



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 874 OF 2013

GAHIR ENGINEERING WORKS LTD.....APPLICANT

VERSUS

RAPID KATE SERVICES LTD

JOHN MBURU NGUGI.....RESPONDENTS

RULING

1. Before me is the Applicant's notice of motion dated 6th September, 2013. The Applicant seeks orders of stay of execution of the judgment and decree issued in Nairobi CMCC No. 3004 of 2008 on 21st December, 2012, leave to file the intended appeal out of time and that the memorandum of appeal annexed to this application be deemed as having been filed with the leave of court within such extended time.
2. Lucy W. Kamau swore an affidavit in support of the application. The application is brought on grounds that judgment was delivered without notice to the Applicant. That the Applicant wrote letters inquiring about the same and only learnt about it when the court file surfaced in June, 2013. She stated further that the appeal had high chances of success and if the orders sought are not granted, the Applicant shall suffer irreparable and substantial loss and the appeal shall be rendered nugatory.
3. In response thereto the Respondents filed grounds of opposition that the application is misconceived, bad in law and amounts to an abuse of court process, that the said application is grossly unmerited as the mandatory conditions prescribed under Order 42 Rule 6 of the Civil Procedure Rules, 2010 have not been met and it fails to satisfy the established criteria for the award of an order under section 79G of the Civil Procedure Act.
4. It was submitted on behalf of the Applicant that the Respondent has not rebutted the facts with regard to delay set out in the supporting affidavit. That there was evidence on record that a letter was written inquiring about the judgment way before it was delivered and that for the aforesaid reasons the Applicant cannot be held to be a lethargic party unconcern about the judgment. This court was urged to take judicial notice of the fact that the judgment was delivered during Christmas period and that the court file resurfaced in August, 2013. It was then urged that the delay was explained and is excusable. It was argued that the memorandum of appeal raises an arguable point for instance, it was stated that the Applicant contends that despite clear documentation of its claim which was admitted by the trial court, the trial magistrate failed to find the Applicants claim as having been proved. The Applicant relied on **A.L.S. v. C.T.S (2014) eKLR** where the court allowed an application for leave to appeal out of time on the basis that no notice for delivery of a ruling had been given to the applicant. The Applicant further cited **Gyka Fuel Mart Ltd v. Bwana Mshiri Sungura (2013) eKLR** where it was found that where the delay in filing an appeal out of time is explicable and there are arguable grounds in the appeal then leave ought to be granted.

5. The Respondents on their part argued that the fact that the Applicant seeks to invoke Section 3A where clear provisions exist under the Civil Procedure Rules renders the application fatally defective. That the application does not satisfy the conditions of Order 42 Rule 6 of the Civil Procedure Rules. It was submitted that the reason for delay given in the supporting affidavit is untenable and this court was urged to find the delay of eight (8) months in filing this application and the appeal to be inordinate and inexcusable. That there was no explanation for the delay from June, 2013 to September, 2013. The Respondent cited **HCCC No. 457 of 2003., Peter Tharau Ngure v. Margaret Wairimu Magugu** to emphasise that for a court to allow such an application, court's intervention must have been sought without unreasonable delay. In that case it was held that:-

"...Once a judgment has been passed there is always the possibility of execution at any time thereafter and the judgment debtor must seek the court's intervention without unreasonable delay if he wants stay of execution pending appeal..."

6. It was submitted that there was an omission of the draft notice of appeal and the prayer for leave to appeal out of time should fail. It was further argued that even if the notice of appeal would have been filed timeously, the delay being inordinate, the application ought to fail. Secondly, it was argued that the Applicant has established sufficient cause since the reason advanced that the appeal is arguable is not worthy of consideration. On this point, the Respondents cited **Carter & Sons Limited v. Deposit Protection Fund Board and Others [1997] LLR 2142 (CAK)** where the court held as follows:-

"...it was contended that the intended appeal has strong probability of success. In our view, the mere fact that there are strong grounds of appeal would not in itself, justify an order of stay. A party is expected to prefer an appeal only when there are strong reasons for doing so."

