REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 722 OF 2016

G4S KENYA LIMITED ....APPLICANT

VERSUS

AMBER ENTERPRISES LIMITED...RESPONDENT

RULING

1. The application dated 30th November, 2016 principally seeks orders that the time for filing the appeal herein be enlarged and the memorandum of appeal filed herein be deemed as having been properly filed.

2. Secondly, that pending the hearing and determination of the Appellant's appeal there be a stay of execution of the judgment delivered by Honourable Mr. D. Mburu, Principal Magistrate on 14th October, 2016 in Milimani CMCC No. 1175 of 2014.

3. The application is predicated on the grounds stated in the application and is supported by the affidavit sworn by the Applicant's Employee Relations Manager, Boniface Ngungu. It is stated that judgment was delivered in the lower court on 14th October, 2016 for the sum of Ksh.1,597,600.45 together with interest and costs. That the Applicant did not receive any notice of the judgment. That following inquiries made at the registry, the Applicant's counsel on 2nd November, 2016 received a letter informing them that the judgment was delivered on 14th October, 2016. Upon receiving a copy of the judgment, the Applicant was aggrieved by the same and filed the memorandum of appeal and the instant application.

4. The delay in filing the appeal is blamed on the failure to receive the notice of delivery of judgment. It is stated that the judgment had first to be sent to the Applicant's in house lawyers who are based in South Africa. According to the application the appeal is arguable and has high chances of success. The Applicant is apprehensive that unless an order of stay of execution is granted, it stands to suffer substantial loss as the Respondent has no assets that are known to the Applicant. The Applicant is willing to furnish security for the due performance of the decree.

5. In opposition to the application, the Respondent filed a replying affidavit and grounds of opposition. It is stated that on 21st October, 2014 the court wrote to the parties and informed them of the delivery of the judgment. That on 3rd November, 2016 the Applicant wrote to the court and requested for a copy of the judgment but it was not until 1st December, 2016 that the instant application was filed. The Respondent stated that the application herein was filed after inordinate delay and stated that the application ought to have been filed in the lower court first as the court of first instance. That the memorandum of appeal filed herein ought to have been annexed as a draft to the supporting affidavit to the application and first seek

leave to file the appeal out of time. The Respondent accused the Applicant of tactical delay herein as the application was served after two weeks of obtaining the *exparte* orders and that no certified copies of the proceedings and judgment have been applied for yet.

6. It is further deponed that the Respondent Company is well established with over 25 years experience and more than 30 million stocks in trade and can comfortably refund the decretal sum. The Respondent's view of the application is that it is misconceived, vexatious and an abuse of the court process and that the same is means to delay the Respondent from enjoying the fruits of it's judgment.

7. During the hearing of the application, the parties opted to file written submissions. I have considered the said submissions.

8. Section 79G of the Civil Procedure Act provides that:

> **"Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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."**
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> (See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

9. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

> **"No order for stay of execution shall be made under sub-rule (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."**

10. Sufficient cause is established if the conditions set out in Order 42 rule 6(2) are met. (See for example the following persuasive authorities: **Tabro Transporters Ltd v Absalum Dova [2012] eKLR, Wachira Karani v Bildad Wachira [2016] eKLR**).

11. The judgment the subject of the application was delivered on 14th October, 2016. The application under consideration was filed on 1st December, 2016. The delay of about two weeks is not inordinate and has been explained.

12. On substantial loss, the fear of imminent execution is not misplaced. Execution would render the appeal nugatory. As stated by the Court of Appeal in the case of **Kenya Shell limited vs Kibiru (1986) KLR:**

> **"Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented."**

13. The Respondent's averments in respect of his financial resources are not supported by any documentary evidence. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another**:

> **"This 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, Chapter 80 Laws of Kenya."

14. On the chances of appeal succeeding, under Order 42 Rule 6(2) of the Civil Procedure Rules, the applicant is seeking orders of stay pending appeal from the subordinate court to the High Court. The applicant is not required to prove that it has an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98 – Maritha Njeri Wanyoike & 3 others vs Peter Machewa Mwangi & 5 others; Bake 'N' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR**).

15. The applicant has expressed it's readiness to deposit security for the due performance of the decree.

16. To balance the interests of both parties herein, I allow the application on condition that the Applicant deposits the decretal sum in a joint interest earning bank account of the counsels for both parties herein or in court within 30 days from the date hereof. In default the application stands dismissed. Costs of this application in cause. The appeal is hereby deemed as duly filed.

Date, signed and delivered at Nairobi this 27th day of April, 2017

B. THURANIRA JADEN

JUDGE