



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NUMBER 236 OF 2016
METAL CANS CLOSURES (K) LIMITED.APPLICANT
VERSUS
CHRISTOPHER MUTOMBI MALONZA. RESPONDENT

R U L I N G

The Applicant/Defendant has moved this court through its application dated 9th June, 2016 wherein it has sought the following orders: -

1. That this matter be certified urgent and heard ex-parte in the first instance.
2. That this honourable court be pleased to grant leave to the Applicant to file appeal out of time.
3. That this honourable court be pleased to stay execution of the Decree in Milimani Civil Case No. 2885 of 2013 pending hearing and determination of this application and the appeal.
4. That the costs of this application be provided for.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit of Betty Kageni and a supplementary affidavit by the same deponent.

The deponent avers that judgment in Chief Magistrate's Case No. 2885 of 2013 was delivered on the 7th day of March, 2016 against the Applicant for a sum of Ksh.273,600/- and being dissatisfied with the same, it intends to appeal against the said agreement out of time. According to the deponent, the delay in filing the appeal was due to inadvertent delay on the part of the Applicant's counsel who failed to file the appeal on time upon the Applicant's instructions to do so.

It is further contended that the appeal is arguable and has a high likelihood of success since the Applicant holds that it is not liable for any loss, damage or injury to the Plaintiff/Respondent.

In support of prayer 3 of the application, which seeks for a stay of execution pending the hearing of the appeal, the Applicant depones that it is ready and willing to abide by the conditions that may be set by the court. That if the application is not granted, the appeal will be rendered nugatory that the Applicant stands to suffer substantial loss and damages. It has urged the court to grant the application.

The Respondent has opposed the application by way of a replying affidavit sworn by Norah A. Owino sworn on the 8th July, 2016. It is averred that the application has been brought in bad faith. That the Applicant has failed to disclose to the Honourable court material facts in regard to the case before the

court, in that the Applicant had filed a similar application in the lower court on the 20th May, 2016, seeking orders of stay of execution and leave to file appeal out of time which orders are similar to the ones sought herein. The said application was by then, pending ruling before the lower court.

The deponent further contended that the Applicant had failed to inform the court that it issued the Respondent with a cheque dated the 13th June, 2016 towards the payment of the decretal sum which subsequently bounced when it was presented for payment. That the Applicant had come to court with unclean hands and therefore, it should not be accorded the discretionary remedies prayed for. According to the Respondent, the decree herein is a money decree and there is no irreparable loss that the Applicant can suffer if the orders of stay of execution are not granted. That the Applicant has not provided any security to warrant the court to grant an order staying execution. The Respondent avers that the Application is brought in bad faith and it is a ploy by the Applicant to delay the Plaintiff the fruits of his judgment.

In the supplementary affidavit, it is denied that the application is brought in bad faith. The Applicant admitted that it filed an application for stay of execution before the lower court but it filed a notice of withdrawal of the same.

The Respondent has urged the court to dismiss the application.

Parties filed written submissions in support of their respective cases. On its part, the Applicant has submitted on the conditions necessary for granting a stay of execution as laid down under Order 42 Rule 6(2) of the Civil Procedure Rules. In addition, it has submitted on substantial loss and in the learned counsel's view, it is unjust and downright unfair if the Applicant is condemned to pay the decretal sum without a determination of whether the Applicant was an employee of the Respondent.

It has also submitted that if a stay of execution is not granted the Respondent shall be at liberty to execute the decree and should the appeal succeed he will not be in a position to refund the decretal sum bearing in mind that he was earning Ksh.7,800/- per month. It has relied on the case of **Lawi Nyateng Vs Arnold William Omulando [2015] eKLR** in which the court relied on the case of **Kenya Orient Insurance Co. Ltd Vs Paul Mathenge Gichuki CA 40/2004 [2014] eKLR**.

On the issue of unreasonable delay, the learned counsel, has submitted that the cause of the delay was that judgment was entered on the 9th March, 2016 without notice to him or his client and that he learnt about the judgment on 14th March, 2016 when the Respondent's Advocate wrote to them but due to inadvertence on their part, they did not file the appeal within 30 days as required by the law. That the application for stay of execution before the lower court was filed on the 26th May, 2016 which was two months later, while the present application was filed on 9th June, 2016 after the Respondent moved to execute the decree. He prays that the mistake of a counsel should not be visited upon his client.

The learned counsel for the Applicant submitted on leave to appeal out of time and in support of his client's case, he has relied on the case of **David Kuria Maina Kamau T/a Mukinduri General Agencies Vs Shem Onyango [2009] eKLR** relied on in the case of **Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi Civil Appl. Nrb, No. 251 of 1997**. He further submitted that the length of the delay has been explained and that the appeal has high chances of success.

