REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CIVIL CASE 347 OF 2008

CREATIVE INNOVATIONS LIMITED .....PLAINTIFF

VERSUS

MARY AKINYI NDAR.....DEFENDANT

RULING

The Applicant herein moved to this Court by way of a notice of motion brought under Order 49 rule 5 Civil Procedure Rules, Section 3A and 79 of the Civil Procedure Act and order 21 rule 22 and all other enabling provisions of the law. It is dated 3rd June 2008 and filed the same date. There are 5 prayers sought namely:-

(1) spent

(2) The honourable court be pleased to grant leave to the applicant to file an appeal out of time in respect of NAIROBI CMCC NO.3071 OF 2006 as per the draft memorandum of appeal annexed hereto and the same be deemed filed and served subject to payment of Court fees.

(3) That pending the hearing and determination of this application there be stay of proceedings and execution against the applicant pursuant to the judgment dated 24th July 2007 in Nairobi CMCCC NO. 3071 of 2006.

(4) That enforcement of the Order/judgement made by the Hon. Mr. were on 24th July 2007 in the said Nairobi CMCCC No.3071 of 2006 be stayed pending the hearing and determination of the intended appeal.

(5) That the costs be in the cause.

The grounds in support are set out in the body of the application, supporting affidavit, annextures, written skeleton arguments, oral submissions in court and the major ones are as follows.

(1) That the Applicant was the 2nd defendant in NRB CMCC 2071 of 2001 having been sued by the respondent who sought judgment against the defendants jointly and severally for general damages, special damages, costs and interest. The cause of action arose from a road traffic accident as a result of which the respondent claimed to have sustained injuries. The applicant was sued in its capacity as the owner of the accident motor vehicle where as the first defendant was averred to be the beneficial owner and or driver

and agent of the applicant. The Plaint is annexed as JA1. The suit was defended in the usual manner by filing a defence dated 29th September, 2006 and filed on 2nd October 2006.

(2) Proceedings annexed to the further replying affidavit for the respondent as annexture nos 1 indicate that the trial was concluded on 26.6.2007. There is an order that submissions be filed by 10.7.2007 and judgment was set for 25.7.2007 at 2.30 p.m.

(3) A copy of the Plaintiffs submissions exhibit under Nos 1 shows that the same was dated 10.7.2007 and was filed the same date where as the judgment annexed as JA TO THE APPLCIANTS AFFIDVIT WAS DELIVERED BY THE Court on 25.7.07 in the absence of both parties.

(4) It is to be noted from the copy exhibited that there is no order made by the lower Court, to the effect that notice of delivery of the said judgment was to be issued to the parties.

(5) It is the stand of the applicants Counsel that they came to learn of the said judgment from the respondents counsel vide their letter annexture JA 2 dated 28th day of May 2008 that judgment had been delivered way back on 2nd July 2007, on the same date that the auctioneers effected the attachment.

(6) The applicants lawyer thereafter obtained the judgment men framed perused the same, and after due consideration the applicant instructed the lawyer to draw up a memo of appeal along the lines of the content of the annexed J.A. 5 and then move to this court to present the application under consideration.

(7) It is their stand that the failure to appeal in time was occasioned by the fact that they were not notified of the delivery of the judgment. They came to learn of it when the attachment was effected.

In their written skeleton arguments Counsel simply reiterated the content of their deponement, and then stressed the following:-

(i) The Counsel on record was unaware of the delivery of the judgment until the attachment stage. Upon learning of the same the applicant presented the current application promptly.

(ii) Despite the respondent's lawyer's knowledge of the delivery of the judgment, he took no steps to inform the applicants counsel about it.

(iii) That when the applicant moved to this court to seek temporary stay, he was granted the orders on condition that he deposits the decretal sum in court which he complied with on 11th day of June 2008.

(iv) They have fulfilled the condition of showing sufficient course to warrant this court to allow them to file an appeal out of time.

(v) This court, has power, authority and jurisdiction to grant the orders being sought.

(vi) The applicants counsel is aware that the court, has a wide discretion in such matters but their plea is that this discretion should not be exercised in such a manner so as to prevent an appeal from being pursued.

(vii) The courts', attention is drawn to the case law on the subject as per decisions cited for the courts', perusal.

(viii) They assert the applicant has an arguable appeal because their defence is that the vehicle attributed to their ownerships which allegedly caused the accident had been sold by them 5 years before the alleged accident.

