REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISCELLANEOUS CIVIL APPLICATION NO. 5 OF 2015

JIHAN FREIGHTERS LIMITED…….…….....APPLICANT

-VERSUS-

VERONICA WANJIRU GIKONYO (*Suing as the*

administrator of the estate of the late **SAMUEL**

NDUNG'U GIKONYO)….……..…….RESPONDENT

R U L I N G

Introduction

1. The Applicant's Notice of Motion filed on 11/3/2015 contains several prayers of which number 3, 4, and 5 are relevant at this stage. These prayers are:-

3. **THAT this Honourable Court be pleased to enlarge time and grant the Applicant leave to file an appeal out of time against the Judgment /Decree dated 19th November 2014 in Naivasha CMCC 282 of 2013 VERONICA WANJIRU GIKONYO (Administrator of the estate of JOSEPH NDUNGU GIKONYO (DECEASED) -V- JIHAN FREIGHTERS LIMITED.**

4. **THAT there be stay of execution of the aforesaid Judgment/Decree pending the hearing and determination of such appeal as may be preferred against the said Judgment/Decree as laid out in the draft Memorandum of Appeal and upon leave being granted by this Honourable court on any terms and**

5. **THAT the costs of this application be provided for.**

2. The application is expressed to be brought under Order 42 Rule 6 (1) of the Civil Procedure Rules and Section79 G and 95 of the Civil Procedure Act. Twelve factual grounds are cited on the face of the application. The Applicant's advocate Mr. Terer swore a Supporting affidavit and a Further affidavit in support of the application. There are several annextures, mainly correspondence annexed to the Supporting affidavit. Counsel for the Respondent Mr. Wainaina swore a Replying affidavit in opposition to the application. The application was argued before me on 24/3/2015.

The Background

3. The background to the Notice of Motion is that the parties herein were the Defendant and Plaintiff, respectively, in Naivasha CMCC 282 of 2013 from which this matter emanates. The suit was a fatal accident claim wherein the parties recorded a consent judgment on liability at 65:35% in favour of the Respondent. Judgment on quantum was rendered on 19/11/2014 in the net sum of Shs 757,932.50 with costs and interest.

4. The 30 day period of stay of execution was due to expire on or about 19th December 2014. It would seem that about a fortnight prior to the said deadline, the advocates for the parties commenced negotiations which culminated with an offer to the Respondent to accept the re-negotiation of the judgment sum. By an email dated 13/12/2014 the Respondent's advocate out rightly rejected the proposal and advised his counterparts to proceed to file an appeal or to pay the undisputed decretal sum.

5. The email further reminded the Applicant's advocates of the looming deadline, stated to be 18/12/2014. Two days later on 15th December, 2014 the Respondents advocates wrote the Applicant's advocate advising that their client had *"accepted to reduce the award to Kshs 697,000……on condition that the same is paid inclusive of costs on or before the expiration of the stay period."*

6. On 17/12/2014 Mr. Terer wrote to the Insurance company communicating the new development and asking that a cheque for Kshs 764,490/= including costs be drawn in favour of the Respondent's advocate. There followed a statement which is now disputed by Mr. Wainaina: *"The time line for stay of execution has since lapsed but we have agreed in principle that our counterparts shall not execute so long as you kindly expedite settlement."*

7. All appeared silent until Mr. Terer wrote to Mr. Wainaina on 13/1/2015 forwarding the cheque for Shs 764,490/= stating interalia as follows:

> **"We refer to the above matter and enclose herewith our client's Cheque No. 128310 for Kshs 764,490.00 being full and final settlement of the decretal amount and party and party costs herein.**
>
> **Kindly acknowledge receipt and confirm that the above matter is now fully settled."**

The cheque is in the name of B. G. Wainaina & Co Advocates and is dated 12/1/2015.

The Arguments

8. With regard to the prayer under Section 79(G) of Civil Procedure Act for extension of the time for filing the appeal, the Applicants argue that the application is timeously brought as ongoing negotiations led the Applicant to believe that the matter would be resolved and that there would be no need to file an appeal. That as soon as stay orders were vacated in the lower court on 10/2/2015 the applicant filed the present application on 11/2/2015.

