



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Miscellaneous Application 4 of 2013**

**ELDORET STEEL MILLS COMPANY LIMITED ..... APPLICANT**

**VERSUS**

**ANTHONY SHILEWA KAIDA ..... RESPONDENT**

**RULING**

The application brought by way of Notice of Motion dated 7th February, 2013 under Sections 1A, 1B, 3A and 79 G of the Civil Procedure Act, Orders 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules seeks two main prayers:-

- 1. That the Applicant be allowed to file an appeal from the Judgment and decree of the court in Eldoret CMCC. No. 880 of 2009 out of time.**
- 2. That upon grant of the above payer, there be stay of execution and/or further execution of the decree in Eldoret CMCC. No. 850 of 2009 pending hearing and determination in the intended appeal.**

The same is premised on the following grounds:-

- (i) That judgment was delivered on 6th December, 2012 and the Applicant informed accordingly.**
- (ii) That the Applicant is aggrieved by the judgment and decree in Eldoret CMCC No. 850 of 2009.**
- (iii) That the Applicant herein wishes to challenge the judgment and decree of the court in Eldoret CMCC. No. 850 of 2009.**
- (iv) That the delay in filing the appeal herein was not deliberate but due to inadvertence on the part of M/s. Nyairo & Company Advocates staff.**
- (v) That the letter of instruction to appeal was received on 20th December, 2012 and filed away without being acted upon hence the delay in filing the appeal.**
- (vi) That the Applicant has an arguable appeal with very high chances of success.**
- (vii) That this application is made timely and in good faith.**

**(viii) That this court has to power to grant the orders sought herein.**

**(ix) That the circumstances of the case it is just fair and in the best interest of justice that the prayers sought herein be granted.**

**(x) That no prejudice will be suffered of the orders sought issue.**

It is also supported by the affidavit of Alfred King'oina Nyairo, an advocate of the High Court of Kenya and a partner in the law firm having the conduct of the application on behalf of the Applicant. It is deposed in the affidavit that judgment in the lower court was delivered on 6th December, 2012 and instructions to appeal from the Applicant given to the law firm on 20th December, 2012 which was the office closing day for the Christmas holiday. That on 28th the office was served with a bill of costs from the Respondent's advocates and that is when the letter of instructions to appeal was seen. That the appeal has high chances of success. That the failure to appeal on time was inadvertent and not deliberate.

The application is opposed vide a Replying Affidavit sworn by Daniel Lawrence Were an advocate of the High Court of Kenya having the conduct of the application on behalf of the Respondent. He deposed that the failure by Counsel for the Applicant to file the appeal out of time is out of utter carelessness and negligence which should not be visited upon the Respondent who is innocent and should not be denied the opportunity to enjoy the fruits of his judgment.

The application was canvassed before me on 26th February, 2013 by way of oral submissions. M/s. Khayo, advocate for the Applicant urged the court not to visit the mistake of the counsel upon the Applicant. She cited three authorities in advancing the cause of her client which I will consider hereafter.

Mr. Were advocate for the Respondent on the other hand submitted that the delay in filing the appeal was avoidable. That further the Applicant has not satisfied the conditions provided under Order 42 Rule 6.

I have now carefully appraised myself with submissions made. The reasons given by Counsel for the Applicant in not filing the appeal on time is that the instructions to do so by the Applicant were filed away during the Christmas period and the file was only pulled out when they were served with a bill of costs by counsel for the Respondent. It is deposed in the Supporting Affidavit that on 18th December, 2012 counsel for Applicant informed their client of the judgment and on 20th December, 2012 the Applicant instructed them to appeal against it.

None of these correspondences were annexed to the supporting affidavit, clearly leaving the court without any documentary evidence to rely on. Ms. Khayo did not explain whether this omission was inadvertent and she expected the court, as a matter of course, to believe her story without supporting evidence.

Be that as it may, it is clear that time for filing the appeal lapsed sometime in mid January, 2013. This application was filed on 7th February, 2013. Whatever caused the delay in filing the appeal is not well canvassed but it is the court's duty to administer justice to all without applying undue technicalities. Further as provided by Section 1A of the Civil Procedure Act the overriding objective of the Civil Procedure Act and the Rules is to facilitate the just, expeditious and proportionate and affordable resolution to civil disputes. This objective may not be met where courts are rigid in the application of the rules without exercising the wide discretion given to them in ensuring administration of justice.

Bearing this in mind, I will give counsel for the Applicant the benefit of doubt and uphold that the delay in filing the appeal on time was indeed occasioned by an oversight on their part in the manner it is explained in the application.