(ix) They intend to contest liability because the respondent admitted in evidence that the owner of the vehicle was shown in the abstract, and despite this admission the learned trial magistrate wrongly found

the applicant strictly liable for the causation of the accident. The decision was contrary to the applicant having demonstrated to court, that it had divested itself of the ownership of the said motor vehicle.

(x) The delay in presenting the application has been adequately explained namely that counsel inadvertently misdiarized the date of the judgment but as soon as it came to their notice they moved with speed to present the current application. The applicant has shown good faith by depositing the decretal sum as ordered by this court.

(xi) The balance of convenience as to who would suffer more harm and damage if stay pending appeal and leave to appeal out of time is not granted tilts in their favour as opposed to the respondent on the basis of the foregoing the court, was urged to allow the prayers sought.

The respondents have opposed the application on the basis of the replying affidavit, written skeleton arguments and oral submissions in Court, and case law. The salient features of the same are as follows:-

(1) Prayer 4 on stay of execution pending appeal cannot lie until the appeal is filed.

(2) Ousting of prayer 4 leaves prayer 2 as the only prayer in contest. It concerns leave to file appeal out of time. It is their stand that ingredients are principles to be considered are now well established as shown by decisions of the Court of Appeal in the case law cited. Those to be stressed by them are:-

(a) The length of the delay in filing the application of this nature

(b) Whether there is sufficient reasonable explanation for the inordinate delay of close to one year on the part of the applicant in filing the present application.

(c) Thirdly and possibly upon the determination of the above two outstanding grounds set out herein above, whether the intended appeal has chances of succeeding if the application is allowed.

(d) The degree of prejudice to the respondent if the application is granted.

(3) As regards the issue of delay they contend that the same is too inordinate, as the judgment was on 24.7.07, and yet the application for leave was presented – almost a year later on 3rd June 2008. To them a delay of one year is too inordinate.

(4) They do not accept the reason given for the delay because:

(i) It is not true that the applicants Counsel was not aware of the judgment because the date for submissions and judgment was given in Court.

(ii) They agree that the judgment was delivered on 24.7.2007 one day earlier than the date indicated, but there is no justification for the applicants counsel failing to make a follow up on the matter in the same manner that the respondents Counsel, made efforts to trace the file and peruse the same to know the position.

(iii) The allegation that the file was missing is not accepted and nothing has been exhibited that any efforts were made by the applicants counsel to bring this fact to the executive officer of the court, that they have failed to trace the file for perusal.

(iv) They do not accept the allegations that it is the respondent's counsel who was to notify the applicant's counsel of the judgment. If it is true as alleged that counsel for the applicant failed to hear from the respondents counsel, he should then have sought assurance from the court, as regards the issue of the delivery or non delivery of the judgment.

(5) Even if it can be taken that the applicants counsel had no notice of the delivery of the judgment, they received notice from the respondents vide their letter exhibited dated 12.5.08 to demanding payment to

the effect that if payment is not received by the date indicated they were going to go ahead and execute and despite this warning it took three weeks for the applicants counsel to file the current application having been prompted by the proclamation of the applicants goods.

(6) They contend that the granting of leave to appeal out of time will not serve any purpose as the intended appeal is frivolous because;-

a. The only ground relied upon is the allegation that the applicant was not the owner of the accident motor vehicle and the produced no evidence to counter evidence produced by the respondent at the trial from the Registrar of motor vehicles, evidencing proof of ownership.

b. The alleged 3rd party who was allegely sold the motor vehicle and was the alleged owner was not party to the proceedings as no efforts were made by the said applicant to join this 3rd party to the proceedings.

c. The fact of the accident and the injuries of the respondent are not in dispute as the allegation of negligence were never contested.

d. Evidence in the police abstract which forms the basis of the plaintiffs evidence cannot be capitalized on as that cannot operate to oust the clear documentary evidence from the registrar of motor vehicles.

e. The learned trial magistrate had reason to doubt and disregard the alleged sale agreement.

(6) Another reason as to why this court, should not accede to the applicants application is because the respondent will be greatly prejudiced because she has judgment in her favour and she should not be withheld from the enjoyment of the same solely because of the default of the applicant to which she had made no contribution.

(8) The court, is further urged not to let the applicant benefit from his default, solely because he has deposited the decretal sum in court. The respondent is thus prejudiced by a late comer who arrives at the last minute to scuttle the respondents access to her award of general damages.

