REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLENOUS CIVIL APPLICATION NO. 381 OF 2015

SUPA HAULIERS LTD.....APPLICANT

VERSUS

DAVID MASINDE MUSUNGU.....RESPONDENT

RULING

1. Before this court for determination is a notice of motion application dated 3rd September,2015 filed by the applicant Supa Hauliers Limited seeking the following orders:-

i. ***That the time for filing the intended appeal be extended.***
ii. ***That there be temporary stay of execution of the decree and judgment in CMCC No. 5787 of 2012 David Masinde Musungu v. Supa Hauliers pending the hearing and determination of the intended appeal.***
iii. ***Costs of and incidental to this application.***

2. The motion is premised on the grounds set out on the body of the application and the supporting affidavit of Linda Mukami who is the Applicant's legal Officer. She deposes, attributing the delay of filing an appeal to an inadvertent mistake in their office, that of filing away the file for CMCC No. 5787 of 2012 since the Respondent had a similar matter, CMCC No. 5786 of 2012 in which a determination and payment was made to the Respondent. That by the time the file for CMCC No. 5787 of 2012 was retrieved, the time limit within which an appeal was to be filed had already expired. She averred that the Respondent will not suffer prejudice that cannot be compensated by costs if the orders sought herein are granted. That the Applicant has an arguable appeal and that the Respondent has signalled his intention to execute by having the decree ready. That unless the orders sought are granted, the Applicant stands to suffer substantial loss since the decretal amount is substantial yet the Applicant is uncertain of the Respondent's financial status. She also expressed the Applicants willingness to furnish security for the decretal sum.
3. In his oral submissions, learned counsel for the Applicant Mr. Mbithi expressed that there was no unreasonable delay in the filing of this application and that no prejudice would be occasioned to the Respondent. He stated that the decretal sum which is KShs. 483,032/= is substantial and the Applicant will be unable to recover the same from the Respondent who is a casual labourer and in the event the appeal succeeds, it would be rendered nugatory. Mr Mbithi emphasised the Applicant's willingness to furnish security for costs. He pointed out that the legal officer of an insurance company can depose to facts in a matter such as this.
4. The applicant also relied on the authorities filed namely-**Juma Ali Mbwana &another v Umir Omar Musa[2014]eKLR, Joseph Kangethe Kabogo v Michael Kinyua Ngari[2014]eKLR, Strategic Industries Ltd v Rebecca Fashion(K) LTD [2013eKLR and Factory Guards Limited v Abel Vundi Kitungi[2014]eKLR** and urged the court to grant the orders sought in the interest of justice.

5. The application was opposed by the Respondent vide a replying affidavit of Fidelis Maithya Mutisya who is the advocate in conduct of this matter on behalf of the Respondent. He contended that the Applicant and their insurer were duly aware of the details of the judgment passed by the court and the period for filing of appeals is common knowledge to any competent lawyer such as Linda Mukami; that the Applicant's advocates wrote to the Respondent advocates on the 22nd July, 2015 expressing their client's desire to settle; that no tangible reasons had been advanced why the Applicant never filed the appeal in time hence this application is an afterthought and that the intended appeal is a sham. He further contended that there is no decree capable of execution Mr Maithya downplayed the allegation of threat of attachment of the Applicant's property.
6. Mr. Maithya learned counsel for the Respondent submitted in opposition to the applicant's counsels submissions contending that:-the decree is a money decree and should be satisfied; that the reasons for delay in filing the intended appeal are not sound; that the reason for delay given by Linda Mukami is outrageous and unacceptable since she is an advocate of this court and cannot feign ignorance of law; that the case was on going and there was no reason to archive the file; that the Applicant was well advised on the terms of the judgment and the pleadings could be obtained from court and loss of a file cannot prevent one from filing an appeal out of time.
7. Learned counsel for the respondent further contended that this application is an afterthought since the Applicant intended to settle the claim as was expressed by its advocates in the month of July, 2015. He argued that the authorities relied on by the Applicant are of no assistance to this court since they all address the issue of a parties' advocates' ability to swear affidavit which objection they had abandoned and that in the case of **Strategic Industries Ltd v. Rebecca Fashion (Kenya) Ltd (2013) eKLR** the appellants were unaware of the dismissal of the suit hence they were granted leave while in this case the Applicant sat on its right until the time for filing appeal expired.

