



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 444 OF 2012

ITALIAN MARKET KENYA LIMITED.....PLAINTIFF

V E R S U S

FIDELITY COMMERCIAL BANK LIMITED..... DEFENDANT

RULING

1. The application before the court is a **Notice of Motion** dated **5th March 2015** filed by the Defendant/Applicant seeking as the main order that time be enlarged for the Defendant to file and serve Notice of Appeal out of time in respect of the judgment that was delivered on 19th December 2014 in the absence of the parties.
2. The application is premised on the grounds set out therein and is supported by affidavit of **Timothy K. Kariba Mbabu** sworn on **5th March 2015**.
3. The Applicant's case is that the parties filed their submissions on the 22nd September 2014 and the judgment was set to be delivered on the 14th November 2014. On the said date the matter was not listed and they were informed that the judge was on leave and that the judgment was to be delivered on notice. On or about 14th November 2014 the secretary to the judge called and requested for the submission on soft copy. Sometime in the month of February 2015 the advocates for the Plaintiff informed the Applicants that the judgment was delivered on 19th December 2014 in the absence of all the parties and the advocates. The Applicant herein only managed to see judgement on the 18th February 2014 after severally trying to get the court file. After receiving the copy of the judgment, the Applicant desired to appeal again the judgment of the court delivered on the 19th December 2014. Due to the delay and failure to be given a Notice of the delivery of the judgment, the Applicant was not able to issue and serve a Notice of Appeal within the stipulated time unless this court enlarges the time for filing and serving the Notice of Appeal. The Plaintiff is already acting on the said judgment, and by a letter dated 20th February 2015 the Advocates for the Plaintiff called for the release of the funds deposited in the joint account. That is why this application is necessary seeking stay of execution pending the hearing and determination of the appeal, and enlargement of the time for filing Notice of Appeal.
4. The application is opposed by the Plaintiff through grounds of opposition filed in court on 16th April 2015.
5. The Respondent's case is that the court does not have jurisdiction to entertain the application, and that the application is brought under the wrong provisions of the law. No extension of time to file a Notice of Appeal can emanate from Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A cannot help either. The application is bad in law and procedure therefore, fatally defective and is an abuse of the court process. The application offends the mandatory provisions of Rule 4 and of the Court of Appeal Rules 2010. The Respondent submitted that Notice of entry of judgement is not a condition precedent to filing of Notice of Appeal. It is upon the

aggrieved party to ensure that court timelines are observed. It was also submitted for the Respondent that there is no draft Notice of Appeal annexed to show that the Defendants are keen on filing and prosecuting any appeal. The Defendants have not shown any sufficient cause to warrant the orders sought. The application is not made in good faith and is only meant to delay the Plaintiff from enjoying the judgement duly and lawfully obtained. Further, the Respondent submitted that Notice of Appeal should be filed fourteen (14) days of delivery of the judgment being appealed against in accordance with Rule 4 of the Court of Appeal Rules, and served. It was submitted that the Defendant's application is indented to defeat the Plaintiff's efforts to access funds kept in an escrow account at CFC Stanbic Bank in the joint names of the advocates herein, and a refund of Kshs.223,000/= in accordance with a Consent Order dated 26th July 2012 and filed on 27th July 2012 and subsequent Orders of the court issued on 20th March 2014. The Defendant's application is actuated with malice and calculated to delay the Plaintiff's access to the said funds which will cause great financial prejudice to the Plaintiff if the said funds are not released to the Plaintiff.

6. I have considered the application. The only issue is whether the court can on its own discretion allow the enlargement of time to enable the Defendant/Applicant to lodge its appeal.
7. Court records show that judgement herein was to be delivered on 14th November 2014. However, that was not possible as the court was not sitting. A Notice was subsequently issued to the parties that judgement would be delivered on 19th December 2014. There is no indication on record whether the Notice was received by the parties. What is recorded however is that on 19th December 2012 neither of the parties attended the court for the Ruling, which was nonetheless delivered in their absence. The Applicant states that it got to know about the Ruling on 19th February 2015, and being dissatisfied with the judgment sought to file an appeal. But because the Applicant is now time barred, this application for enlargement of time is necessary and should be allowed.
8. On their part the Plaintiff/Respondent submitted that the application is filed late in the day, having been filed on 5th March 2015, even if it is accepted that the Applicant got to know about the Judgement on 18th February 2015. Further the Respondent submitted that there are no draft grounds of appeal to enable the court determine if the intended appeal has merit. The Plaintiff/Respondent therefore urges the court to dismiss the application.
9. In my view the issue must be traced from 19th December 2014 when the judgment was delivered. None of the parties attended the court. It is therefore arguable that indeed non of the parties received the notice for the delivery of the judgement. If this is so, then clearly, the Defendant was prejudiced from 19th December 2014. The fact that there were difficulties tracing the court file causing the Applicant to file the application on 5th March 2015 shows that the Applicant indeed intended to beat the time deadline but was unable due to matters beyond its control.
10. Every party is entitled to the right to appeal. Such a right cannot be taken away lightly. Even where there appears to be good grounds to deny such a right a court should always, err on the side of justice, and ensure that the constitutional right of a fair trial is guaranteed at all stages of litigation.
11. I am therefore satisfied that there were justifiable grounds causing the delay in filing the Notice of Appeal.
12. I therefore allow the application as prayed and direct that the Applicant shall issue the said Notice of Appeal within 7 days from the date hereof.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF JUNE 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Maithya holding brief for Kiima for the Plaintiffs

Mr. Kaburu holding brief for Mbaabu for the Defendant

Teresia – Court Clerk