REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPL. NO. 600 OF 2015

TIMWOOD PRODUCTS LIMITED …….....APPLICANT

VERSUS

KARACHIWALLA (NAIROBI) LIMITED.....RESPONDENT

RULING

1. By an Notice of Motion dated 24th December 2015, the applicant Timwood Products Limited filed an application seeking from this court orders :

a. Spent
b. Spent
c. That the court be pleased to grant the applicant leave to lodge its appeal against the judgment and decree of 5th October 2015 delivered by Honourable Mr Chesang(Senior Resident Magistrate) in Milimani CMCC 3522 of 2014, Karachiwalla (Nairobi) Limited V Timwood Products Limited, out of time.
d. That there be a stay of execution of the decree and judgment of 5th October 2015 and further proceedings in Milimani CM CC 3522 of 2014, Karachiwalla (Nairobi Limited Vs Timwood Products Limited, pending the determination of the applicant's intended appeal.
e. That costs be provided for.

2. The application is premised on the grounds that:

a. On 18th December 2015, the respondent proclaimed the applicant's core business goods pursuant to a decree in Milimani CM CC 3522 OF 2014, where judgment was delivered in the absence and without notice to the applicant's advocates.
b. That the applicant was not heard on its defence that it did not receive goods whose value formed the basis of the respondent's claim.
c. That the 30 days period within which to file an appeal has expired.
d. That the applicant wishes to appeal against the trial court's judgment and unless execution is stayed pending the hearing of the intended appeal, the respondent will proceed with execution which will cause substantial harm to the applicant and render the applicant's intended appeal nugatory.
e. That in the circumstances, it is just and fair that this application be certified as urgent and the orders sought in the interim be granted.

3. The application is brought under the provisions of Sections 1A, 3, 3A, 79G and 95 of the Civil

Procedure Act, Section 59 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya, Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law.

4. The said application is further supported by the affidavit of V.H.D. Bakrania, Director of the applicant sworn on 24th December 2015 deposing that the respondent's claim in the lower court for shs 504,600 was on account of goods allegedly collected by the applicant's agents using its vehicles but that there was no evidence that the applicant owned those motor vehicles. That the applicant denied the claim in its defence. That the applicant was never heard on its defence and that had the trial court heard the evidence in defence it would not have arrived at the conclusion that the applicant received the claimed goods. Further, that the applicant's counsel was not notified of the date of judgment hence it was delivered in its absence; and they only learnt of the judgment on 17th December 2015 after expiry of the time for filing of an appeal. That the applicant's goods were proclaimed on 18th December 2015 and it was given only 7 days to settle the claim. That the applicant is dissatisfied with the judgment and decree and that the intended appeal is meritorious; that the applicant will suffer substantial loss unless stay is granted; and that the applicant is willing to abide by any conditions for stay of execution that the court may give.

5. To the affidavit are annextures of the plaint, order of stay on a temporary basis and Notice of change advocates.

6. The application was opposed by the respondent who filed a replying affidavit sworn on 5th January 2016 by Sanjay Chiman Bhai Patel the director of the respondent Company. Mr Patel deposes that he actively participated in the hearing of the suit and gave evidence. That the applicants did not have witnesses on the hearing date and so a date for submissions was given for 4th September 2015 but that no submissions were filed by the applicants hence a date for judgment was set for 29th September 2015 at 9.00am. That on 29th September 2015 judgment was not ready and the trial magistrate deferred it to 5th October 2015 when the same was delivered and that had the applicant's advocates exercised due diligence and follow up, they would have known of the date of the judgment. That the letter of 17th December 2015 acknowledges that judgment was delivered on 5th October 2015 and their indebtedness to the respondent following the regular judgment. That the applicant is seeking to introduce new evidence regarding ownership of the motor vehicle yet it had deliberately failed to do so hence that new evidence cannot form the basis of this appeal. That these proceedings are subjudice and an afterthought, meant to deny the respondent its entitlement and dues upon successful litigation and finally that the intended appeal stands no reasonable chance of success; is made in bad faith and is an abuse of court process.

7. The applicant filed supplementary affidavit on 12th January 2016 sworn on 11th January 2015 by V.H.D. Bakirania deposing that the replying affidavit is incompetent for non compliance with the requirements for swearing of affidavits on behalf of corporations hence it should be struck out.

8. Further that the deponent was the sole witness who was locked out of the proceedings by the refusal of the trial court to grant an adjournment on account of an emergency that had held him in Mombasa when the matter came up for hearing on 6th August 2015. That the submissions were not filed on 4th September 2015 as that was the day the trial court had set for hearing of the application for leave to be heard on its defence. That their advocates tried to locate the court file without success as it could have been in custody of the trial magistrate for judgment and or decree thereby complicating their efforts in tracing the location and movement of the file at the registry and it was only located on 17th December 2015 at the execution of decree section. That had the process for drawing and extraction of decree been followed then the applicant's counsel could have been made aware of the judgment. That the failure to adduce evidence in the lower court was not deliberate but refusal by the trial court to grant an adjournment yet bona fide grounds had been advanced thereby denying the applicant its right to fair hearing and to exercise its right of appeal.