In the case of **AFRICAN AIRLINES INTERNATIONAL LTD -VS- EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK (2003) EA, 2** court held that in granting leave to file appeal out of time "***all relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay,***

*whether there is an arguable case on the appeal and the degree of prejudice to the Defendant if time is extended.” And further that “in an application for extension of time, the discretion which falls to be exercised is unfettered, and should be exercised flexibly with regard to the fact of the particular line.”*

The judgment having been delivered on 6th December, 2013 and this application having been filed on 7th February, 2013 the length of delay in filing this application cannot be deemed as inordinate.

As to whether the appeal is arguable, this must be argued vis-a-vis the provisions of Order 42 Rule 6 (2) of the Civil Procedure Act which I will consider later on in this ruling. On whether any prejudice would be caused to the Respondent, the answer is in the negative as right to appeal should be accorded to a party in order for justice to be seen to be done, not only to one party but to all parties in a matter.

In the **MULI -VS- KITUKU (2004) 1 EA, 178** case, although the court found that the delay to file an appeal was occasioned by the advocate on record, it nonetheless extended the time to file the appeal on grounds that the Applicant should not be shut from proceedings. The Applicant was however castigated by the court for occasioning the unnecessary delay and was condemned to pay costs.

A similar scenario attended in the case of **BAMANYA -VS- ZAVER (2002) 2 EA, 325** in which delay in filing the appeal was one of two and a half years. Mr. Were advocate for the Respondent attempted to distinguish the facts of this authority with the instant case at hand, stating that, in the former, the delay was occasioned by previous advocates of the Applicant on record. I agree with Mr. Were but the court had this to say:-

**“The delay of two and half years to file the application would normally amount to dilatory conduct or inordinate delay. The chequered background of the case warranted the case to be given special consideration especially because the conduct of his two former advocates was disappointing. Mistakes, faults or dilatory conduct of counsel should not be visited on the litigant.”**

Having observed this, I think it is only fair that the first limb of this application succeeds.

As to whether the stay of execution should be granted, I am guided by the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules which sets out the conditions that an Applicant must satisfy before such a relief is granted. The same provides as under:-

**“Order 42 Rule 6 (2) No order for stay of execution shall be made under subrule (1) unless-**

**(a) the court is satisfied that substantial loss may result tot 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.”**

I have already addressed the issue of delay herein above and I need not repeat myself save to add that this application has relatively been filed timeously.

As to whether the Applicant would suffer any substantial loss if orders sought are not granted, my view is that the appeal intended to be filed would be rendered nugatory. Execution would proceed on and this would present a situation in which there would be no need to pursue the appeal. I find such a scenario occasioning the Applicant substantial loss.

But the hurdle lies in the Applicant failing to offer any security for the due performance of the decree as required by sub-rule (2) (b) above. Indeed it is on record that Ms. Khayo was provoked by Mr. Were when the latter was responding to the initial submissions by the former on this requirement. Mr. Were was categorical that the Applicant was not offering any security and so court could not accord it a stay of execution order. By omission, deliberate or otherwise, Ms. Khayo did not respond to this submission.

The decree of the lower court is one of monetary terms. To cushion the Respondent against any loss in the event that the appeal does not succeed, it is only fair that an equal measure of security as ordered in the decree is deposited.

Ordinarily, it is expected that the Applicant offers the security. But having found it prudent to enlarge the time within which appeal should be filed it is only fair that the Applicant be ordered to deposit the security as failing to do so would render the order enlarging the time a nullity. Court does not act in vain. It has the discretionary powers to make orders as would serve justice to all.

A look at the Memorandum of Appeal demonstrates that weighty issues have been raised. It would not be fair to shut out the Applicant in seeking justice.

In the result I find for the Applicant in the following terms.

1. Prayers number 3 and 4 of the application are granted.
2. The Applicant shall file the appeal within seven (7) days of the date hereof.
3. The Applicant shall deposit Ksh. 181,500/= being the damages awarded plus the taxed costs thereof in a joint interest-earning account to be opened in the names of the advocates for the Applicant and the Respondent.
4. That the said joint account be opened within five (5) days from the date hereof and the said amount of money be deposited in the account within seven (7) days of opening of the account.
5. If the Applicant fails to comply with the requirements set out in Nos. 3 and 4 above, the order of stay of execution granted pursuant to prayer No. 4 of the application will automatically lapse.
6. The orders herein will apply both in this file and in High Court Miscellaneous Civil Application No. 5 of 2013 as agreed by both counsel on record.
7. Costs to the Respondent.

**DATED** and **DELIVERED** at **ELDORET** this 18th day of April, 2013.

**G. W. NGENYE – MACHARIA**

**JUDGE**

Mr. Saina holding brief for Ms. Khayo for the Applicant

Miss Maroko for Were for Respondent