



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 251 OF 2012

BIG ROAD ENTERPRISES.....PLAINTIFF

VERSUS

DHL GLOBAL FORWARDING (K) LIMITED.....DEFENDANT

RULING

[1] Before the Court for determination is the Notice of Motion dated **12 June 2017**. It was filed herein by the Plaintiff pursuant to **Sections 1A, 1B, 3, 3A, 63(e) and 95** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 42 Rule 6** and **Order 51 Rule 1** of the **Civil Procedure Rules. Section 7** of the **Appellate Jurisdiction Act** was also cited as one of the enabling provisions in support of the Orders that:

[a] The application be certified urgent and be heard ex-parte in the first instance; (spent)

[b] The Court be pleased to extend the time for filing and serving the Notice of Appeal against the decision of the Court made herein on **12 April 2017** in respect of the Counterclaim;

[c] The Court be pleased to stay the execution of the Judgment and any other consequential orders of the Court and issue an Order of Stay in respect of its Order emanating from the Judgment of **12 April 2017**, more specifically Judgment and Orders allowing the Counterclaim, and any consequential orders that may be issued pending the hearing and determination of the application; (spent)

[d] The Court be pleased to stay the execution of any other consequential orders emanating from the Judgment of **12 April 2017**, more specifically Judgment and Orders allowing the Counterclaim, and any consequential orders that may be issued pending the hearing and determination of the intended Appeal;

[e] The Court be pleased to extend the time for making an application for leave to appeal against the Judgment made on **12 April 2017** in respect of the Counterclaim;

[f] The Court be pleased to grant leave to the Plaintiff to appeal against its Judgment made on **12 April 2017** in respect to the Counterclaim;

[g] The costs of the application be provided for.

[2] The application was supported by the two affidavits annexed thereto, sworn by **Ian Richard Wachira, Advocate**, and **Ismail Abdukadir Hassan**. It was deponed, in the affidavit of **Mr. Wachira** that the firm of **Taib A. Taib Advocates**, which is on record for the Plaintiff only became aware of the Judgment of **12 April 2017** when it received the letter dated **2 May 2017** from the Defendant's Counsel on **4 May 2017**; and that it was not until **30 May 2017** that Counsel for the Plaintiff was able to obtain a copy of the Judgment. According to **Mr. Wachira**, they appeared before **Ng'etich, J.** on **7 April 2017** for delivery of the Judgment but were advised that the same was not ready and would be delivered on **21 April 2017**. On the **21 April 2017** they were again advised that the Judgment would be delivered by the Trial Judge on **19 May 2017** upon resuming duty from leave.

[3] It was thus the averment of **Mr. Wachira** that they were patiently waiting for **19 May 2017** only to learn from the Defence Counsel that Judgment had in fact been delivered by **Ng'etich, J.** on **12 April 2017**; yet when they attended Court on **21 April 2017** no such information was given to them; but instead were advised to attend court on **19 May 2017** for Judgment. He added that, upon receiving the letter from the Defendant's Counsel, they wrote to the Deputy Registrar on the aforesaid matters but had not received any response by the time the application was made. It was thus the contention of Counsel that it was only just and proper that the application be allowed and orders issued as prayed.

[4] The averments of **Mr. Wachira** were reiterated by the Plaintiff's General Manager, **Mr. Ismail Abdukadir Hassan**, in his affidavit sworn on **8 June 2017**. He added that there was a real and imminent risk of the Defendant executing against the Plaintiff, which would end up crippling the Plaintiff as its working capital would be all but drained. **Mr. Hassan** averred that the Plaintiff intends to appeal the Judgment of **12 April 2017**, a process that would be rendered academic should the Plaintiff be subjected to execution, whose proceeds would be due to a third party over whom the Plaintiff has no control, and who bears no obligation or duty to reimburse the said sums to the Plaintiff. Thus, **Mr. Hassan** deposed that, while the Plaintiff stands to suffer irreparable and irreversible harm should the orders sought not be granted, the Defendant stands to suffer no prejudice. He added that the Plaintiff is prepared and willing to provide such security as the Court may order, as a condition for granting stay of execution pending appeal.

