



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISCELLANEOUS APPLICATION NO. 461 OF 2013

D.T. DOBIE & COMPANY (K) LTD.....PLAINTIFF

VERSUS

CITY PANEL BEATERS & PAINTERS LTD.....DEFENDANT

R U L I N G

1. There are two main orders sought in the **amended notice of motion dated 6th May 2013** –

(i) That leave be granted to the Applicant to appeal out of time against the decree of the lower court (Nairobi CMCC No. 5036 of 2003) passed on 20th April 2013.

(ii) That there be stay of execution of that decree pending disposal of the appeal.

2. The first prayer would normally be sought under **section 79G of Civil Procedure Act, Cap 21 (the Act)** while the second prayer is normally sought under **Order 42, Rule 6 of the Civil Procedure Rules, 2010 (the Rules)**. But quoting the wrong law or rules of procedure should not by that reason alone defeat an application as it is a technicality.

3. I have read the supporting and replying affidavits. I have also given consideration to the submissions of the learned counsels appearing, including the cases cited.

4. Under section 79G aforesaid an appeal from a subordinate court to the High Court must be filed within a period of thirty (30) 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. But the Court has power under the proviso to that section to admit an appeal out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.

5. The only reason given for the delay of about one year in filing appeal is delay by the lower court in supplying proceedings to the Applicant's advocates, which proceedings had not been supplied at the time of applying. It has not been explained why it was necessary to have the proceedings before preparing and filing a memorandum of appeal, especially when it appears that the same counsels acted for the Applicant in the lower court. Further, it is not stated that the Applicant's advocates were also waiting for a copy of the judgment from the lower court. If they had the judgment it should have been easy to prepare and file

a memorandum of appeal in time. A memorandum of appeal can always be amended subsequently should the need arise.

6. I am not satisfied that there was good and sufficient cause for not filing the appeal in time. I must therefore refuse leave to file appeal out of time.

7. It is now not necessary to consider the application for stay of execution pending appeal as there will be no appeal. But even if I had granted leave to appeal, I would not have granted stay of execution. The decree is for money (KShs. 1,671,487/67 plus costs and interest). Stay of execution of a money decree will normally not be granted unless the appeal will be rendered nugatory if the appellant ultimately succeeds. An appeal will not normally be rendered nugatory by payment of a money decree; but where the appellant may not be able to recover the decretal sum from the respondent if he succeeds in the appeal, or where he cannot recover the money without undue difficulty, then the appeal may be rendered nugatory.

9. I do not find in the supporting affidavit any plea that the Applicant, if it were to succeed in its intended appeal, may not be able to recover from the Respondent (a well-known and long-established motor vehicle dealer) the fairly modest decretal sum, or that such recovery may not be without undue difficulty.

10. As it is, having refused leave to appeal, the entire application is without merit, and it is hereby dismissed with costs. Any interim stay of execution in place is hereby lifted. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2013