9. The parties' advocates canvassed the application by way of oral submissions on 19th January 2016. Mr Mituga submitted on behalf of the applicant whereas the respondent was represented by Mr Olonde who opposed the application vigorously.

10. The parties advocates s submissions echoed the grounds, supporting affidavit, supplementary affidavit and the replying affidavit which I have reproduced above.

11. Mr Mituga in addition submitted that the application was made without undue delay since the same was filed on 24th December 2015 after learning of the judgment on 17th December 2015. Further, that the appeal as intended is not frivolous. On the prayer for stay of execution of decree pending appeal It was submitted that the applicant was willing to deposit security for due performance of decree and that if stay is refused and execution proceeds the applicant stands to suffer as the attached goods form the core of the applicant's business hence the applicant's business would be grounded.

12. Mr Mituga relied on **High Court Miscellaneous Application 78/2015 [2015] e KLR Edward Kamau & Another V Hannah Mukui Gichuki** and Another wherein this court granted leave to the applicant to appeal out of time and also gave orders of stay of execution of decree pending appeal by balancing out two rights, that of appeal by the applicants and of enjoyment of a lawful judgment and not being discriminated for being of unknown financial means. He also relied on the Court of Appeal decision of **Abdirahman Abdi V Safi Petroleum Products Ltd & 6 Others CA Nairobi 173/2010 [2011] e KLR** where the Court of Appeal exercised its discretion to grant extension of time for filing of Notice of Appeal taking into account the overriding objective of civil litigation and found that delay of one day was excusable, to afford a constitutional right to a hearing by the applicant.

13. As stated earlier Mr Olonde counsel for the respondent vigorously opposed the applicant's application and relied entirely on the replying affidavit of his client's director filed on 6th January 2016. He submitted that if this court had the lower court record it would properly exercise its discretion to either grant or reject this application since the applicant was not being candid. That the trial court declined an adjournment after the applicant's counsel stated that he had no witness in court and that the trial court correctly exercised its discretion to reject an adjournment, which orders were never appealed against for such refusal to grant an adjournment. That the applicant never served upon the respondent's counsel an application to arrest the judgment in the trial court which Mr Olonde had just learnt of. That the applicant's counsel was aware of the date for judgment given as 29th September 2015 when the court deferred it to 5th October 2015 on which date the applicant's counsels did not attend court. Mr Olonde maintained the stance that had the applicant's counsel's been vigilant they would have followed up the issue of date for judgment from 29th September 2015 and known the judgment date and further that the fact of applying to arrest a judgment is a clear indication that they knew of the judgment date.

14. Further, Mr Olonde submitted that the applicant did not even file submissions and therefore the court relied on unrebutted evidence. Further, that there is no ownership of the blunders by the applicant's former advocates. Mr Olonde further maintained that the intended appeal has no chances of success and that albeit the court has the discretion to enlarge time for filing of an appeal, the material placed before the court in support of the application was not sufficient to warrant enlargement of time as the applicant seeks to introduce new evidence which it failed to adduce at the hearing. Mr Olonde urged the court to dismiss the application by the applicant with costs.

15. In a brief rejoinder, Mr Mituga submitted that his client did not wish to adduce new evidence but was denied a fair hearing and an opportunity for a fair hearing so they seek that opportunity which they lost on 4th September 2015.

16. I have carefully considered the application herein in line with the annextures, affidavits and the able rival submissions by both parties' advocates in support thereof and in opposition thereto. The issues for determination are two namely:

a. Whether the applicant has made out a case for grant of leave to file an appeal challenging judgment and decree of the lower court out of time; and
b. Whether the applicant has fulfilled conditions for the granting of stay of execution of decree pending hearing and determination of the intended appeal.

17. On the first issue of whether the applicant has made out a case for leave of this court to be granted to file an appeal out of time, the applicable law is Section 79 G of the Civil Procedure Ac which enact 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 a copy of the decree or order provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for not filing the appeal in time."***

18. In **Nicholas Kiptoo Arap Salat V IEBC & 7 Others SC Application** 16/**2014,** the Supreme Court of Kenya laid down some underlying principles that a court ought to consider in the exercise of discretion to extend time for filing an appeal out of time. The Court stated:

> ***"……the grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively, or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the appeal tribunal. The result of the exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses."***
>
> ***2. As Sir Thomas Bingham M.R. pointed out in Costellow V Somerset CC (supra) at page 956 C, times problems arise at the intersection of two principles, both salutary, neither absolute. ……..The first principle is that the Rules of court and the associated rules of practice, deserved in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met….." (Emphasis added).***
>
> ***The second principle is that:***
>
> ***"…….a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of cost cannot compensate……"***
>
> ***3. The approach indicated in these two principles is modified to the stage which the relevant proceedings have reached. If for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice, to the other party, justice will usually favour the action proceeding to a full trial on the merits.***
>
> ***The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine the case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court***

more strict about time limits on appeals. An extension may be refused even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings.

