeal at this stage.

42. I shall first deal with the issue of setting aside the Judgment. It suffices to note that, the power of this Court in relation to this matter at this stage is Appellate jurisdiction. In that regard the Court can only set aside the Judgment herein after the Appeal has been heard. There is no Appeal filed herein. Therefore the questions that arise are: on what basis will the Court set aside the Judgment? On what material will the Court base its findings to set aside the judgment if the parties will not have been heard on Appeal? I therefore concur with the Respondent's argument that the grant of the order to set aside the Judgment cannot be granted before the intended Appeal is heard and determined. Prayer (e) of the Application is therefore premature and I decline to grant it.

43. That leads to the prayer of stay of execution. The provisions of Order 42 Rule 6 of the Civil Procedure Rules that deals with stay of execution states that:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. (emphasis mine)

44. These provisions are clear that, the Trial Court may for sufficient cause order for stay of execution for a decree or order. Thus, the Applicants should have in the first instance, applied for stay of execution in the Trial Court. However, where an Appeal has been preferred against the order appealed against, then the Appellate Court, can entertain the Application for stay of execution.

45. I have gone through all the documents annexed to the Affidavit in support of the Application and I find that, as aforesaid, there is no evidence that an Appeal has been filed herein. In fact the Applicants' describe themselves as "Proposed Appellants". It is not therefore in vain that, the Respondent submitted that, the Court has no jurisdiction to entertain the Application. Surprisingly when the Respondent raised the issue in the Replying Affidavit and in the grounds of opposition, the Applicants filed a supplementary Affidavit, they did not expressly respond to the issue but generally reiterating the averments in the Affidavit in support of the Application. The lack of an Appeal is also reinforced by the prayer seeking for extension of the time within which to file an Appeal herein

46. Even then, I have seen a document on the Court file dated 23rd April 2018, and filed on the same date entitled: "Draft Memo of Appeal". But it is not lodged in the High Court Registry, as Hon. Deputy Registrar has not endorsed and/or signed it. In that case, I uphold the submissions by the Respondent that, in the absence of the Appeal, the Court cannot and does not have proper Appellate jurisdiction to entertain the Application and in particular the prayer for stay of execution.

47. It is also noteworthy that, the prayer for stay of execution of the judgment/ruling delivered on 31st January 2018 and all consequential orders thereto, has been sought for under prayer (2) "pending hearing of the Application inter parties." Consequently, the prayer was spent at an ex parte stage. Be that as it were, it does not state the purpose for which it is intended. Is it to be granted pending the hearing and/or determination of anything, for example the determination of an Appeal?. Is there such an Appeal?. The Court cannot just issue the stay of execution without an intended purpose and/or indefinitely. Therefore, even if the Court were to entertain the Application and/or the prayer of stay of execution, it will be hard pressed to issue the same, as the stay of execution can only be granted pending the hearing and determination of an Appeal lodged.

48. Moreover, the provisions of Order 42 Rule 6 of the Civil Procedure Rules, sets down the principles that guide the grant of an order of stay of execution. The Applicant has to prove that, they will suffer substantial loss if the stay of execution is not granted. In that regard, the Applicant argued that, the decretal sum is colossal and the payment thereof will cripple the 1st Applicants business and that if the stay is not granted, the Appeal will be rendered nugatory.

49. First as aforesaid, there is no Appeal on record. Secondly, there is no evidence that if the sum claimed is paid, it cannot be recovered. In all circumstances where the opposing party has a valid judgment then, that party's interest too must be considered. Therefore unless a good cause has been shown to deny the successful litigant the fruit of the judgment the Court will not allow the stay of execution. Be that as it may, if for whatever worthy the Court would have been inclined to consider the order of stay of execution, then the same would be granted on condition that the Applicant deposits the entire sum claimed in an interest earning account in the joint names of the lawyers representing the parties.

50. The other prayer sought for by the Applicant is for an injunction order. As submitted by the Respondent such an order cannot be granted. What purpose will it serve? What will the Court be restraining? It suffices to note that the Applicant has sought for stay of execution under prayer (b) and for an order of injunction to restrain the Respondents from charting away their goods under prayer (c). Is it possible that, the Court can grant a stay of execution and an Injunction order at the same time? Can an Injunctive order be granted when there is a decree? In my considered opinion, when the Applicant sought for stay of the execution that was sufficient. Even then, the prayer for an Injunction is not only misplaced but unsupported by the evidence adduced in support thereof.

