



REPUBLIC OF KENYA
IN THE HIGH COURT AT KENYA AT NAIROBI
CIVIL APPEAL NO. 332 OF 2013

PARTICK NYAGA 1ST APPELLANT/APPLICANT

RENTOKIL INITIAL (K) LIMITED.....2ND APPELLANT/ APPLICANT

-VERSUS-

SANITAM SERVICES (E.A) LIMITEDRespondent

RULING

The appellants /applicants hereinafter referred to as the applicants have filed two applications as follows; the notice of motion dated the 28th of June 2013 is brought under Order 51 rule 1 and Order 42 rule 6 of the Civil Procedure Rules 2010 and Sections 1A, 1B & 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya . In this application the applicant seeks a stay of execution of the Judgment and Decree in Milimani CMCC No. 6289 of 2008 issued on the 14th May 2013 pending the hearing and determination of the Appeal and that costs be in the cause. The application is based on ten (10) on the face of the application and is supported with the affidavit of Mr. Partick Nyaga the Managing Director of the 2nd Applicant Company dated the 28th of June 2013.

The 2nd notice of motion is dated the 3rd of July 2013. It is brought under sections 1A, 1B, & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 50 rule 6 & Order 51 rule 1 of the Civil Procedure Rules, 2010. The applicants seek the following orders;

1. That the Court be pleased to enlarge time within which the applicants ought to have filed their Appeal.
2. That the Memorandum of Appeal herein filed on the 14th of June 2013 be deemed to have been filed within such extended time.
3. That there be a stay of execution of the Judgment and Decree in Milimani CMCC No. 6289 of 2008 pending the hearing and determination of the application
4. That costs of the application be in the cause.

The application is premised on ten (10) grounds stated on the face of the application, together with the affidavit of Mr. John Katiku a partner in charge of litigation at the firm of Musyoka Wambua and Kituku Advocates.

The applications were opposed by a replying affidavit of Mr. Samson Nganga a director of the respondent company dated the 5th July 2013 and a replying affidavit of Mr. Richard M. Mutiso an advocate dated the 22nd of September 2013.

I have read the affidavits and this is what I find as the facts. The respondent sued the appellants in CMCC No. 6289 of 2008. The suit was heard by Hon. Obulutsa who delivered judgment on the 14th May 2013. Being aggrieved by the said judgment the appellants filed a Memorandum of Appeal on the 14th June 2013 and their application for stay on the 28th June 2014. When the application was presented in Court the applicants were denied a stay of execution order as the appeal was filed late by a day and hence their application dated the 3rd July 2013. In their application dated the 3/7/13 the applicants state that they were under the inadvertently impression that they had filed the Appeal within time; that they realized that they had filed the appeal late by a day when they came to Court on the 1st of July 2013 for their application dated the 28/6/13; that the mistake was that of Counsel and that the inadvertence of the Counsel should not be visited on the client as it is the client who will suffer in the event that the decree is executed without affording them a chance to be heard on Appeal; that the Court should therefore extend time and the Appeal filed herein be deemed as filed within the dully extended time and that the Decree holder will not suffer any prejudice if the orders sought are granted.

For the application for stay of execution the applicants argue that they are aggrieved by the judgment, that the Trial Magistrate had no jurisdiction to award the sum of Kshs. 7,000,000/= as he is a Principal Magistrate whose pecuniary jurisdictional limits is Kshs. 4,000,000/-, further that the Learned Magistrate erred in his judgment as stated in their Memorandum of Appeal on facts and in law, that the appeal has high chances of success, that if the stay order is not granted then the appeal will be rendered nugatory and the appellants will suffer substantial and irreparable loss. That they doubt the ability of the Respondent to pay back the decretal sum if execution were to proceed as the respondents has not been able to pay the 2nd appellant his costs and that they are willing to furnish such security as the Court may deem fit.