4. An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with it full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default."

19. The above holding can be summarized as folows:

i. 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;

1. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
2. As to whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis.
3. Whether there is a reasonable reason for the delay; the delay should be explained to the satisfaction of the court,
4. Whether there will be any prejudice to be suffered by the respondents if the extension is granted.
5. The application should have been brought without undue delay; and in certain cases, like election petition, public interest should be a consideration for extending time.

20. Applying the above principles to this case, the question is whether the applicant has shown good and sufficient cause for not filing the appeal in time. The applicant claims that it was not aware of the judgment and neither was its advocate notified of the dare of judgment and that it was awoken by the proclamation to attach its property.

21. Proceedings and record of the trial court has not been availed by any of the contending parties for this court's examination and or verification of the above allegations. However, the respondent submitted that when the judgment date was given for 29th September 2015 the applicant's counsel was in court. He then concedes that the applicant did not attend court on 29th September 2015 when the judgment was deferred to 5th October 2015 when the applicant's counsel also failed to attend court and that had they been diligent they would have followed up the issue from 29th September 2015 and known the judgment date of 5th October 2015. Further, that the fact that the applicant filed an application to arrest judgment is an indication that they knew of the judgment date. This court has not been shown the application to arrest that judgment and as to whether it was placed on the court file before or after 29th September 2015. That being the case, this court is inclined to give to the applicant the benefit of doubt that indeed, they were not aware of the judgment date, although it was their duty to enquire and know such date from the presiding magistrate.

22. This court, nonetheless agrees with the applicant that it is not clear how the decree and certificate of costs were drawn and sealed by the court without seeking for an approval of the adverse party as required by the Rules under Order 21 Rule 8 of the Civil procedure Rules which provide, material to this case:

1. **……**
2. ***Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall oppose it with or without amendment, or***

reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn in accordance with the judgment, shall sign and seal the decree accordingly.

3. ***If no approval of or disagreement with the draft decree is received with seven days after delivery thereof to the other parties, the Registrar on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.***
4. ***On any disagreement with the draft decree any party may file the draft decree marked as " for settlement" and the registrar shall thereupon list the same in chambers before the judge who heard the case or if he is not available, before any other judge and shall give notice thereof to the parties.***
5. ***The provision of Subrules 2, 3, and 4 shall apply to a subordinate court and reference to the registrar and judge in Subrules shall refer to magistrates.***
6. ***Any order, whether in the High Court or in the subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.***
7. **……..**

23. The above provisions obliged the plaintiff/decree holder in the lower court to prepare a draft decree, send it over to the defendants/ judgment debtor's advocates for approval. In the absence of such approval or an order by the court under Subrule 7 thereof approving a draft decree at the time of pronouncing the judgment in the suit, the "decree" thereof was irregular which irregularity can nonetheless be cured by following the procedure as stipulated in Subrules 1,2,3, and 4 of Order 21 Rule 8 of the Civil Procedure Rules.

24. As was espoused in the **Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others** (supra) case, the power to grant leave extending the period for filing of an appeal out of the statutory period is a discretionary one and granted on a case by case basis since it is not a matter of right. It therefore follows that a party applying for leave must satisfy the court such material upon which the discretion of the court may be exercised in their favour.

25. Indeed, it was the duty of the applicant or its advocate to follow up on the date of pronouncement of judgment even if no notice of such judgment date was given to the parties. It is upon them to be vigilant. In this case, I am satisfied that the applicant was not vigilant in knowing the judgment date otherwise nothing prevented them from knowing the date which was given on 29th September 2015 when judgment was deferred to 5th October 2015.

26. Nonetheless, the applicants having failed to attend court on 29th September 2015, It was upon the court or even the respondent's counsel, to notify them of the next date when judgment would be delivered. Neither the court nor the respondent's counsel notified the applicant of such subsequent date.