[5] The Defendant opposed the Plaintiff's application vide its Replying Affidavit dated **3 July 2017** sworn by **Mary Mbirira** contending that the Plaintiff has come to Court late in the day; that there is no sufficient ground to warrant the issuance of the Order of Stay as sought; and that the Plaintiff stands to suffer no prejudice should the Order of Stay not be granted as the application is just a ploy to delay and/or deny the Defendant the fruits of their Judgment.

[6] The application was canvassed by way of written submissions, pursuant to the directions issued herein on **19 June 2017**. In its written submissions filed on **14 July 2017**, the Plaintiff contended that **Order 43 Rule 1(3)** of the **Civil Procedure Rules** recognizes that an application for leave may be made orally at the time when the order is made or within 14 days of the date of such order. However, by the time the Judgment was brought to its attention, the prescribed time had already lapsed. Thus it was submitted that Counsel was neither indolent, nor was this a case of a party sleeping on its rights; but rather a situation where conflicting positions as respects the date reserved for the delivery of the Judgment were communicated to the parties. Counsel also relied on **Section 7** of the **Appellate Jurisdiction Act** and **Section 95** of the **Civil Procedure Act** as being the provisions that give the Court the discretion to enlarge time as and when necessary. The Plaintiff relied on the case of **Edward Njane Nganga & Another vs. Damaris Wanjiku Kamau & Another [2016] eKLR** and **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR** in support of its argument that the Court does have the jurisdiction and the discretion to grant the extension of time as sought.

[7] With regard to the stay component of the application, the Plaintiff relied on **Order 42 Rule 6** of the **Civil Procedure Rules** in submitting that the Plaintiff had demonstrated that it will suffer substantial loss; that the application had been brought without unreasonable delay; and that it is ready to furnish security for the due performance of the decree. Additionally, on the authority of the cases of **Sally Nyakio Thuo vs. Douglas Ojwang & Another [2007] eKLR** and **Patrick Kalava Kulamba & Another vs. Philip Kamosu and Roda Ndanu Philip (suing as the Legal Representative of the Estate of Jackline**

Ndinda Philip, deceased [2016] eKLR, the Plaintiff urged the Court to note that the decretal sum on the Counterclaim is due to a third party, **IT4Africa**; and that once paid would be out of the reach of the Plaintiff should it be successful on appeal. It was accordingly submitted by Counsel for the Plaintiff that the Plaintiff risks being reduced to a 'paper victor' in the Appeal, and would undoubtedly be exposed to further delays and/or potential suits to recover the sums of the decree should execution ensue. The Court was accordingly urged to exercise its unfettered discretion judiciously by granting the prayers sought by the Plaintiff in the Notice of Motion dated **12 June 2017**.

[8] The Defendant's written submission were filed herein on **4 October 2017**. On extension of time for filing an appeal, the Defendant relied on the case of **Lucas Mwita Machera & Another vs. Gati Maroa Wagera & Another** [2017] eKLR wherein the Court of Appeal set out the principles governing the extension of time thus:

"...the Court has unfettered discretion to determine whether to extend time or not. This discretion should be exercised judiciously, and not capriciously. In adherence to the guiding principles, the Court should evaluate the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the court were to grant the extension sought..."

[9] It was the submission of the Defendant that the Plaintiff has failed to meet any of the abovementioned criteria, noting that it allegedly became aware of the Judgment on **4 May 2017** but did not file the instant application until **12 June 2017**. It was further submitted that the reasons given for the delay are neither excusable nor veritable, as the Plaintiff had not tendered any documents either in the form of a letter to the Deputy Registrar or a request for perusal of the court file prior to the date of the Defendant's letter dated **8 May 2017**. Additionally, it was the contention of the Defendant that it was incumbent upon the Plaintiff to demonstrate that there are chances of success on appeal; which, it was submitted, has not been done herein. Thus, it was the contention of the Defendant that the instant application is seemingly a dilatory tactic employed by the Plaintiff to keep it from enjoying the fruits of its judgment, in utter abuse of the process of the Court.

[10] On stay pending appeal, it was the submission of the Defendant that the Plaintiff has not met the threshold set out in **Order 42 rule 6(2) of the Civil Procedure Rules**. Reliance was placed on the cases of **James Wangalwa & Another vs. Agnes Naliaka Cheseto** [2012] eKLR and **Apar Industries Limited vs. Joe's Freighters Limited** [2015] eKLR by Counsel for the Defendant, in urging the Court to find that the Plaintiff has failed to demonstrate that it will suffer substantial loss if stay of execution is not granted. Thus, the Defendant argued that the Plaintiff, having failed to meet the applicable legal threshold, is not entitled to the orders for extension of time for filing the notice of appeal or stay pending appeal. The Defendant urged the Court to accordingly dismiss the application dated **12 July 2017** with costs.