9. Citing the case of **Niazsons (K) Limited –Vs- Bridge Corporation (Kenya) [2000] eKLR** the Applicants argued that delay is not inordinate and has been explained. The Applicant argues that the having paid a substantial part of the decretal sum and suffered the subsequent attachment of their goods, they stand to suffer substantial loss if stay of execution is not granted, yet the amounts paid are adequate security.

10. The Respondent's position is that the conditions of their counter offer made on 15/12/2015 were not complied with hence negotiations collapsed on 15/12/2015 and the Applicants should have filed their appeal within the remaining 4 days to the deadline of the period of stay. Mr. Wainaina contended that no reason has been given for the inordinate delay since 19/12/2014 in filing the

application.

11. The Respondent asserts that the negotiations having broken down on 15/12/2014, the subsequent payment was a voluntary one based on the threat of execution. And further that the threat was made good by the consequent undisputed attachment of the Applicant's goods on 5th February 2015 and released through an order of the lower court on 10th February, which was later discharged prompting the present application.

12. The Respondent contends that the payment received is lawfully due to the Respondent in view of the consent on liability and that she is entitled to a further balance of Shs 111,461/=. For their part the Applicants want the money treated as security and held by a neutral party pending the appeal.

13. With regard to the prayer for stay pending appeal, he argued that from a reading of Order 42 Rule 6 (2) of the Civil Procedure Rules such may be available where an appeal exists. Alternatively, he stated that the said prayer cannot be granted as the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules have not been satisfied concerning security. He alluded to an order, presumably made in the lower court to refund the payment by the Applicants and urged the court to dismiss the application.

Analysis and Determination

14. I have considered the material canvassed by the parties in respect of the Notice of Motion before me and take the following view. Section 79 (G) of the Civil Procedure Act which allows for the extension of time to file an appeal is in the following terms:

> **"Every appeal from a subordinate court of the High Court shall be filed within a period of thirty 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 time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."**

15. There is no doubt that the period for filing appeal from the lower court matter lapsed on or about 19/12/2014. By that date, the application had not filed an appeal. Admittedly, there were discussions between the parties advocates to re-negotiate the award prior to the said date.

16. The email of 13/12/2014 from Mr. Wainaina marked as annexture **Exh 4** and attached to the Supporting affidavit of Mr. Terer refers to a letter, in this connection from the Respondents, dated 25/11/2014 and a conversation on 10/12/2014 between Mr. Wainaina and possibly Mr. Terer or other counsel in his office.

17. The email was conveying the rejection of the proposal to renegotiate the judgment and a demand for payment of undisputed sums. But two days later the offer was accepted through an email dated 15/12/2014 (annexture **Exh 3**), effectively to reduce the award to Shs 697,000/=, on condition of payment being made inclusive of costs before the expiry of the stay period. This offer was communicated two days later to the Insurance company by Mr. Terer by a letter dated 17/12/2014 (marked as annexture **Exh. 6**)

18. Evidently the payment was not made on the terms given by the Respondents and there is a dispute as to whether there was some further mutual understanding "in principle" that execution would not proceed so long as the payment was expedited as per Mr. Terer's letter of 17/12/2014, to the insurance company. There is no written commitment from the Respondent's affidavit on this score. Indeed the Respondent refers to a telephone call through which Mr. Terer allegedly informed the deponent of the impossibility of payment being made within the stipulated period. It

is difficult to tell where the truth lies on that matter. If indeed as Mr. Wainaina says no mutual agreement for abeyance was reached, Mr. Terer's letter of 17/12/2014 to the insurance company contains a blatant lie.

19. Further Mr. Terer's action of forwarding the payment on 13/1/2015 without any explanation or reservation does not make any sense. This payment was equally received without any reservation by the Respondents despite the clear wording of the forwarding letter. I am inclined to believe, that by their admitted conduct the Respondents appeared to be willing to take a negotiated settlement and to extend some abeyance to the Applicants to make payment, notwithstanding the absence of a written commitment on their part.

