



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 559 OF 2014**

**DEVKI STEEL MILLS ..... APPLICANT**

**VERSUS**

**ROBERT APUTO AMARIATI ..... RESPONDENT**

**R U L I N G**

Before me is an application by way of notice of motion dated 1<sup>st</sup> August 2014 filed on 4<sup>th</sup> August 2014 by the applicant Devki Steel Mills against the respondent Robert Aputo Amariati. The application seeks orders for stay of execution of the judgment and decree of the lower court in **Thika CMCC 1175 of 2010** pending the hearing and determination of this application and the intended appeal.

The application further seeks for leave of this court to be granted extending time within which an appeal ought to have been filed challenging judgment and decree in **Thika CMCC 1175 of 2010** on 30<sup>th</sup> April 2014.

The application is premised on the grounds on the face thereof and supporting affidavit sworn by Mr Jackson Omwenga advocate on 1<sup>st</sup> August 2014 and annexures thereto.

The application was opposed by the respondent filing of a replying affidavit sworn by Nelson Hanim Muturi on 7<sup>th</sup> August 2014. However, the respondent's counsel did not attend court for the formal hearing of the application despite the date having been fixed by consent before **Hon. Justice Waweru** on 8<sup>th</sup> June 2014.

Only Mr Omwenga appeared in court for the applicant and I allowed him to proceed to argue the application as no reasons were advanced why the respondent's counsel was not in court.

Mr. Omwenga submitted in support of the application that judgment in the lower court matter was to be delivered on 9<sup>th</sup> April 2014 but on the material date, the court intimated that the judgment was not ready and that the same would be delivered on notice. He therefore waited for the said notice which was never served on him despite the fact that he was on record for the defendant/applicant. Instead, he later learnt that judgment was delivered on 30<sup>th</sup> April 2014 in the absence of the parties, and that he only came to learn of the said judgment when his office received a letter on 20<sup>th</sup> June 2014 delivered by the respondent personally informing counsel that judgment had been entered, and also attaching a copy of typed judgment. The said letter which was dated 20<sup>th</sup> June 2014 informed counsel that the court had given a 30

days stay of execution of the judgment, which stay had lapsed on 30<sup>th</sup> May 2014. The letter asked for settlement of Ksh. 402,000/- together with costs of Ksh. 80,000/-.

Mr. Omwenga further submitted that upon receipt of the said letter and judgment, he informed his client who responded by letter dated 23<sup>rd</sup> July 2014 instructing counsel to seek leave to appeal out of time.

He urged the court to exercise its discretion and grant the orders sought as the application was filed timeously upon learning of the judgment and receiving client's instructions.

He further informed the court that his client had deposited in court the whole decretal sum and in excess Ksh. 500,000/- as security on appeal.

The respondent did not attend court to advance their opposition as contained in the replying affidavit sworn on 7<sup>th</sup> August 2014 and filed on 8<sup>th</sup> June 2014. I have nevertheless examined the depositions therein and taken them into account in determining whether or not I should grant orders prayed in the applicant's application. The respondent maintains that the advocates for the applicant were well aware of the date of the judgment which was given in the presence of both parties on 13<sup>th</sup> March 2014 the date fixed for filing of written submissions and that he notified counsel for the applicant on 20<sup>th</sup> June 2014. The rest of the depositions in the replying affidavit are argumentative matters which are totally irrelevant and do not explain why the applicant should not be granted leave to appeal out of time and a stay pending such intended appeal.

An order of stay will be granted where the court is satisfied that substantial loss may result to the applicant, if the order is not made, and the application for stay has been brought without unreasonable delay.

The applicant must also demonstrate willingness and readiness to abide by any order as to security. The judgment against which an appeal is intended is a monetary decree. It was not submitted that substantial loss will be occasioned to the applicant if stay is not granted by merely paying the decretal sum. It should be that the appellant may suffer loss in the event that the appeal succeeds, he/she will be unable to recover the decretal sum from the respondent or that it cannot be recovered without undue difficult or expense. In this case, the applicant has been ready, able and more than willing to deposit the decretal sum in court pending hearing of this application. The same was deposited on 30<sup>th</sup> September 2014, in the sum of Ksh. 500,000/-. In compliance with Order 42 rule 6(2) of the Civil Procedure Rules.

The applicant depones that they are challenging the judgment on account that the quantum of damages as awarded was inordinately excessive. In other words, they argue that they have an arguable appeal with the probability of success and that the said intended appeal shall be rendered nugatory unless stay of execution of decree appealed from is granted. See **Chris Munga N. Bichage – Vs – Richard Nyagaka Tongi & 2 Others CA at Kisumu Appl No. 30/2013 UR 17/2013** Per **Onyango-Otieno, Azangalala, Kantai JJA.**

The applicant must also demonstrate that he has filed the application without unreasonable delay. I will consider this condition alongside the prayer for leave to appeal out of time. It is not in dispute that judgment in the lower court was delivered on 30<sup>th</sup> June 2014. In the absence of both parties to the suit. Although counsel for the respondent alleges that the parties were aware of the said date, no proceedings were attached to controvert that fact. It is also not in dispute that counsel for the applicant received a letter dated 20<sup>th</sup> June 2014 notifying him of the said judgment, enclosing a copy of the judgment in question. It is also obvious that counsel could not be expected to unilaterally file an appeal without his clients' instructions which were supplied on 23<sup>rd</sup> July 2014. In addition, it is not disputed that by the time counsel for the applicant was receiving information that judgment had been delivered, one month had lapsed and therefore he could not have lodged an appeal without seeking leave to extend the period of filing. The application herein was filed on 4<sup>th</sup> August 2014 after receiving client's instructions on 1<sup>st</sup> August 2014. In my view, there is no inordinate delay in filing the application herein seeking for stay

of execution of decree and leave to file an appeal out of time.

Decree from which an intended appeal is sought is appellable under Section 65 of the Civil Procedure Act. Under Section 79G of the said Act, an appeal may be admitted out of time if the appellant satisfies the court that he has a good and sufficient cause for not filing the appeal in time. As I have stated, I am satisfied with the explanation given by Mr. Omwenga as to why the appeal was not filed within 30 days period as stipulated by law. Accordingly, I order that

- 1) The applicant is granted leave to file an appeal out of time, which appeal must be filed within 14 days from the date hereof.
- 2) As to the stay of execution, although the respondent intends to challenge both liability and quantum on appeal, it is clear that the challenge is mainly on the alleged excessive award of damages which are said not to be in tandem with current court awards. The applicant suggested what they thought could have been reasonable had the respondent proved his claim, an award of Ksh. 150,000/-

The court finds no reason why the whole judgment award should be kept away from the respondent who is entitled to it by the judgment of the court, and as it has not been shown that the applicant will be unable to recover it from the respondent to recover it without undue difficulty. In other words, that monetary decree, the applicant must demonstrate the conditions above which were not demonstrated. In the end, I order for stay on condition that there shall be payment of Ksh. 200,000/- being part of the decretal sum of the Ksh. 500,000/- deposited in court by the applicant to the respondent decree holder.

The balance thereof Ksh. 300,000/- shall be deposited in an interest earning account to be operated by both counsels for the parties pending hearing and determination of the intended appeal.

In default of compliance of any of the above conditions, leave granted, and stay as above shall stand discharged without more.

Costs of this application shall be costs in the appeal.

**Dated, signed and delivered at Nairobi this 30<sup>th</sup> Day of October, 2014.**

**R.E. ABURILI**

**JUDGE**