(9) On security for costs, the learned counsel for the respondent urged the court, to note that the deposit of security for costs is not a requirement or a consideration for the grant of prayers sought by the Applicant for leave to file an appeal out of time, but the court, should not overlook the fact that limitation of actions would serve no purpose if the only mitigating factor would be to deposit the decretal sum in court, and then disregard the limitation period set in place – namely that suits should be processed and disposed off speedily.

(10) This court, is further urged to take note that a remedy for negligent errors and omission committed by counsel for the applicant, and which are in favour of the applicant is a plea for damages against the counsel but not to penalize the innocent respondent by forcing the withholding of the enjoyment of the fruits of judgement from her.

(11) The court, is urged to ignore the applicants written skeleton arguments because the applicant has urged the case for a stay of execution pending appeal when the real case before court, is an application for leave to appeal out of time.

On case law the court was referred to the case of **KAMLESH MANSUKHLAL DAMJI PATTNI VERSUS CANE LAND LIMITED AND 4 OTHERS, NAIROBI, NAIROBI CA 269 OF 2002 (134/2002 UR)** in which Bosire JA declined to extend time to file an appeal out of time because the applicant had contended that he could not bring the application any earlier because he was busy prosecuting and defending other substantial proceedings that it was not possible for him to take any steps in this matter. In the courts opinion, the fact that a litigant was involved in other civil or even criminal proceedings was not a fact to stay another suit or proceedings. On the basis of that reasoning the learned Law Lord of the C.A. ruled that in the circumstances, no sufficient reasons had been placed before his

Lordship to enable his Lordship exercise his judicial rule discretion under Rule 4 of the C.A. rules to extend time within which to file an appeal and on that account dismissed the application.

The case of **POINTEX (K) LIMITED & 2 OTHERS VERSUS SANAIM INVESTMENTS LTD., NAIROBI C.A. 280 OF 2002** decided by Kwach J.A. as he then was who declined the action because the application had been presented more than 5 months after the orders sought to be appealed against had been made. In his Lordships opinion it seemed that the application had been brought solely to circumvent an application made under Rule 80 of the rules, to strike out the notice of appeal filed by the applicant, which application had been filed on 30th September, 2002 and served on the applicants advocates before 3rd October 2002 when the application for leave to appeal out of time was filed. For that reason the application was declined.

The case of **KUWINDA RURINJA & COMPANY LTD. VERSUS KENINDIA HOLDINGS LTD. AND 3 OTHERS, NAIROBI C.A. NAIROBI 243 OF 1998 (96/98 UR)**. At page 3 of the ruling the Law Lords quoted with approval their own decision in the case of **MICHUKI KIRAGU VERSUS JAMES MICHUGI KIRAGU AND ANOTHER CA NAIROBI, NO. 356 OF 19996 (UR)** observed that:- "*the discretion under Rule 4 of the CA rules to extend time for lodging an appeal is well known that it is unfettered with the only fetter being that it is subject to it being granted on terms as the court, may think fit. That within that context the said court, had on several occasions granted extension of time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out f court, and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it*."

On the same page 3 the same CA quoted with approval their own decision in the case of **SILA MUTISO VERSUS ROSE HELLEN WANGARI MWANGI, NAIROBI CA 251 OF 1997 (UR)** where it was *observed that:- "it was now well settled that the decision whether or not to extend the time for appealing is essentiality discretionary. It is also well settled that in general the matters which this court, takes into account in deciding whether to grant an extension of time are first the length of the delay, secondly the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted, and fourthly the degree of prejudice to the respondent if the application is granted.*

Also the case of **VANLEER EAST AFRICA LTD. GRIEF (K) LTD. A BUSINESS OF GRIEF BROS CORPORATION VERSUS BAUBA DHIDHA MJIDHO, NAIROBI CA NAIROBI 27/2006 (14/2006 UR)** decided by Onyango Otieno JA at page 4 the Law Lord of the CA made the following observations:- "The law is now well settled that where such discretion is granted to the court, or for that matter to anybody exercising judicial or quasi judicial authority, the same discretion can only be exercised upon reasoning availed for the exercise of the same. The discretion under Rule 4 is unfettered, and there is no limit, to the number of factors that the court, will consider. However there are clear guidelines set over the years and some of them were referred to in the case of **MAJOR JOSEPH MWATERI IGWETA VERSUS MUCHIRA M. ETHARE AND ATTORENEY GENERAL, NAIROBI C.A. 8 OF 2000 (UR)** where Lakha JA (as he then was) stated as follows:- "*The application made under Rule 4 of the rules is to be viewed by reference to underlying principle of justice. In applying the criteria of justice several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini appeal) the effect of the delay in public administration, the importance of the compliance within limits bearing in mind that they were to be observed, and the resources of the parties which might in particular be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously degraded if there was laxity in respect of compliance to them*."

