



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO 79 OF 2016**

**NEW ORIGINAL INVESTMENTS COMPANY**

**LIMITED.....APPLICANT**

**VERSUS**

**BERNARD KIMATU MUIA.....RESPONDENT**

**RULING**

**The Application**

Judgment was delivered in favour of the Respondent on 16<sup>th</sup> June 2016 for damages of Kshs 2,328,023/= in Tawa SRMCC No 40 of 2015. On 30<sup>th</sup> September 2016 the Applicant filed a Notice of Motion of the same date seeking orders that the Court extends the time for filing and lodging an appeal in respect of the said judgment and the already filed Memorandum of Appeal be deemed to be properly on record; and for a stay of execution of the judgment/decree in Tawa SRMCC No 40 of 2015 pending the hearing and determination of the appeal.

The application is premised on the grounds that the Applicant is aggrieved by the judgment of the trial and has preferred an appeal which raises serious triable issues. Further, that there is a high likelihood that execution may issue at any time, and the Applicant stands to suffer irreparable harm if the orders sought are not granted. The Applicant stated that it is ready to deposit half of the sum as security and abide with any other directions.

It was further stated in a supporting affidavit sworn on 30<sup>th</sup> September 2015 by Dennis Munywoki, a Manager of the Applicant, that the parties had agreed to compromise and settle the matter in the mode of installments, but that the decree holder proceeded to execute despite this arrangement. Further, that the instructions to appeal were received in their advocate's office on 11<sup>th</sup> August 2016 and the Memorandum of Appeal filed on 12<sup>th</sup> August 2016, almost thirty days after the date of lodging an appeal had lapsed. Lastly, that the delay is not inordinate and would not cause the Respondent any prejudice.

**The Response**

The Respondent opposed the Applicant's application in a replying affidavit he swore on 10<sup>th</sup> October 2016. According to the Respondent, there is no valid appeal pending before this Court as the appeal was preferred two months after the judgment in the trial Court without leave being granted, and that there has been inordinate delay between the date of delivery of the said judgment and the filing of the instant application which has not been explained by the Applicant. Further, that execution in this matter has already taken place after the Applicant was granted stay of 30 days, a proclamation notice issued and the

proclaimed property collected by the auctioneers.

On 25<sup>th</sup> October 2016 the parties subsequently filed a consent in Court dated 21<sup>st</sup> October 2016 wherein it was agreed by consent that there be a stay of execution of the lower court judgment pending the hearing and disposal of the instant application, on the condition that the sum of Kshs 1,418,388.40 being half of the decretal sum be paid to Mulu & Company Advocates, the Respondents Advocates, and the remaining balance of Kshs 1,418,388.40 be deposited in a joint interest earning account in the name of the Advocates for the Respondent and Applicant. This consent was adopted as an order of this Court on 2<sup>nd</sup> November 2016.

### **The Determination**

I have read and carefully considered the pleadings and submissions filed. The two outstanding issues to be determined are whether the Court should exercise its discretion in favour of the Applicant and grant leave to appeal out of time, and if so, whether the judgment delivered in Tawa SRMCC No 40 of 20151 on 30<sup>th</sup> June 2015 should be stayed pending the hearing of the appeal.

The Applicant's Advocates, Lesinko Njoroge & Gathogo Advocates filed submissions dated 22<sup>nd</sup> November 2016, wherein reliance was placed on the decision in **Edith Gichugu Koine vs Stephen Njagi Thoithi (2014) e KLR** for the position that the application was brought without undue delay, no prejudice will be occasioned to the Respondent as the Applicant has already provided security, and that the Applicant has an arguable appeal. Further, that the circumstances set out in Order 42 Rule 6 of the Civil Procedure Rules of substantial loss, no unreasonable delay, and security have been shown by the Applicant.

Mulu & Company Advocates for the Respondent filed submissions dated 24<sup>th</sup> January 2017 wherein it was contended that the Applicant had not established good and sufficient cause for not filing the appeal in time, and reliance was placed in this regard on the decisions in **Alexander Muli Ngumbi & Anor vs Rose Mukai Kalu, Misc Civ App No 110 of 2015** and **Jachris Investments (K) Ltd vs Mary Wandu alias Mary Njeri Waithaka, Misc Civ pp No 393 of 2014**. In addition that the Applicant had not shown what substantial loss he stands to suffer.

The law as regards the filing of appeals in the High Court is found in section 79G of the Civil Procedure Act which provides as follows:

**“ 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.”**

The grant of leave to file an appeal out of time is a matter of judicial discretion, which principle was espoused in the case of **Machira & Company Advocates vs Mwangi & Another ,(2002) e KLR** and expounded in **Kenya Shell Ltd vs Kobil Petroleum Ltd, (2006) 2 EA 132**. The Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat – vs – IEBC & 7 Others, (2014) eKLR** laid down the principles for extension of time for filing an appeal as follows:

- 1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

- 3) Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis;
- 4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- 5) Whether there will be any prejudice suffered by the respondent if the extension is granted
- 6) Whether the application has been brought without undue delay; and
- 7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

The Applicants' main reason for the delay in filing his appeal is that they were exploring a settlement with the Respondent as to the payment of the decretal sum. I note that the Respondent did not dispute this averment. This Court therefore finds this reason for the delay to be credible. In addition, I note that the instant application was eventually filed on 29<sup>th</sup> September 2015, and I do not find the delay of three months in filing the application inordinate. I will therefore allow the Applicant's prayer for leave to appeal out of time for the foregoing reasons.

On the second issue, stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

**“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.**

**(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.”**

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

In the present application, this Court has found the delay in filling the application not to have been inordinate in the foregoing. On the fulfillment of the second condition, the Applicant has pleaded that the decretal sum of Kshs 2,836,776.80 is a colossal sum, and the Respondent has not produced any material evidence that he may be able to refund the decretal sum if the appeal succeeds. As the decretal sum due is not contested by the Respondent, I agree that this is sufficient evidence of substantial loss, and I am in this regard guided by the position as stated by the Court of Appeal in **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike**, Nrb CA Civil Application No 238 of 2005 where it was held as follows:

*“The court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge see for example Section 112 of the Evidence Act Cap 80 Laws of Kenya.”*

Lastly, on the third condition, the Applicant did affirm that he is willing to furnish security for satisfaction of the decree. This Court is also persuaded that the Respondent will not suffer prejudice as his Advocate has been paid half of the decretal sum, and since security for the balance has been provided for. The interests of the Applicant in pursuing their appeal ought also to be safeguarded in the circumstances.

Accordingly, the orders that commend themselves to me arising from the foregoing, is that the Applicant’s Notice of Motion dated 30<sup>th</sup> September 2016 is allowed on the following terms:

1. The Applicant be and is hereby granted leave to file and serve his appeal out of time within 14 days from the date of this ruling.
2. There shall be a stay of execution of the judgment and decree in Tawa SRMCC No 40 of 2015 and all consequential orders arising therefrom pending the hearing and determination of the Applicant’s appeal, only on condition that the sum of Kshs 1,418,388.40 being half of the decretal sum already deposited with Mulu & Company Advocates shall be paid to the Respondent forthwith, and the remaining balance of Kshs 1,418,388.40 already deposited in a joint interest earning account in the name of the Advocates for the Respondent and Advocates for the Applicant on record shall continue to be so deposited.
3. The costs of the Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21<sup>st</sup> day of March 2017.

**P. NYAMWEYA**

**JUDGE**