20. There is another aspect, not particularly addressed by the Respondents that appears to stand in favour of the Applicants. It is independent of any mutual agreement that may have been entered between the parties for stay. It is based on the fact that the last date on which an appeal would be filed was the 19th December 2014, a Friday.

21. The next working day fell on 22nd December 2014 coinciding with the period when time ceases to run under Order 50 Rule 4 of the Civil Procedure Rules. Order 50 Rule 4 of Civil Procedure Rules states:-

> **"Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:**
>
> **Provided that this rule shall not apply to any application in respect of a temporary injunction."**

22. The Applicant has made reference, albeit feeble, to this provision. It is true that the Applicant had lost the opportunity to file his appeal directly by Friday 19th December, 2015, the same date by which the Respondent had demanded payment. However, I think that a proper reading and application of order 50 Rule 4 of the Civil Procedure Rules to the facts of this case would require that the period between the 22nd December and 13th January, not be reckoned in the total delay period of 82 days cited by the Respondent.

23. By virtue of the provisions of Order 50 Rule 8 of the Civil Procedure Rules 30 days from the day of judgment in the lower court (19th November 2014) lapsed on 19th December, 2014 and not 18th December, 2014 as asserted by the Respondent. In my considered view, the Applicants took a risk by engaging in negotiations as the appeal window was closing, without filing an appeal, if only to secure their position. However, it is plain enough that the Respondent had given an indication that they were willing to receive payment until 18th December 2014 (the correct date is 19th December 2014) from the Applicants, pursuant to negotiations.

24. As I noted earlier, whether or not the parties had formally agreed to stay execution beyond 19th December 2014, it does appear that by their conduct the Respondents created the belief in the Applicants that the matter would be settled. And indeed they did receive the cheque sent to them on 13/1/2015 without any protest or reservation.

25. I am therefore of the view that the period between 19th November 2014 and 13th January 2015 has been satisfactorily accounted for: negotiations and steps related to settling the matter were ongoing, even though the process could have been better executed. What of the period between 13th January 2015 and 11th March 2015?

26. Firstly, the settlement cheque had already been forwarded by the Applicants and received by the

Respondent's advocates. Rather than confirm settlement, it would seem that ignoring the contents of the forwarding letter, the Respondents reverted to the position in their email dated 15th December 2015. They extracted warrants of attachment and proceeded to attach the Applicant's goods in February 2015, prompting applications in the lower court. It does appear that upon the Respondents evincing an intention to proceed with execution the Respondents challenged the same in the lower on the basis that the matter was settled. There are some applications still pending before the lower court. Eventually on 11/3/2015 the Applicants filed the present application.

27. In my considered view, this approach was the second blunder by the Applicant's advocates which resulted in unnecessary delay. It would seem that as early as 27th January 2015 the Applicants were aware of the Respondent's intention to proceed with execution. Apart from filing applications in the lower court they did not consider it prudent to bring the present application expeditiously. They were pinning their hopes on the fact of payment made in settlement of the decretal sum.

28. The delay between 27th February 2015 and 11th March 2015 is 43 days. In attempting to explain this delay counsel for the Applicant depones interalia in his Further affidavit:

> **"<u>THAT</u> the Application dated 11th March 2015 was filed timeously and without undue delay as the matter was last before the Lower Court on 10th March 2015 when stay of execution orders were vacated thus exposing the Applicant to great prejudice and rendering the instant application a perforce.**
>
> **<u>THAT</u> the said application is premised on the ground that the respondent herein has evidently reneged on her earlier consent to review the Lower Court Judgment on quantum in lieu of appeal and further on the fact that a sum of Kshs 764,490.00 was forwarded to the Respondent's Advocates on record on 13th January 2015 in final settlement of the claim only for warrants of execution to be taken out on 27th January 2015 contrary to the mutual agreement.**
>
> **<u>THAT</u> the Applicant did not deliberately fail to file an appeal in good time as alleged as the respondent herein embraced an offer to review Judgment terms on quantum in lieu of appeal and cannot thus have his cake and eat it by turning around and alleging that the Applicant herein failed to file an appeal in good time. If any delay, same has been occasioned by the Respondent through his conduct.**
>
> **<u>THAT</u> after forwarding the settlement cheque on 13th January 2015, counsel for the Respondent did not indicate that further sums were still outstanding and by his actions thus acquiesced to full and final settlement of the claim."**

