



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 432 OF 2015

VEKARIA CONSTRUCTION COMPANY LTD.....PLAINTIFF/RESPONDENT

VERSUS

OCCIDENTAL INSURANCE COMPANY LTD.....DEFENDANT/APPLICANT

RULING

1. The application dated 15th December, 2016 principally seeks orders that this Honourable court do extend the time within which the Defendant/Applicant can lodge its Notice of appeal.
2. Secondly, that there be a stay of execution of the ruling delivered on 29th November, 2016, and any consequential decree there on pending the hearing and determination of the defendant/Applicant's appeal.
3. The application is predicated on the grounds stated in the body of the application and is supported by the affidavit sworn by Bernard O. Ayuko, the Applicant's head of Legal Department. The delay in filing the Notice of Appeal is blamed on the unavailability of the court file. According to the Applicant, the registry managed to trace the court file on 14th December, 2016. By then the time to lodge the Notice of Appeal had lapsed.
4. It is stated that the intended appeal is arguable with high chances of success. That the Applicant is apprehensive that the Respondent is about to commence execution proceedings to recover the decretal sum of Ksh.3,351,170/=. That the appeal will be rendered nugatory. That the Applicant will suffer substantial loss as the Respondent's financial standing is unknown. It is further averred that the Respondent has been unable to pay the decretal sum in **HCCA No. 278 of 2015 Paul Makatu & Vekaria Construction Ltd v Quarrant Services Ltd**.
5. The Applicant is ready to provide security for the due performance of the decree.
6. The application is opposed. It is stated in the replying affidavit that the Respondent is a successful construction company with assets that run into hundreds of millions of shillings and is capable of refunding the decretal sum if the intended appeal is successful.
7. The Applicant filed an affidavit in reply to the Respondent's averments. It is stated that there are no annexures e.g. Log books, Title Deeds etc. in proof of the Respondent's ability to refund the decretal sum. It is further stated that no documents have been exhibited herein to confirm the payment in the case of **Paul Makatu & Vekaria Construction Ltd v Quarrant Services Ltd**. The Applicant prayed that the decretal sum herein be secured by depositing the same in an interest earning joint bank account in the

names of the advocates for both parties.

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

9. Section 7 of the Appellate Jurisdiction Act Cap 9 Law of Kenya provides as follows:

“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.”

10. The ruling the subject of the appeal was delivered on 29th November, 2016. The Applicant has exhibited a letter to the court dated 13th December, 2016 requesting for the file. The letter has a court stamp for 14th December, 2016. The application at hand was filed on 16th December, 2016. The delay is not inordinate and has been explained to the satisfaction of the court.

11. The Applicant is apprehensive that in the event that the appeal is successful, it will suffer substantial loss if the Respondent is not able to refund the decretal sum. Although the Respondent has stated that it's a company worth millions of shillings, no documentary evidence has been brought before this court to show the Respondent's means.

12. As stated by the Court of Appeal in the case of **Wangethi Mwangi v Hon. Amb. Chirau Ali Mwakere CA Nbi.353/2009**.

“It is plain from the grounds set forth in the draft memorandum of appeal that the applicants have asked the appellate court to interfere with the awards of damages and there is possibility that the appellate court may either decline or reduce the awards considerably. In the event of the former there might be a long delay in recovering from the respondent the decretal sum as there are so many imponderables in the sale of the respondent's land which forms the bulk of his assets. It is obvious therefore that in such a likely eventuality, the applicant might be greatly inconvenienced. The balance of convenience is definitely in favour of the applicants, we would think so.”

13. The Applicant has offered security for the due performance of the decree. The Applicant has thus met the requirements set out under Order 42 rule 6.

14. On the chances of success, the appeal is arguable.

15. To balance the interest of the parties herein, I allow the application on condition that the decretal sum be deposited in a joint interest earning bank account of the counsels for the parties herein within 30 days from the date hereof. In default the application stands dismissed. The appeal to be filed within 14 days from the date hereof.

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

B. THURANIRA JADEN

JUDGE