[11] The Court has given due consideration to the application dated **12 June 2017**, the grounds relied on in support thereof as well as the respective affidavits and written submissions filed herein. The background of the application is not in dispute, namely, that following the hearing that was had on **27 June 2016** and **26 July 2016**, the Court rendered its Judgment on **12 April 2017**. The record of the proceedings of that day confirms that there was no appearance for the Plaintiff. It is now averred that the Plaintiff was not given notice of the delivery of Judgment on **12 April 2017**, hence it was unaware thereof until **4 May 2017**. The two letters attached to the Affidavit of **Ian Richard Wachira** and marked **Annexures "IRW001"** and **"IRW002"** confirm this posturing and support the Plaintiff's application for extension of time to file a Notice of Appeal as well as stay of execution pending appeal. Thus, since it was the contention of the Defence that the Plaintiff had notice of the date of Judgment, and that it is therefore not deserving of the Court's discretion, the twin issues that falls for my determination are whether the Plaintiff has met the threshold for extension of time for filing its Notice of Appeal; and whether the conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules** for stay of execution pending appeal have been satisfied by the Plaintiff.

[a] **On Extension of Time**

[12] Needless to say that the Court does have the requisite jurisdiction and the discretion to grant extension of time as sought herein. **Section 7 of the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya**, is explicit that:

"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."

[13] Similarly, **Order 50 Rule 6 of the Civil Procedure Rules, 2010** provides that:

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

[14] It is however trite that judicial discretion can only be exercised judiciously; not capriciously or whimsically. Thus, in Haywood vs. Cope [1958] 25 BEAV 140, Lord Romilly, MR expressed the view that:

"...the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so."

[15] Accordingly, in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others: SC Application No. 16 of 2014, the Supreme Court had occasion to consider the applicable principles in an application for extension of time; and had the following to say:

"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

- 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 time 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 respondents 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."

[16] The same principles were echoed by the Court of Appeal in **Lucas Mwita Machera & Another vs. Gati Maroa Wangera & Another [2017] eKLR**. Thus, with the said principles in mind, I have given consideration to the averments of the Plaintiff in its two Supporting Affidavits, the Replying Affidavit and the court record of the proceedings to date. There is no dispute that a period of about 38 days had elapsed by the time the instant application was filed, which the Defendant considered inordinate. It is also manifest that, whereas the Judgment was delivered on **12 April 2017**, and whereas the Plaintiff had 14 days to lodge a Notice of Appeal in accordance with **Rule 75(1) of the Court of Appeal Rules, 2010**, it did not do so.

[17] An explanation has been proffered by the Plaintiff for this state of affairs in the two affidavits filed in support of the application. In particular, it has been explained in the affidavit of **Mr. Wachira** that their firm was unaware of the date of **12 April 2017**, having been given the date of **19 May 2017** as the date when Judgment would be delivered; and that they only got to learn, on **4 May 2017**, that Judgment had in fact been delivered by **Ng'etich, J.** on **12 April 2017**. The letter in question, from Counsel for the Defendant, was exhibited herein as an annexure to the Supporting Affidavit. Those averments remain uncontroverted. Additionally, the Plaintiff averred that it wrote the letter dated **8 May 2017 (Annexure "IRW002")** to the Deputy Registrar, expressing its concerns about the anomaly about dates, and that it received no response by the time the application was made. That too, is an averment that has not been controverted herein. The same letter also shows that the Plaintiff requested to be furnished with a copy of the Judgment; and that this was not done swiftly enough. There being nothing to show that the Defendant would be prejudiced by the extension sought, I would find and hold that the Plaintiff has not only given a plausible explanation for the delay in filing a Notice of Appeal, but has also demonstrated that, in the circumstances, the instant application was filed without undue delay; and is therefore entitled to the discretion of the Court for extension of time as sought.

[b] On Stay Pending Appeal:

[18] **Order 42 Rule 6 of the Civil Procedure Rules** provides that:

"(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 thereof 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."

[19] Accordingly, it is imperative that the Court be convinced by the Plaintiff that:

[a] it will suffer substantial loss unless the order is made;

[b] the application has been made without unreasonable delay, and

[c] that such security as the court orders for the due performance of such decree has been given.

[20] The case of Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63, aptly elucidates the rationale for the conditions aforementioned thus:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.

[21] Thus, with a view of demonstrating that it stands to suffer **substantial loss** unless the order of stay is made, the Plaintiff's General Manager, **Mr. Ismail Abdukadir Hassan**, in his affidavit sworn on **8 June 2017** averred that there was a real and imminent risk of the Defendant executing against the Plaintiff, which would end up crippling the Plaintiff as its working capital would be all but drained; and that its intended appeal would be rendered purely academic should the Plaintiff be subjected to execution, given that the proceeds thereof are due to a third party, over whom the Plaintiff has no control. It was averred that the said third party bears no obligation or duty to reimburse the said sums to the Plaintiff. Thus, it was the contention of the Plaintiff that, while the Plaintiff stands to suffer irreparable and irreversible harm should the orders sought not be granted, the Defendant stands to suffer no prejudice, given that it is ready and willing to provide such security as the Court may order, as a condition for granting stay of execution pending appeal.

[22] At paragraph 23 of the Judgment dated **12 April 2017**, the Court found as a fact that:

"...the goods belonged to IT4Africa Kenya Limited. However, that the goods were consigned to the Defendant as a bailee, for the purpose of ensuring delivery to the importers, is not in question. The Bill of Lading confirms that the goods were dispatched from DHL Global Forwarding TAS AS, Istanbul, Turkey to Global Forwarding Kenya Ltd. Indeed it was the Defendant who sub-contracted the Plaintiff to transport the goods safely to the importers..."

[23] In the premises, the Plaintiff having put forward a plausible basis for its postulation that it stands to suffer substantial loss should execution issue and the funds be paid out to a third party, it was incumbent upon the Defendant to demonstrate that it would nevertheless be in a position to disgorge the funds. In National Industrial Credit Bank Ltd vs. Acuinans Francis Wasike Civil Application No. 238 of 2005, the Court of Appeal held as follows to underscore the aforementioned principle:

"...while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the 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 the 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."

[24] Accordingly, there being no rebuttal evidence to reassure the Court that the Defendant will be in a position to repay the decretal sums should it be called upon to do so, and having balanced the competing interests of the parties herein, it is my finding that the interests of justice would best be served by granting the Plaintiff's application for stay of execution pending appeal, on condition that security, in the form of a Bank Guarantee for **Kshs. 5,000,000/=** be provided by the Plaintiff within 14 days from the date hereof.

[25] I note that in **Prayers [5] and [6]** of the Plaintiff's application, it sought for extension of time to apply for leave to appeal, and leave to appeal, respectively. However, I take the view that such leave would only be necessary in respect of appeals falling under **Order 43** of the **Civil Procedure Rules**. An appeal from a Judgment or Decree of the Court arises as a matter of right pursuant to **Article 164(3)(a)** of

the **Constitution** and **Section 66** of the **Civil Procedure Act**. I would accordingly disallow those prayers granted that an extension of time pursuant to **Section 7** of the **Appellate Jurisdiction Act**, would automatically extend the time for the filing appeal, where this is otherwise conferred as a matter of right as aforementioned, by dint of **Rules 82 and 83** of the **Court of Appeal Rules**.

[26] Thus, in the result, the Plaintiff's Notice of Motion dated **12 June 2017**, is hereby allowed and Orders granted as follows:

[a] That time for filing and serving a Notice of Appeal in respect of the Judgment of the Court made herein on **12 April 2017** in respect of the Counterclaim be and is hereby extended by 14 days from the date hereof;

[b] That an Order for Stay of the execution of the Judgment dated **12 April 2017** and any other consequential orders of the Court emanating from the Judgment, more specifically Judgment and Orders allowing the Counterclaim, and any consequential orders that may be issued therefrom, be and is hereby granted pending the hearing and determination of the intended Appeal, on condition that security, in the form of a Bank Guarantee for **Kshs. 5,000,000/=** be provided by the Plaintiff within 14 days from the date hereof. ;

[c] That the costs of the application be borne by the Plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER 2017

OLGA SEWE

JUDGE