29. The matters disclosed in these paragraphs refer to the initial negotiations and engagements between the parties. In a sense, it is true that these matters cannot be divorced from the events in the period after 13th or 27th January 2015. Were the ongoing proceedings in the lower court in the 45 days justification for the delay in bringing the present application? As I have indicated, it seems that the Applicants were corralled by what is now clearly an unrealistic expectation that the matter would resolve in the lower court. Because, if indeed it was found that a settlement in lieu of appeal had been reached, there would have been no need to file any appeal. Thus when it became evident that 45 days spent in the lower could not resolve the issue the Applicants rushed to this court.

30. A delay of 45 days is long and inordinate. However in the circumstances of this case, the entire context within which this application is brought must be borne in mind. I am prepared to accept that the explanation given by the Applicant though not particularly impressive can pass the test of the proviso in Section 79G of the Civil Procedure Act. The court's discretion under the provision

though unfettered must be exercised judicially considering the length of delay, the explanation for it; and possibly, the chances of the appeal succeeding; and the degree of prejudice to the Respondent. (**See Niazsons (K) Ltd -Vs-China Road and Bridge Corporation (Kenya) [2000] eKLR. See also Mwangi -Vs- Kenya Airways Ltd [2003] KLR 486**).

31. What is a court of justice to make of this scenario? In **Bagajo -Vs- Christian's Children Fund Inc. [2004] 2 KLR 73** the court emphasized that in exercising its discretion relating to extension of time; *"the court's primary concern should be to do justice to the parties."* The Applicant has already paid out a substantial part of the decretal sum to the appellant, which monies are still in the counsel's possession. It seems to me that the sole point upon which the appeal was countenanced was the estimated income of the deceased adopted in computing damages for lost dependency. The lower court used a monthly income of Shs 10,000/= which is challenged in the draft memorandum of appeal as *"not founded on evidence and/or proof of monthly income."*

32. The disputed finding is contained in paragraph 5 of the judgment of the court annexed to the application. This is certainly a weighty question with regard to the success of the appeal. All in all, for justice to be done to all parties, the order that commends itself to me with regard to prayer 3 is that the same be allowed. The Applicant is directed to file the appeal within 7 days of today's date.

33. With regard to prayer 4, there is considerable merit in Mr. Wainaina's submission that the filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1). Although the provision does not expressly say so, this can be inferred from the rule. Further an analogy can be drawn from Order 42 Rule 6 (4) of the Civil Procedure Rules court which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given.

34. Equally Order 42 Rule 6 (6) of the Civil Procedure Rules states:

> **"Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just <u>provided the procedure for instituting an appeal from</u> a subordinate court or tribunal has been complied with."**

35. It would seem that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the Memorandum of Appeal is filed, the court may be acting in *vacuo* by granting stay of execution pending appeal.

36. I am fortified on this position by the pronouncement of the Court of Appeal in the case of **Equity Bank -Vs- Westlink MBO Limited [2013] eKLR**. Commenting on Rule 5 (2) (b) of the Court of Appeal Rules which is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules and on Order 42 Rule 6 (6) of Civil Procedure Rules, the Court of Appeal left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (**See also Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR**).

37. I therefore reject prayer 4 of the Notice of Motion as being prematurely brought, and for the avoidance of doubt, that part of the Notice of Motion is deemed as struck out. In the interest of justice however I order that the status quo be maintained during the seven days allowed for the filing of the appeal. All the costs occasioned by the application are awarded to the Respondent.

Delivered and signed at Naivasha this **23rd** day of **April, 2015.**

In the presence of:

For Plaintiff/Applicant

For Defendant/Respondent

Court Assistant Stephen

C. W. MEOLI

JUDGE