On the courts assessment of the facts herein, it is clear that this court ,has been called upon to rule on two major reliefs namely, the prayer for stay of execution pending appeal, and the relief of leave to appeal out of time. The 3rd one is a usual rider mainly provision of costs.

On stay of execution, the jurisdiction to grant or decline the same depends on the demonstration of the existence or non-existence of ingredients for granting of the same. The stand of the applicant from the deponements as well as written skeleton arguments, is that they have demonstrated existence of the fact that go to satisfy the required ingredients for granting the same. Whereas the stand of the respondent is that none of the factors put forward entitle this court, to exercise its discretion in favour of the applicant in a bid to grant the said reliefs to them as the facts displayed by them as grounds for seeking the same have not satisfied the required ingredients and the now well set or established clear standards. The reasons advanced for each are set out herein above. That being the case, then the role of this coCivil Case 89/2008

urt, is to simply determine which of the rival arguments is to be upheld.

Starting with the issue of stay of execution pending appeal the starting point for this court, is the relevant provision on the subject namely Order41 Rule 4 (1) and (2) of the Civil Procedure Rules. The central command in Order 41 Rule 4 (1) is found in the following words: - "*Except in so far as the cour,t appealed from may order, but the cour,t appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court, appealed from, the court, to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seems just*."

The addressees of the command in the said provision is the court appealed from and the court appealed to. This court, in its current jurisdiction is not seized of the matter as the court, appealed from as it is common ground that the appeal arises from a decision of the lower court. Likewise it is neither the court appealed to as no appeal has been filed yet. The matter has come before it as a miscellaneous application. An appeal as this court, knows it comes before the court seized of the file in an appellate file. Herein what this court, has been informed of is that the appeal is intended, and that is why leave is being sought to file an appeal out of time. As such it is the finding of this court, that there is no jurisdiction to grant stay of execution pending appeal in a miscellaneous file.

This court, is alive to the fact that when the applicant came to this court, he was granted temporary stay of execution on condition that the decretal sum was deposited in court. The fact that this court, has declined to make a substantive pronouncement on stay of execution pending appeal does not fault the action of the court, which granted a reprieve to the applicant in the wake of an imminent execution. This court, has no doubt the learned Judge invoked his/her inherent power vested in him/her under Section 3 A of the Civil Procedure Act whether it is invoked or not which enjoins the court, to do justice to litigants in order for ends of justice to be met to both parties. The court, has judicial notice of the fact that a court, of law has its own fountain of mercy which litigants can drink from whenever circumstances demand so.

The foregoing not withstanding this court, is of the opinion that the life span of the said stay orders will end with the pronouncement of the orders herein unless trial reprieve is extended. However, that is not the end of the road for the applicant. There is room for the court, to revisit that issue should leave to file appeal be granted. They will then be enjoined to file the appeal and upon such filing of the appeal, present an application for stay pending appeal. The court would then be properly seized of the matter as an appellate court.

On the issue of leave pending appeal this court has judicial notice of the provisions of law relied upon; namely Section 79G of the Civil Procedure Act and Order 49 Rule 5 of the Civil Procedure Rules. These read:-

"*Order 49 Rule 5 Civil Procedure Rules, where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court, shall have power to enlarge such time upon such terms (if any) as the justice of the case may require and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application unless the court, orders otherwise Section 79G. Every appeal from a subordinate court, to the High Court, shall be filed within a*

period of thirty 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, provided that an appeal may be admitted out of time if the appellant satisfies the court, that he had good and sufficient cause for filing the appeal in time."

