



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL NO. 522 OF 2015

KENAFRIC INDUSTRIES LIMITED.....APPLICANT

VERSUS

SAMUEL OCHIENG'OKETCH.....RESPONDENT

RULING

1. The application dated 25th November, 2016 seeks orders that there be a stay of execution of the judgment and decree entered against the Applicant in Nairobi CMCC No. 3924 of 2010 – Samuel Ochieng' Oketch v Kenafric Industries Limited on 17th July, 2015 pending the hearing and determination of the intended Appeal.
2. Secondly, the application seeks orders for the enlargement of time within which the Applicant may prefer an appeal against the judgment delivered on 17th July, 2015.
3. The application is based on the grounds stated in the application and is supported by the affidavit of Paul Kariba, a legal officer with APA Insurance Company Ltd, the Applicant's insurers. It is stated that the judgment of the lower court was delivered on 17th July, 2015. The delay in instructing the Advocate to file the appeal is blamed on the withdrawal of the instructions from the Advocate by the Insurance Company on the mistaken belief that the Applicant did not have the relevant insurance cover at the material time. That thereafter the Applicant provided the documents that were missing from the insurance company's file and the insurance company instructed the Advocates to appeal. By then the time within which to appeal had lapsed. It is further stated that the Respondent has already proclaimed the Applicant's goods through their auctioneers, Kiriyu Merchants. The Applicant is willing to furnish security for the due performance of the decree. According to the Applicant, the intended appeal has a probability of success.
4. The application is opposed. It is stated in the replying affidavit that the delay in bringing this application is inordinate. That the explanation given for the delay is not satisfactory. The Respondent's position is that he is entitled to the fruits of his judgment and that the application is an after thought and a delaying tactic.
5. During the hearing of the application, the parties opted to file written submissions. I have considered the said submissions.
6. 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 –

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

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.”

7. Order 22 Rule 22 (1) of the Civil Procedure Rules provides as follows:

“22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof,

for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

8. 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**).

9. 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.”

(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)

10. The court therefore has the discretion to extend time within which to file an appeal. As stated by the Court of Appeal in the case of **Aviation Cargo Limited v St. Mark Freight Services Limited [2014] eKLR**:

“...whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”

11. On the question of substantial loss, the Applicant has not said anything that would make this court to conclude that substantial loss would be suffered. There are no allegations that the Respondent is not capable of refunding the decretal sum in the event that the appeal is successful. There are also no allegations of any irregularities in the execution process.

12. There was a delay of over four (4) months in filing the instant application. The explanation given for the delay on the part of the Applicant's insurers does not explain what steps the Applicant took to secure his interest in the meantime. The Applicant had the responsibility of following up on his case, the position of his insurers and it's advocates notwithstanding. There is also no reason given why it took the Applicant such a long time to forward the insurance documents to his insurers. The explanation for the delay is not satisfactory.

13. The Applicant is willing to deposit security for the due performance of the decree. Although the Applicant has failed to meet some of the conditions for the grant of stay, the Applicant has the undoubted right of appeal while the Applicant is entitled to enjoy the fruits of his judgment. The court has to balance the interests of both parties.

14. With the foregoing, I allow the application on condition that the Applicant do pay the Respondent 50% of the decretal sum and deposit the 50% balance in a joint interest earning bank account of both counsels herein within 30 days from the date hereof costs in cause.

Dated, signed and delivered at Nairobi this 3rd day of August, 2017

B. THURANIRA JADEN

JUDGE