Determination

8. I have carefully considered the application by the applicant, the grounds thereof, the supporting affidavit, annextures, oral submissions by its counsel. I have also considered the authorities relied on by the applicant and the opposition raised by the respondent in the replying affidavit and in the submissions.
9. There are two issues for determination:-

a. Whether the applicant has satisfied the conditions for the grant of leave to file an appeal out of time; and
b. Whether the applicant has satisfied the conditions for the grant of stay of execution of decree pending the hearing and determination of the intended appeal.

10. On the first issue of leave, the court's concern is whether sufficient reason for delay in filing the appeal has been tendered by the applicant. The applicable law is section 79G of the Civil Procedure Act, Cap 21 Laws of Kenya which espouses the right of appeal from decree or order made by a subordinate court to this Court. The section enacts:

"Every appeal from a Subordinate Court to 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 of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."(Emphasis mine).

11. Thus, albeit the law provides for the time within which an appeal lies from the order/decree of the subordinate court to this court which is thirty days from such order or decree, the proviso thereof makes an allowance for the filing of such appeal out of time stipulated, with the sanction of the court.
12. The power to grant leave to file an appeal out of time is a discretionary one. That discretion,

nonetheless, must be exercised judiciously and on sound legal principles and not capriciously.

13. The reason advanced on behalf of the Applicant for the delay in filing the appeal within the statutory 30 days from date of judgment is misfiling and or inadvertently archiving their case file since the respondent had a similar claim which was settled.
14. The Respondent on the other hand contends that the said reason is outrageous and that the time limit for filing an appeal was common knowledge that should have been known to the legal officer and further that the Applicant had expressed their willingness to settle the claim vide the letter dated 22nd July, 2015.
15. In the Court of Appeal decision of **Philip Keipto Chemwolo &another v Augustine Kubende[1986] KLR 492-(1982-88)1KAR 1036** the court expressed itself thus concerning mistakes which are admitted:

" it must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits."

16. Nonetheless, it is not in every case that a mistake committed by a party of his advocate that would be a ground for the court to exercise its discretion in favour of the applicant. Each case must be treated according to its circumstances. The conduct of the party seeking discretionary orders of the court is also factor to be taken into account.
17. In this case, the applicant has candidly explained that they misfiled their case file after judgment was delivered and which act was contributed to by the existence of a similar claim filed by the respondent which was settled. I tend to agree with the appellant on this point since misfiling does in some instances happen and such possibility cannot be ruled out in this case considering that there was another suit whose case file number was close to the one which is subject of this intended appeal, and whose existence has not been denied by the Respondent.
18. In the **Belinda Murai & Others (Supra)** case, Madan JA held:

"A mistake is a mistake. It is no less a mistake because it is committed by Senior Counsel. Though in the case of junior counsel the court might feel compassionate more readily. If a blunder on a point of law can be a mistake, the door to justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

19. The leaned Judge of Appeal further went on to state that:-

" It is well known that courts of law themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal point of view which courts of appeal sometimes overrule……"

20. I am in the circumstances inclined to give a benefit of doubt to the Applicant that there was a likelihood of misfiling and or archiving away of the parent file for this matter which caused the delay in filing the appeal in time.
21. Albeit the Respondent contends that the Applicant had expressed willingness to settle the claim, I have perused the contents of the letter dated 22nd July, 2015. The said letter which is written by the Applicant's insurer's advocate state that the said advocates would proceed to ask for a cheque in settlement of the claim. It is worth noting that it is not the advocate who decides whether or not the claim is to be settled, theirs' is normally to advise the insurer/client of the outcome of the case. It is the client to instruct, either in agreement or disagreement to a settlement.
22. The letter dated 22nd July, 2015 was in my view, not a proposal of settlement. It was information to the respondent's counsel that the applicant's counsel was seeking for payment from the insurer.
23. Indeed, there was a lawful judgment on record and the reasonable thing for counsel for the applicant was to seek for settlement of decree. But that cannot be construed to mean that there was a proposal to settle. Counsel for the applicant may have been satisfied with the judgement but that in itself does not mean that the client will always agree with counsel.

24. While it is true that the period within which an appeal should be filed is common knowledge more so to advocates, it came out clearly from the supporting affidavit of Linda Mukami that they received the letter dated 20th July, 2015 but by the time they were retrieving the file, the period for appeal had lapsed and they had to seek extension of time which reason I find excusable.
25. For the aforesaid reasons, I find that the delay was not inordinate. It was also not shown to be deliberate or contumelious. The applicant has explained to the satisfaction of this court the reasons for the delay which the court accepts. Judgment was delivered on 14th July, 2015 and this application was lodged on 3rd September, 2015. This court is unable to discern indolence or laches on the part of the applicant.
26. In addition, it has not been shown that should leave be granted in this case to the applicant to institute an appeal out of time challenging decree of the lower court, the respondent shall suffer any prejudice or loss that cannot be compensated in costs. Neither did the Respondent establish how he will be prejudiced in the event leave is granted. See: **Factory Guards Limited v. Abel Vundi Kitungi, Misc. Civil Application No. 621 of 2014** where this court held as follows:-

"...I see no prejudice and as none has been exhibited, that is likely to be occasioned to the respondent if leave to appeal is granted..."