The response from the respondents is as follows; that the notice of motion dated the 28/6/13 is incompetent as it is founded on an incompetent appeal, that the applicant is misleading the Court as Hon. Obulutsa is an Acting Chief Magistrate with jurisdiction (see Kenya Gazette Notice dated the 12th July 2012), that the Respondent company has been in operation since 6th September 1988, that it has provided services to various institutions and has a huge revenue inputs from the various contracts it has, that they did not refuse to pay costs, that the decision to pay costs was overturned in Civil Appeal No. 228 of 2004. Mr. Mutiso in his affidavit rebutted the applicants claims on why it took long to open the joint account and why he should not be blamed, that from the RTGs form filed by the applicant its evident that the applicants applied for the transfer of funds outside the 21days granted by the Court and the sums credited in the joint account on the 2nd of August 2013 again outside the 21 days as ordered by the Court. The Respondent relied on 2 cases namely; **Kenya Shell Ltd vs.Kibiru and another 1986, KLR 410** where it was held that:

“In applications for stay the Court should balance two parallel propositions , first the litigant, if successful should not be deprived of the fruits of judgment in his favor without just cause and secondly that execution would render the proposed appeal nugatory”;

and the case of **Kenya Power and Lightning Co. Ltd vs. Philip A. M. Kimondi HCCC ELc No. 1034 of 2007** where the Court held that by **offering a security that is not an adequate reason to get a stay automatically.**

At the hearing of this application Counsels’ reiterated what is deponed in the affidavits. Mr. Muli for the applicants submitted that they had deposited the decretal sum in a joint account and therefore the respondent will not suffer any prejudice or substantial loss. Mr. Mutiso submitted that the applicants have failed to show the loss they will suffer nor have they demonstrated how the appeal will be rendered nugatory. In reply the applicants argued that the respondents had not opposed their application to file the appeal out of time and that in the case cited of Kenya Shell the applicant had delayed for 5 days.

I have considered the affidavits the submissions. I will first deal with the application dated the 3rd July

2013; it's not in dispute that the applicants filed the appeal a day late. The applicants have offered an explanation for the delay that it was the mistake of the Counsel who was handing the matter; they have argued this Court not to visit the inadvertence of the Counsel on their clients. In the case of **Andrea Chibuyi Mwachi vs. Eliakana Oyondo Mulupi Civil Application No. 81 of 1996** it was held that “**an advocate’s mistake is sufficient for extension of time**”, I will therefore exercise my discretion and enlarge time within which the applicants ought to have filed their appeal. The applicants were late by a day and therefore I will deem the Memorandum of Appeal filed herein on the 14th of June 2013 to be deemed to have been filed within such extended time. Costs of the application dated the 3rd of July 2013 shall be in the cause.

On the application for a stay of execution pending appeal, I am guided by the provisions of Order 42 rule (6) (2). The application was not within reasonable time, there was no delay. What I have to consider next I whether the applicants will suffer substantial loss. In the affidavit sworn by Mr. Nyaga dated the 28th June 2013 he contends that the appeal has high chances of success, that the magistrate erred in law in arriving at the decision he made, he also states that doubts the ability of Kshs. 7,000,000/-. The respondent counteracts this through the affidavit of Mr. Nganga that they are able to pay the sum as they are a company with huge revenue inputs. In the case of **Kenya Shell Limited vs. Kibiru and another (supra)** the Court held that a Court must balance the two parallel propositions, that of the litigant and whether execution would render the appeal nugatory. The applicants in their grounds of appeal have raised issues on the law and facts that need to be considered at the appeal. The amount of Kshs 7,000,000/ is a colossal sum which if paid out could be a problem to recover later in the event the appeal succeeds and this would result into a substantial loss. I do note that the applicants have deposited the sum in a joint account, thus I will exercise my discretion and grant a stay of execution of the Judgment and Decree in Milimani CMCC.No. 6289 of 2008 issued on the 14th May 2013 pending the hearing and determination of the Appeal. Costs of the application shall be in the cause.

Orders accordingly.

Dated signed and delivered this **24th** day of **June** 2014

R. E. OUGO

JUDGE

.In the presence of the;-

.....For the 1st and 2nd applicants/appellants.

.....For the Respondent

.....Court Clerk