



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

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 37 OF 2017**

**SHREEJI ENTERPRISES (K) LIMITED.....PLAINTIFF**

**VERSUS**

**ABERDARE STEEL & HARDWARE LTD.....DEFENDANT**

**RULING**

1. This is a Motion. It is for leave to appeal and for stay of execution.
2. The Defendant seeks leave to appeal against my decision of 19 May 2017 which struck out the Defendant's statement of defence in this cause and entered judgment in favour of the Plaintiff with costs.
3. By its motion dated 6<sup>th</sup> April 2017, the Plaintiff had sought to have the Defendant's Statement of Defence struck out and judgment entered. Having heard both the Plaintiff's counsel and the Defendant's counsel on 10 May 2017, I reserved my decision. On 19 May 2017, I delivered the ruling entering judgment as prayed for the Plaintiff. I refused to condone the defense. I held the view that the Defence statement raised no bona fide triable issue. I further held that the defence was simply evasive, bare and obviously unwinnable.
4. In its application for leave to appeal, the Defendant persists with the argument that it had an arguable defence and thus its appeal is also arguable. Counsel for the Defendant added that when the ruling was delivered on 19 May 2017, Counsel was absent from court and the Defendant only became aware of the ruling after the Plaintiff moved to attach the Defendant's assets in execution of the decree. Counsel submitted that as soon as the Defendant knew of the ruling on 19 June 2017, it quickly moved to court and also filed a Notice of Appeal. The record reveals that the notice of appeal was filed on 21 June 2017.
5. The Plaintiff opposed the application. Through a Replying Affidavit sworn by Dhaval Soni on 27 June 2017, the Plaintiff maintained that the Defendant was only employing delaying tactics having deliberately failed to show up on the day the ruling was delivered. Mr Muruingi , the learned counsel for the Plaintiff, urged the court not to assist the Defendant who had demonstrated indolence.
6. On the question as to whether the Defendant was entitled to an order of stay of execution pending appeal, counsel for the Plaintiff submitted that the Defendant had not satisfied the requirements outlined under **Order 42 Rule 2 of the Civil Procedure Rules**.
7. The Defendant has filed a Notice of Appeal. It was filed outside the prescribed time. It was filed on 21 June 2017, yet the ruling sought to be appealed against was delivered on 19 May 2017. The Notice of Appeal was some odd 17 or so days late: **see Rule 75(2) of the Court of Appeal Rules**.

8. The Defendant submitted that it only became aware of the ruling and decision on or about 19 June 2017. It is true that the Defendant was not in court on the material day when the ruling was delivered. I doubt the Defendant was aware of the date, the ruling having been rescheduled from 15 May 2017 to 19 May 2017. The Defendant does not however seek condonation for the late filing. The Defendant has also not sought to prompt this court's discretion to extend time under **s.7 of the Appellate Jurisdiction Act (Cap 9) Laws of Kenya**. The Defendant only seeks leave to appeal.

9. The application leading to the now impugned ruling was an Order 2 Rule 15 application. It sought to have the defence statement struck out for not disclosing a reasonable cause of defence. Under Section 75 of the Civil Procedure Act (Cap 21) as read together with Order 43 Rule 1 of the Civil Procedure Rules, orders made under Order 2 of the Civil Procedure Rules are appealable as of right. No leave of the court is necessary.

10. I need not grant the Defendant any leave. What the Defendant truly needed was an order condoning the late filing of the Notice of Appeal. Alternatively, the Defendant needed an order to allow the Defendant to file its appeal out of time. Neither order has been sought.

11. As far as I know, the position in law is that a Notice of Appeal filed out of time and without the leave of the court or prior extension of time is a nullity. It may not be salvaged. The consequent result is that the current Notice of Appeal filed by the Defendant on 21 June 2017 is a nullity.

12. It brings me to the prayer for stay of execution.

13. An application for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules may only lie if there is on record a valid Notice of Appeal duly filed and served: **see Rule 6(4)**. I have found that the Notice of Appeal filed herein on 21 June 2017 is a nullity.

14. I consequently must also return the verdict that there is, in my view, no appeal upon which an application for stay of execution may be pegged pursuant to Order 42 Rule 6 of the Civil Procedure Rules. I thus need not consider the merits of the prayer for stay of execution.

15. In the result, I dismiss the application dated 21 June 2017. I however make no order as to costs. Orders accordingly.

**Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of September, 2017.**

***J.L.ONGUTO***

**JUDGE**