27. See also **Nairobi Civil Application No. 173 of 2010., Abdirahman Abdi alias Abdirahman Muhumed Abdi v. Safi Petroleum Products Ltd. & 6 others,** the Court of Appeal had this to say where a notice of appeal was served on the respondent out of time and without leave of the court:-

"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice…In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."

28. And in **Civil Appeal (Application) No. 130/2008.,Joseph Kiangoi v. Waruru Wachira & 2 others,** held as follows:-

"The cure would come about because in the circumstances justice is to be found in sustaining the appeal for it to be heard on merit instead of striking it out on a technicality. Indeed, in our view, there cannot be a better case for the invocation of the overriding objective principle than this case. Courts should, in our view, lean more towards sustaining appeals rather than striking them out as far as is practicable and fair… the substantive aspect of sustain the appeal must in the interest of justice override the procedural rule requiring the striking out of the notice of appeal and the record…"

29. Accordingly, Iam satisfied that the applicant has established sufficient cause and reasons to warrant grant of leave extending time for filing an appeal challenging the judgment and decree of the subordinate Court in Milimani CMCC NO. 5787 of 2012.
30. **I grant such leave and order that the applicant files a memorandum of appeal and serve the same upon the respondent within 15 days from the date hereof.**

31. The second issue for determination is whether this court should grant stay of execution of decree of the subordinate court pending the filing, hearing and determination of the intended appeal. The law as regards application for stay of execution pending appeal is now well settled. For an applicant to succeed upon such an application, they must persuade the court that the application is filed timeously and without unreasonable delay; that the applicant shall suffer substantial loss if stay is not granted and the appeal succeeds, it shall be rendered nugatory; and last but not least, that the applicant has offered security that may be binding on him for the due performance of decree. The above conditions are espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules.

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in a dispute so that the rights of an appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. See **BUTT V RENT RESTRICTION TRIBUNAL (1982) KLR 417** that:

"the general principle in granting or refusing a stay is that if there is no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should the decision be reversed."

32. However, in doing so, the court will weigh this against the success of a litigant who should not be deprived of the fruits of his judgment. The court is called upon to ensure that neither party suffers prejudice. This was well stated in the case of **M/s Portreitz Maternity v. James Karanga Kabia, Civil Appeal No. 63 of 1997** where the Court had this to say:-

"That right of appeal must be balanced against an equally weighty right of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."

33. As I have found earlier in this ruling, this application was filed within a reasonable time and I will therefore not repeat myself on that aspect of whether or not the application herein which twinned with the application for leave to appeal out of time, was brought without undue delay.
34. On whether or not the Applicant stands to suffer substantial loss if stay is not granted, the legal burden of proving the allegation that if stay is denied then the appeal if successful shall be rendered nugatory lies on the applicant.
35. It was the Applicant's position that if the orders sought are not granted, its appeal shall be rendered nugatory. On the issue of loss, the Applicant stated that if the order of stay is not granted and the appeal succeeds it may not be in a position to recover the decretal sum which is substantial considering that the Respondent's financial status is meagre since he is a casual labourer. The Respondent on the other hand contested the Applicant's statements. It was particularly denied that the Respondent was a man of meagre financial status and or that the decree amounted to a threat to execute. It was further stated that the existence of the decree is not a threat to execution. The court in **Mukuma v. Abuoga (1988) KLR 645** defined substantial loss as follows:-

"Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

36. Being a legal process, not even the commencement of execution amounts to substantial loss. In this case, I have seen annextures PK annexed to the affidavit of Paul Kariba sworn on 7th September, 2015 in support of the application for leave to be heard during the vacation. There are two documents one being a warrant of sale of property in execution of decree in the CMCC 5787 OF 2012 dated 31st August, 2015 which decree is being challenged and a proclamation of attachment by Moran Auctioneers dated 1st September, 2015. In other word as, the record shows that there is execution already process put in motion.
37. That notwithstanding, execution process is not a pointer to substantial loss. This was the observation the court made in the case of **James Wangalwa & Another v. Agnes Naliaka (2012) eKLR** when it stated as follows:-

"…the process of execution…by itself does not amount to substantial loss...This is because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party."

