



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISC. CIVIL APPLICATION NO. 197 OF 2010

ELDORET STEEL MILLS LTD. APPLICANT

VERSUS

JULIUS KIPKOSGEI MASWAI RESPONDENT

R U L I N G

This Ruling relates to the Notice of Motion taken pursuant to the provisions of sections 3A and 79G of the Civil Procedure Act and Orders XLI Rule 4 and L Rule 1 of the Civil Procedure Rules and all enabling provisions of the Law. The applicant prays for leave to file an appeal out of time and for stay of execution and for the costs of the application. The application is brought on the grounds that upon delivery of the judgment the applicant referred the matter to its insurers who declined to deal with it and hence the applicant had to deal with it in person and when it gave instructions to its advocates to act on its behalf time within which to file appeal had lapsed. That the intended appeal is against both liability and quantum and the application was brought promptly and in good faith.

The affidavit in support of the application in sworn by a director of the applicant who swears that the delay in proceedings in time was occasioned by communicating with the applicant's insurers who later declined to take up liability and the applicant had to proceed in person through its advocates M/S Nyairo and Company advocates. It is sworn in that affidavit that judgment was delivered in the absence of both counsel for the plaintiff and Defendant and counsel for the defendant applicant only became aware of the delivery of judgment when they saw the bill of costs and that it is only fair that the applicant do have time extended to enable the appeal be canvassed on its merits.

The advocate for the plaintiff/respondent Mr. Francis Omondi swore the affidavit in reply to the application and deponed therein that both counsel were aware of the date on which judgment was delivered but each chose not to attend. He added that advocates for the applicant became aware of or ought to have become aware of the delivery on 10/05/2010 when he served them with the bill of costs. He found the reasons given for delay not acceptable and more so because the self same reasons were given in yet another application in which he represents the respondent and the advocate for the applicant is the same as in this case representing this same applicant. He prayed that the application be dismissed.

At the hearing of the application Learned Counsel M/s Khayo submitted for the applicant that the application was brought in good faith and promptly and the delay was sufficiently explained.

In opposing the application learned counsel Mr. Omondi submitted that the applicant had not met the conditions for the grant of the orders sought and that there was no way of telling whether or not the

appeal had any chance of success as no lower court proceedings were availed to this court to determine that. He concluded that the Respondent would suffer prejudice by having his judgment delayed yet he had sustained injuries in the accident that led to the suit.

This kind of application is governed by Order XLI rule 4(2) of the Civil Procedure Rules which provides as follows;

“4(2) No order for stay of execution shall be made under subscribe (1) unless;-

(a) The court is satisfied that substantial loss may result to 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.”

Those, and not the considerations in Rule 4 of the Court of Appeal Rules which are not similar to the above and which were the subject of the Ruling in the case quoted to me by the Respondent’s advocate being **CIVIL APPLICATION NO. NAI. 221 of 1999 KENYA TEA DEVELOPMENT AUTHORITY –VS- MICROFILM EQUIPMENT LIMITED AND KODAK (K) LTD.** are the applicable considerations. The authority is good for extension of time.

Turning to the latter part of subrule 2(b) of Order 41 rule 4 as concerns the application having been brought without unreasonable delay. I find as follows. The applicant says that delay was occasioned by his referring the matter to the insurers who after considering the same declined liability. That is an acceptable explanation for the delay and I find it irrelevant that it may have been the same reason there was delay in another case involving this applicant. If the applicant required to consult with its insurers then that is a matter between it and the insurer and no party outside whatever policy as may have been in force may interfere. In the circumstances of this case and where it is admitted by both sides that judgment was indeed delivered in their absence and even if I were to accept that the applicant became aware of the delivery of that judgment upon service of the bill of costs, I would still find that the ensuing delay is sufficiently explained as above and I accept such explanation as reasonable and I do not consider the delay unreasonable.

As to the earlier part of the same subrule as to substantial loss I note that the proposed appeal is against both liability and quantum and at this stage it is not known what the outcome of such appeal would be, were it to be allowed to proceed. Similarly at this stage it is not known what the Respondent has that would compensate the applicant were the appeal to be allowed to be heard and it succeeds after execution has issued. The ensuing execution might result to substantial loss to the applicant if execution proceeds and later the appeal succeeds. In these circumstances I am satisfied that substantial loss may be suffered by the applicant unless the orders sought are granted.

The security as the court may order for the due performance of any decree that the court may give binding the applicant, is the other requirement of Order XLI(4) (2). Having accepted that the delay is reasonably explained and that there could be substantial loss if stay is not granted and the appeal succeeds, and considering that the financial position of the Respondent was not given so that the court may assess him and see if he could pay back whatever he would have received, if the appeal succeeds and being further satisfied that an order for stay of execution should be granted I hereby order that there will be stay of execution until the appeal is heard. I order that the applicant shall secure that decree by a Bank Guarantee for the entire decretal sum. Such Bank decree shall be furnished within 21 days of today in default of which execution shall issue. The appeal shall be field within 21 days of today in default execution to issue. Costs shall abide the appeal. It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF DECEMBER, 2010.

P.M. MWILU
JUDGE

In the presence of;

Absent - Counsel for the Applicant

Chanzu holding brief for Omondi - Counsel for the Respondent

Tabitha - Court Clerk

P.M. MWILU
JUDGE