On the part of the Respondent, it has been submitted that the Applicant has not provided any evidence or explained the kind of loss that it would incur if the order staying execution is granted. It was also submitted that there was inordinate delay in bringing the application, the same having been brought three months from the date of judgment. That the Applicant has not provided any security in regard to the decretal sum.

With regard to leave to file appeal out of time, the Respondent has submitted that the remedy is discretionary and therefore, the court is bound by the doctrines of Equity which places an onus on the Applicant to demonstrate good faith and reveal all the material facts. In support of this submission, the

Respondent relied on the case of **James Mwangi Mathenge Vs Charles Mwai & another [2014] eKLR**, and averred that the Applicant did not disclose to the court that it had filed a similar application before the lower court.

The learned counsel has also taken issue with the Applicant's supplementary affidavit submitting that the same was filed out of time without the leave of court.

This court has carefully considered all the material before it. The issues for determination by the court are: -

1. Should the Applicant be granted leave to file appeal out of time?
2. Should the court grant an order for stay of execution pending appeal?

On the first issue, the guidelines in considering an application such as the one before the court were given in the case of **David Kuria Maina Kamau T/a Mukinduri General Agencies Vs Shem Onyango (supra)** which are: -

- (a) The length of delay.
- (b) The reason for the delays.
- (c) Thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly.
- (d) The degree of prejudice to the Respondent if the application is granted.

The application herein was filed three months after delivery of judgment. Counsel of the Applicant learnt about the judgment on the 14th March, 2016 which was five days after. The application before the lower court was filed on 20th May, 2016, two months thereafter. The delay has been explained and it has been attributed to a mistake of the counsel for the Applicant. In my view, the delay has been sufficiently explained and being guided by the decision of the court in the case of **Caltex Limited Vs Kenya Airports Authority (2005) eKLR**, I do excuse the delay and find that though the same was undue, it was explained.

On the second issue, Order 42 Rule 6 (2) sets out conditions necessary for granting an order of stay of execution pending appeal which are that: -

1. 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.
2. Such security as the court orders for the due performance of such decree or order as may ultimately be binding to him has been given by the Defendant.

On substantial loss and where execution of a money decree is sought to be stayed, the financial position of the Applicant and that of the Respondent becomes an issue. The court cannot shut its eyes where it appears the possibility of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal is doubtful. The court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. In other words the court should not consider the interest of the Applicant but has also to consider in all fairness the interest of the Respondent who has been denied the fruits of his judgment. See **Attorney General Vs Halal Meat Products Ltd**, Civil Appeal NRB 270/2008 and **Kenya Shell Ltd Vs Kibiru & Another (1986) KLR 410**.

In an application of this nature, the Applicant should show the damages it would suffer if the order of stay

is not granted, where the allegation is that the Respondent will not be able to refund the decretal sum the burden is upon the Applicant to prove that the Respondent will not be able to refund to the Applicant any sums paid should the Appeal succeed. However, it may not be possible for the Applicant to know the Respondent's financial means and for that reason, the law is that all what the Applicant is expected to do is to swear upon reasonable grounds that the Respondent will not be in a position to refund the decretal sum. In that case the legal burden remains with the Applicant while the evidential burden would then be shifted to the Respondent to show that he is in a position to refund the decretal sum. What amounts to reasonable grounds for balancing that the Respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of each particular case See **Abro Amro Bank NK Vs Le Monde Foods Ltd**, Civil Application No. 15 of 2002.

In the application before the court, it was not sworn under oath that the Respondent would not be in a position to refund the decretal sum. The issue was only raised in the submissions and as courts have often held, facts contained in the submissions do not have any evidential value unless they have been made on oath.

In the case of **Mukuma Vs Abuoga (1988) KLR 645**, the Court of Appeal emphasized the centrality of substantial loss thus

"... The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

However, in this case, the Applicant did not swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum should the Appeal succeed.

The Respondent has also raised the issue that the supplementary affidavit was filed without the leave of the court. The record shows that when the matter came up in court on the 16th August, 2016, the Applicant's counsel sought leave to have it admitted out of time which leave was granted. The same is, therefore properly on record.

Having considered the issue of substantial loss which is the cornerstone for granting an application for stay of execution, the issue of delay there would be no need to consider the issue of security.

In the result, the following orders are made: -

- (a) Leave is hereby granted to the Applicant to file appeal out of time. The Appeal to be filed within 14 days from today.**
- (b) Prayer No. 3 of the application disallowed.**
- (c) Each party shall bear its own costs of the application.**

Dated, signed and delivered at Nairobi this 13th day of October, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***for the Applicant***

..... ***for the Respondent***