51. The other prayer closely related to the stay of execution and an injunction is prayer (f) which seeks that the Court lifts the warrants of attachment dated 13th April 2018. This prayer cannot be granted in view of the fact that the Court has not granted the prayers: stay of execution, injunction order and/or setting aside the judgment.

51. I shall now consider the last prayer for enlargement of time to file the Appeal. The provisions of Section 79G deals with the time for filing of Appeals from subordinate Courts and states 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.

52. The Applicant argues that the reason for failure to file the Appeal on time was lack of courtesy on the part of the Advocate for the Respondent who did not notify them that the Ruling/Judgment had been delivered and did not serve them with a copy of the draft decree to approve as required under order 21 Rule 8 of the Civil Procedure Rules, but the Respondents argue that, the reasons advanced do not have merit as the Applicants should not have sat back for a period of three (3) months for a ruling to be delivered on notice without making an enquiry from the Court. That they cannot claim that the mistake of an Advocate should not be visited upon them. That, inordinate delay in filing the Appeal will prejudice the Respondent who will be denied an opportunity to realize the fruits of its judgment.

53. The grant of an order extending time to file an Appeal is a discretionary power of the Court. As in all other circumstances the discretion must be exercised judiciously and in the interest of the parties and justice. One of the most important factors to consider in the exercise of this discretion is where the Applicant has given a reasonable and satisfactory explanation for the delay.

54. In the instant case, the judgment/ruling is alleged to have been delivered on 31st January 2018. I use the term “alleged” because I have gone through all the annexures to the Affidavit sworn by Lydia Gode Yusuf, in support of the Application and the supplementary Affidavit sworn by the same deponent and the alleged decision is not annexed thereto at all. I shall come back to this issue. However, assuming the decision was rendered on 31st January 2018, and then the Appeal should have been filed 30 days thereafter which is by 31st February 2018. This Application was filed on 23rd April 2018. The Applicants aver that they got to know about the matter when they were served with the proclamation form. I have looked at the same marked “LGY-4” and note that it is dated 17th April 2018. In that regard, the Applicants moved with speed and filed their Application within seven (7) days thereafter.

55. The right to be heard is a Constitutional right provided for under Article 48 of the Constitution of Kenya, and in all circumstances it will be in the interest of all parties to hear a matter on merit. The only consideration the Court ought to take into account is to balance the rights of both parties. I am therefore inclined to grant the Applicants an opportunity to file their Appeal out of time so that the same can be heard on merit. In that regard, I allow prayer (d) of the Application and grant the Applicants an extension of fifteen (15) days from the date of this order within which to file the intended Appeal.

56. However, to protect the rights of the Respondent, the Court having granted leave to file an Appeal out of time, the same will be rendered nugatory if the subject matter of the Appeal is not preserved. I have considered that under paragraph 19 of the supporting Affidavit, the Applicants states that they are ready to provide security during the pendency of the Appeal, as a show of good will on their part. Similarly, in their submissions, they offer to provide a security in the form of a Bank guarantee within a reasonable time and/or comply with any other reasonable conditions given by the Court. However, the Respondents opposed the security offered and termed it as an afterthought, meant to bling the Court’s eye from the delay of the case. That, although the Respondent is hesitant to accept the offer, should the Court be inclined to order for security for costs, then the entire decretal sum be deposited in Court.

57. Having heard both parties, I order that, the total sum claimed in the Plaintiff; Kenya shillings twelve million, eight hundred and forty eight thousand, three hundred and thirty three, twenty six cents (Kshs. 12,848,338.26) be deposited in Court within fifteen (15) days of this order and within the period in which the Applicant has been allowed to file the intended Appeal but before filing the intended Appeal. In that regard, the period of extension to file an Appeal out of time will only take effect, if the said money will have been deposited.

58. In default of compliance with the deposit and/or the filing of Appeal, the order which I hereby grant for stay of execution, shall stand vacated forthwith and execution will proceed without further recourse and/or reference to the Court.

59. The costs of the Application shall abide the outcome of the Appeal.

60. As a matter of observation, the Applicant handled this Application rather casually. I say so with outmost respect, in that the impugned Judgment/Ruling was not even provided. Indeed, the Application would have failed and/or struck out on that ground alone. However, I felt inclined to uphold substantive justice pursuant to Article 159 of the Constitution of Kenya.

61. Those then are the orders of the Court.

Dated, delivered and signed in an open Court, this 8th day of August 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Ndegwa for Mr. Wangira Okoba for the 1st and 2nd Applicants

Ms. Mcharo Wanjala for the Respondent

Dennis.....Court Assistant