7. It was further argued that the Applicant has not established that it stands to suffer substantial loss. The Respondent cited **Southern Credit Banking Corporation v. Andrew Lepeita Sunkuli and Another (2008) eKLR** where it was held:-

"...that in money decrees as in one here, the only way of demonstrating the substantial loss that would be suffered is by showing that the respondent would not be able to pay in the event the appeal succeeds and execution has taken place prior to the finalization of the appeal. "

It was argued that the Applicant's omission of to address the issue is deliberate and that the logical conclusion to reach is that the same is not satisfied as the Applicant has not placed evidence before this court that the Respondents are men of straw. The Respondents were of the view that the Applicant is undeserving of the orders of stay and is equally not entitled to leave to file appeal out of time. That this court has the unfettered discretion to grant leave to file appeal out of time but that that discretion should be exercised judiciously to avail all parties to the suit timeous justice.

8. I have considered the depositions, submissions and the authorities cited herein. It is the Respondent's position that this application is fatally defective for seeking to invoke Section 3A of the Civil Procedure Act. Article 159 (2) (d) imposes on this court the duty to focus on substantial justice and not on technicalities. Dismissing this application on that point alone to me would amount to relying on a technicality rather than substance. More so considering that the same application also seeks to invoke Order 42 Rule 6 which is the law on stay of execution. I preliminarily dismiss that argument in view of the foregoing disposition. Order 42 Rule 6 (1) and (2) provides as follows:-

"6.(1) No appeal or second appeal shall operate as a stay of 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 thereon 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 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.”

9. The above rule was discussed in the case **Peter Ondande t/a Spreawett Chemis v. Josephine Wangari Karanja [2006]eKLR** as follows:-

“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.” (Emphasis mine).

10. The fact that there is delay in filing the appeal and this application has not been contended. The Applicant explained that judgment was entered without notice on 21st December, 2012. In the supporting affidavit it is said that the Applicant's counsel learnt of the judgment in June, 2013 while on the grounds set out on the body of the application the date is given as August, 2013. I shall presume the Applicant's counsel knew of the judgment between June and August, 2013. The Applicant took about two months before filing this application. From the supporting affidavit, it is evident that no explanation has been given for the delay which was close to two months. However, the period before knowing of the judgment is explained. It worth considering that it is the norm, and good practice for advocates to advice their clients and further sought their clients instructions on the way forward. Obviously this is not a one day business. These are some factors that may in some cases occasion delay which delay is excusable. Even if I am found to be wrong on that disposition, it is in the interest of justice to determine whether even with an inordinate delay justice can still be done to the parties. On this issue I reiterate the pronouncement of Gikonyo J in **Utalii Transport Company Limited & 3 Others v. NIC Bank Limited & Another [2014] eKLR** where he stated as follows:-

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.” (emphasis own)

11. It is my considered view that the delay being of about two months is unlikely to prejudice the Respondent in a manner that cannot be compensated with costs. Such prejudice has not also been pointed out by the Respondent. In view of the foregoing, I find and hold that the delay herein is excusable.
12. On the issue of loss, it was argued that the Applicant has not established that it is likely to suffer substantial loss. Substantial loss was defined by Musinga, J (as he then was) in **Daniel Chebutul Rotich & 2 Others v. Emirates Airlines Civic Case No. 368 of 2001** as follows:-

“...substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

13. Considering the Applicant's uncontroverted facts is that judgment was entered without notice vis a vis definition above, it is clear that the Applicant shall be exposed to suffer substantial loss.
14. The Applicant did not offer any security and shall be bound by this court's order as to security. In view of the foregoing, I am inclined to allow the application herein in the following terms:-
 - a. The Applicant is granted stay of execution of the judgment and decree issued in Nairobi CMCC No. 3004 of 2008 delivered on 21st December, 2012.
 - b. The Applicant is granted fourteen (10) days leave from the date of this ruling to file the intended appeal out of time and that the memorandum of appeal annexed to this application be deemed as having been filed upon payment of the requisite fee.
 - c. The Applicant to deposit the decretal sum in an interest earning account in the joint names of the firms of advocates of the parties herein within the next 30 days from this date failure to which execution to issue.
 - d. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 29th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

Ambani h/b Mwangi for the Applicant

Kimani for the Respondent