38. The decree threatened to be executed is a monetary one. In **Kenya Shell Ltd V Kibiru and Another(1986) KLR 410** the Court of Appeal stated that in monetary decree, it is not normal for an appeal to be rendered nugatory if payment is made even if the amount involved is substantial. Further, that there was no guarantee that the appeal would be successful. In addition, the court was clear that staying execution would be denying a successful litigant of the fruits of his lawfully obtained judgment.
39. In this case, the applicant alleges that the respondent's financial means are not known since he is a casual labourer and if the appeal is successful; he may not refund the decretal sum if it is paid to him at this stage. Nonetheless, because substantial loss is the main threshold for granting stay, it is not alleged that if the money is paid to the respondent, the applicant's business is likely to come to a standstill. That, in my view, is what substantial loss would entail. The respondent is a successful party in the subordinate court and is entitled to the fruits of his lawful judgment. It is therefore not enough for the applicant to allege that the respondent is a poor man who is a casual labourer and would be unable to refund the money if the appeal is successful. the applicant must prove that allegation. **See Caneland Ltd & 2 others v Delphis Bank Ltd. Civil Application No. Ni.344 of 1999**.The Constitution of Kenya 2010 commands courts to administer equal justice to all without regard to status.
40. The law, however, does appreciate that it may not be possible for the applicant to know the respondent's financial means. The law is can reasonably be expected to do, is to swear an affidavit, upon grounds, that the respondent will not be in apossition to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the respondent to see if there are any funds there. The property that one has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum. See Odunga J in **Sofinac Company Limited v Neplphat Kimotho Muturi[2013] eKLR** citing with approval **Kenya posts nad Telecommunications Cororation v Paul Gachanga Ndarua Civil Appl No Ni 367 of 2001;ABN AMRO BANK, N.K V Le Monde Foods Limited Civil App Nai 15 of 2002.**
41. **In other words, where** an applicant alleges that the respondent is a man of straw or is unable to refund the decretal sum, the burden to prove otherwise shifts to that respondent. See also the Court of Appeal's decision in the case of **ILRAD v. Kinyua(1990) KLR 403 at Page 406** where it was held as follows:-

"We have considered what Mr. Sehimi has said. However, we must "observe that the onus was upon the respondent to rebut by evidence that the claim that the intended appeal if successful would be rendered nugatory on account of his (respondent's) alleged impecunity."

and this court's decision in **Edward Kamau & Another v. Hannah Mukui Gichuki & Another (2015) eKLR** citing the Court of Appeal's decision in **National Industrial Credit Bank Ltd v. Aquinas Francis Wasike Civil Application No. 238 of 2005** where it was held as follows:-

"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge."

42. In this case it is the Respondent's advocate who attested that the Respondent was a man of means.

Would that be considered proper rebuttal of that issue? Iam not persuaded as such. I am enjoined by the decision in **Simon Isaac Ngui v. Overseas Courier Services Ltd (1998) eKLR** which this court cited in the case of **Factory Guards Limited** (supra) considering the difference in the circumstances of the latter and the instant case. In **Simon Isaac Ngui** (supra) it was stated:-

"...The applicant's counsel has deponed to contested matters of fact and said that the same are true and within his own knowledge, information and belief. It is not competent for a party's advocate to depone to evidentially facts at any stage of the suit."

43. The above position holds true to contested evidential matters, especially matters of ability to recompense the decretal sum. In this case, there was nothing annexed to the respondent advocate's affidavit to show the respondent's means. Even if I am to be found wrong on the issue of an advocate swearing an affidavit, I note that no evidence has been tendered to prove the Respondent's financial capacity thereby the Applicant is found to have satisfied this court that it stands to suffer substantial loss.
44. The Applicant has also indicated that it is willing to deposit security for the due performance of decree herein.
45. For those reasons, I find the application for stay pending appeal as intended, if filed, is merited and I accordingly grant it conditional upon the applicant depositing the whole decretal sum in a joint interest earning account to be opened and jointly held by both advocates for the applicant and the advocates for the respondent within 21 day from the date hereof, to secure the performance of decree herein.
46. The costs of this application shall be in the intended appeal if filed and if no appeal is filed and served within 15 days from this date and or if no security is deposited as ordered herein within the stipulated period, the orders granted herein lapse unless extended by this court upon which the respondent shall have costs of this application to be agreed upon or taxed.

Dated, signed and delivered in open court at Nairobi this 26th day of October, 2015.

R.E.ABURILI

JUDGE