



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 58 OF 1999

SANITAM SERVICES (E.A) LIMITED..... PLAINTIFF

-VERSUS-

RENTOKILL (K) LIMITED.....1ST DEFENDANT

KENTAINERS (K) LIMITED.....2ND DEFENDANT

RULING

1. The 1st defendant, *Rentokill (K) Ltd* has filed a **Notice of Motion dated 28th November, 2018**. They seek the following prayer:

a. That the 1st defendant be granted leave to file a notice of Appeal out of time.

b. That there be stay of execution of the orders delivered on 18th May 2017 and all consequential orders pending hearing and determination of the intended appeal.

BACKGROUND

2. By a Ruling delivered by this court on **18th May 2017** the court ordered and authorized the plaintiff to enter into the 1st defendant's premises and the premises of the 1st defendant's clients and to obtain therefrom the bins which violated the injunction orders which orders restrained the 1st defendant from manufacturing or using bins in contravention of the plaintiff's patent. Further by that Ruling the court ordered that such recovered bins be gathered together and then parties would address on whether 1st defendant had violated the court injunction. That if the court determined that such bins violated the injunction orders the same would be destroyed.

3. The 1st defendant by its application dated **6th June, 2017** sought the court to Review the orders of the ruling of **18th May 2017**.

4. This court delivered its Ruling on **3rd October 2017** to that application. By that Ruling this Court reviewed the orders of **18th May 2017**. The review was to the effect the plaintiff would only take an inventory of the bins which were in violation of the rights vested in the plaintiff. Further that in lieu of the plaintiff entering the 1st defendant's premises the 1st defendant would provide the court and the plaintiff affidavit evidence of the bins plaintiff considers contravening the patent.

5. The plaintiff being aggrieved by the Ruling of **3rd October 2017** filed an appeal before the court of appeal. The plaintiff was successful in its appeal. The appeal was allowed and the 1st defendant's application for review dated **6th June 2017** was dismissed.

6. The effect of the court of appeal's judgment was that the plaintiff could, in accordance with the Ruling of **18th May 2017**, enter into the 1st defendant's and its client's premises.

ANALYSIS AND DETERMINATION

7. In respect to the first prayer in the 1st defendant's Notice of Motion, it seeks leave to file a Notice of Appeal out of time. The power to entertain that prayer is found in **section 7 of the Appellant Jurisdiction Act, Cap 9**. That section provides:

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such

notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

8. The definition Section of Cap 9 defines judgment to include decree, order, sentence and decision. It follows that the orders made by the Ruling of **18th May 2017**, which orders the 1st defendant wishes to challenge, are covered under Section 7 above.
9. One would ask: why did it take the 1st defendant more than one year to seek leave to file Notice of Appeal. The answer I obtained from the learned counsel for the 1st defendant was that since this court had reviewed the Ruling of **18th May 2017** the 1st defendant did not until that review as dismissed by the court of appeal, need to appeal against the Ruling of **18th May 2017**.
10. My reading and understanding of **Section 7 of Cap 9** is that this court is not required to consider the merits or demerits of the proposed appeal in entertaining an application to appeal out of time. The court however, under that section, does have discretion whether to grant the leave sought. That discretion would be exercised, in my view, by considering whether the application had been filed timerously and if not whether there was explanation for such delay. I however need to add that that is not the only consideration this court has to take into account. In the case **MWANGI VS KENYA AIRWAYS LTD [2003] KLR 486** the Court of Appeal made a finding that in granting extension to file an appeal out of time the factors the court would take into account are not exhaustive.
11. The 1st defendant explanation for failing to file appeal in time is in my view reasonable explanation. The court is of the view that leave as sought should be granted.
12. The 1st defendant further prayed for stay of execution of the orders made on **18th May 2017**.
13. Stay of execution pending appeal is governed by **Order 42 Rule 6(2) of the Civil Procedure Rules**. Under that Rule the 1st defendant was required to show he would suffer substantial loss if stay was not granted; that the application was brought without unreasonable delay; and such security as ordered by the court be provided.
14. The 1st defendant explained that it would suffer substantial loss in business if the plaintiff took possessions of the bins in its premises and in its client’s premises.
15. On delay 1st defendant explained the delay in making this application which is the same explanation it gave in respect to its prayer for leave to file appeal out of time. That explanation as stated before is reasonable.
16. The issue before court is the plaintiff’s claim that the defendants have infringed its patent. It is on that basis the court granted plaintiff permission to access the 1st defendant and its client’s premises. Because the subject matter, if eventually proved to the court, will lead to financial loss to the plaintiff this court will require, as a condition for stay of execution, the 1st defendant to provide security.
17. The costs of the application dated **28th November 2018** will, in any case, be borne by the 1st defendant because, although I have excused the delay in seeking the orders sought, therein, the 1st defendant did delay in approaching the court.
18. The following are the orders of this court in respect to the Notice of Motion dated **28th November, 2018**:

- a. The 1st defendant is hereby granted leave to file a Notice of Appeal within 7 days from this date hereof.***
- b. Stay of execution of the orders of 18th May 2017 is granted pending the proposed appeal on condition that the 1st defendant does either deposit into court Ksh 50 million or provide a Bank guarantee of that amount within 7 days from this date hereof. Failure to make the deposit or provide a Bank guarantee as ordered the stay of execution shall lapse.***
- c. The costs of the Notice of Motion dated 28th November 2018 are awarded to the Plaintiff to be paid by the 1st defendant.***

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of December, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE