



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. NO. 12 OF 2017

NEW BIBIRIONI INVESTMENTS LIMITED.....1ST APPLICANT

PRESTIGE MANAGEMENT VALUERS LIMITED.....2ND APPLICANT

CASH CROP AUCTIONEERS3RD APPLICANT

VERSUS

JOSEPH KANYI.....RESPONDENT

RULING

1. The application dated 9th January 2017 seeks orders that:

“(1) Spent

(2) That the 1st and 2nd Applicants be granted leave to lodge their Memorandum of Appeal and the Record of Appeal out of time against the Orders given on the 5th day of January 2016 by Hon. L. Kassan (Mr.) (SPM) in Milimani, CMCC No. 5020 of 2015.

(3) That the Memorandum of Appeal annexed at paragraph 8 in Peter Maina Karanja’s supporting affidavit filed herewith be admitted in a Civil Appeal at the High Court of Kenya at Nairobi Upon payment of the requisite court fees.

(4) That the execution of the Orders given by Hon. L., Kassan (Mr.) (SPM) in Milimani, CMCC No. 5020 of 2015 on 15th January 2016 and any other proceedings whatsoever arising therefrom and all consequential Orders be stayed pending the hearing and determination of the Applicants’ Appeal.

(5) That the costs of this application be awarded to the Applicants.”

2. The application is premised on the grounds stated in the application and is supported by the affidavit of Peter Maina Karanja, a director of the 2nd Applicant. It is stated that the 2nd Applicant is a managing agent of the 1st Applicant. It is further stated that the application dated 1st March 2016 in CMCC Nbi 5020/15 which sought orders to set aside or review the orders by Hon. L. Kassan SPM given on 15th January, 2016 was dismissed on 2nd November, 2016. The Applicants are dissatisfied with the said dismissal, hence the appeal herein. It is further stated that the Applicants are under threat of contempt of

court proceedings.

3. The application is opposed. It is stated in the replying affidavit that the Applicants are in disobedience of the orders issued by the Lower Court. That the Applicants' application for a review of the said orders was dismissed. That no valid reasons have been given to justify the extension of time within which to file an appeal and that the application has no merits.

4. The Applicants filed a further affidavit and denied having disobeyed the court orders. The Applicants contended that it is the Respondent who is in disobedience of the court orders as the Respondent has not deposited the rent arrears of Ksh.66,376/= in court.

5. The application was canvassed by way of written submissions. I have considered the said submissions.

6. 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)

7. 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.”

8. In the case at hand the ruling the subject of the appeal was delivered on 18th January, 2016. The Applicants sought orders to set aside or review the said ruling but the said application was dismissed on 2nd November, 2016. The instant application was filed on 11th January, 2017. That is a period of about one year from the date of the ruling sought to be appealed against and about two months and one week after the dismissal of the application seeking orders to set aside or review the judgment. Although the Applicants had a right to apply for the orders to set aside or review the earlier ruling, there is no satisfactory explanation for the delay in the filing of the instant application. In any event, the delay to be taken into account is the delay of about one year since the orders appealed from emanate from the ruling of 15th January, 2016.

9. In an execution for stay of execution, 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. As observed above, there was delay in the filing of the application.

11. On whether there Applicants will suffer substantial loss if stay is not granted, it is noted that the Applicants have averred in the further affidavit that they are not in contempt of court. Thus there is nothing to fear if the Respondent commences any contempt of court proceedings.

12. In the upshot, I find no merits in the application and dismiss the same with costs.

Date, signed and delivered at Nairobi this 23rd day of Nov., 2017

B. THURANIRAJADEN

JUDGE