27. A judgment or order of the court gives rise to a new cause of action that can only be ventilated at the appellate stage. The right of appeal is a constitutional right which is the cornerstone of the rule of law. It would be a denial of access to justice if this court were, in the circumstances of this case to deny the applicant an opportunity to ventilate their grievances on appeal, which appeal as intended need not necessarily be meritorious but that it is arguable from the draft Memorandum of appeal annexed. It is not for this court at this stage to determine the merits of the intended appeal which the parties' respective advocates have endeavoured to demonstrate. There was indeed delay in filing the appeal but which delay was not inordinate from date of discovery of judgment and decree and which delay has been explained to the partial satisfaction of this court in that had the respondent's counsel submitted a draft decree for approval by the applicant's counsel, the applicant would not be claiming that it was ambushed by the proclamation. The fact of failure to notify the applicant of date of judgment after the judgment delivery aborted in the date that was given interpartes is sufficient explanation to justify an exercise of judicial discretion to extend the time within which the appeal should have been filed challenging the judgment and decree of the trial court.

28. In any event, the delay occasioned which as I have stated is not inordinate can still be sufficiently compensated by an award of costs. Further, It has not been shown by the respondent what amount of prejudice it will suffer if the application herein is allowed.

29. I reiterate my findings and holding in **Edward Kamau & Another V Hannah Mukui Gichuki & Another [2015] e KLR** wherein I cited with approval **Banco Arabe Espanol Vs Bank of Uganda [1999] 2 EA 22** where it was held that:

> ***" The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."***

30. Applying the above principles to this case, I would, in the spirit of according the applicant an opportunity to ventilate its grievances on appeal and in order not to oust it from the judgment seat, allow the application for leave to file an appeal out of the statutory period of 30 days and order that such appeal shall be filed within 21 days from the date of this ruling.

31. Turning now to the prayer for Stay of execution of the judgment and decree of the subordinate court pending the hearing and determination of the intended appeal, the law applicable to the grant of stay pending appeal is Order 42 Rule 6 of the Civil Procedure Rules which espouse 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.***

2. ***No order of stay of execution shall be made under Subrule (1) unless:-***

> ***The court is satisfied d that substantial loss may result 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."***

32. This court must therefore be satisfied that the applicant has satisfied the three conditions set out in the above Order 42 Rule 6 of the Civil Procedure Rules.

33. As to what substantial loss the applicant will suffer if the stay sought is not granted pending appeal, the applicant contends that the attached goods form the core of its business venture and so it will be grounded if execution takes place and that it has a good and meritorious appeal which is likely to be rendered nugatory if stay is not granted.

34. I note that the claim by the respondent against the appellant was liquidated and therefore monetary in nature. The applicant denied the claim albeit it did not adduce any evidence in defence to counter the assertion by the respondent and now complains that it was denied the right to a hearing. That argument in my view, will be subject of the appeal and therefore this court restrains itself from venturing into the merits of the intended appeal.

35. Nonetheless, I have seen the proclamation dated 15th December 2015 which lists 9 items proclaimed which are basically goods found in the applicant's business premises and for sale; with estimated values given. Although in money decrees it may not be true that an appeal shall be rendered

nugatory if successful unless it is proved that the respondent is not possessed of sufficient means to recompense should the appeal be successful, this court takes cognizance of the fact that once goods in trade are sold to recover a debt, that business can never be the same. It is not the intention of this court to ground the business operations of any business entity or person for it is businesses that contribute to the growth of our economy. This is not to say that a decree cannot be executed to recover the decretal sum but that before the merits of the appeal are considered by the court on appeal, the appellant should be given the opportunity to continue trading as opposed to grounding it by selling off the goods forming its core business.

36. The justice of the case such as this one is that this court is enjoined to apply the overriding objectives of the Civil Procedure Act and balance out on the rights of both parties. The respondent indeed has a lawfully obtained judgment which it is entitled to execute to recover the claimed sum of money but the applicant too should be allowed to continue with its business as well and if found liable, payment of the decree shall not be an option to the applicant.

37. Therefore, taking into account the rights of each party to this application and intended appeal, this court can still grant a stay on terms that will guarantee the security of the decretal sum.

38. As earlier stated in the decision extending time for filing of the appeal out of time, the application herein was filed timeously upon discovery of the judgment. The second condition for stay is therefore fulfilled. The applicant is also ready, able and willing to deposit security for the due performance of decree. That being the case, I would grant stay of execution of decree of the subordinate court in Milimani CMCC 3522 of 2014 pending hearing and determination of the intended appeal on condition that the applicant deposits the whole of the decretal sum in a joint interest earning account to be opened and operated by both counsels for the parties hereto within 21 days from the date hereof. In default thereof, the stay granted herein shall lapse unless such period is extended by the court.

39. The Respondent shall have the costs of this application which shall be in the appeal.

Dated, signed and delivered in open court at Nairobi this 22nd day of March 2016.

R.E. ABURILI

JUDGE

In the presence of Mr Olonde for the Respondent

Mr Kosgei h/b for Mulani for the applicant

Gitonga: Court Assistant