From the two provisions jurisdiction, to extend time to file an appeal out of time exists. It is however clear that both Order 49 Rule 5 Civil Procedure Rules and Section 79G Civil Procedure Act do not provide the yardstick to be applied by the court, seized of the matter in trying to determine whether appropriate circumstances exist to warrant the courts' discretion in granting the extension or not. This court, has judicial notice that the yardstick has been provided by case law. Those cited to this court, emanate from the court of appeal. These were decided under Rule 4 of the court of appeal rules. That notwithstanding this court, has judicial notice of the fact that despite the jurisdiction being invoked under different provisions of the law in the superior court, and the appellate court, the underlying principles for granting of the relief are the same. The court, of appeal has provided the guidelines. These have already been set out herein. They are applied to the facts demonstrated herein. They are applied to the facts demonstrated herein.

The court, has applied the said principles to the facts demonstrated herein and it is of the opinion that the said rules enjoin this court, to take note of the following:-

(1) To take note that the judgment sought to be appealed against was entered on or about 25.7.2007 where as the application under consideration was filed on 3rd June 2008 almost one year later.

(2) The explanation given for the delay. The explanation advanced is that upon completion of the trial a date was set for submission for 10.07.2007. Being counsel for the defendant, counsel ensured that he would be served with submissions first before he could respond but he was not served with any submissions. For this reason counsel did not attend court on the date submissions were to be filed. Neither did he attend court, on the date set for the delivery of the judgment.

It is on record that in avertedly the court, delivered the judgment in the absence of both counsels and their parties. It is on record that the court did not sent notice of delivery of judgement in absentia to the parties. The respondent counsel who was the counsel for the plaintiffs however made efforts to trace the file. He perused the same and discovered that judgement had been delivered in their favour. He too did not sent notice of delivery of the judgment.

Counsel for the applicant on the other hand never took steps to peruse the file in time allegedly on the ground that the file was not available for perusal. But as asserted by the respondents counsel, there is nothing displayed by them to show that they raised complaints that the file was not available.

There is no doubt that the applicant was woken up by the execution process, hence the filing of the application on the date of the proclamation. This court has judicial notice of the fact that a litigant takes sole responsibility for the good and or poor workmanship of counsel hired by them. The court, is also aware that remedy exists for an aggrieved litigant to seek damages against his counsel for any loss suffered as a result of the errors and or commissions of his counsel.

The court, is also aware of the converse of the above two propositions, that it is now trite law, that litigants should not be unduly be punished for the errors and commissions of counsel hired by him/her. In the circumstances of this case the errors and commissions displayed herein were committed by the applicants counsel for not being vigilant enough to keep checking on the position of the judgment.

The court, too contributed to the errors and commissions in that it in avertedly delivered judgment in the absence of both parties, and yet it never bothered to issue notice of delivery of the judgement in their absence. In this courts ,opinion counsel for the respondent shares the blame because he should have served the notice of delivery, the bill of costs for taxation, the decree for approval before seeking execution.

(3) As for the prejudice to the other party, this has been stated to be unjustifiable withholding of the fruits of the judgement since the judgement entered in her favour. Indeed this court has judicial notice of a cardinal principle in this area, of law to the effect that a successful litigant should not be unlawfully and unjustifiably withheld from the enjoyment of the fruits of his/her judgement unreasonably. On the other hand there is a corresponding right in favour of the loosing party that he/she has an undoubted right to an appeal and seek a second opinion on his rights. Hand in hand with this rule, is also the requirement that he has a right to seek stay of execution of the decree pending the hearing of the appeal. This court, has judicial notice of the fact that granting or refusal of stay pending appeal has to be exercised within well known principles, under consideration herein. The exception to the rule is that there is no have or fast rule on the exercise of that power, except that, it has to be exercised judicially, and with reason, and that each case depends on its own circumstances. In other words the rights of both litigants rank equal before the judgement seat.

(4) As regards consideration of the merits of the appeal without holding a mini-appeal, all that the court has to say is that the raised that the applicant had divested himself of the ownership of the accident vehicle is an arguable point to be taken up on appeal. Going into a scrutiny of the evidence adduced for and against it, would be tantamount to holding a mini-appeal. In this courts's opinion that is a matter to be left to the appellate court.

(5) On the effect of the delay on public administration of justice, is that the applicant is not wholly to blame for the delay. The court, and both counsels contributed to the delay and therefore take a greater blame as outlined above. As such it will be unfair to make the applicant to swallow bitter the whole default pill.

(6) As for the importance of compliance with time limits, bearing in mind that they have to be observed, indeed this court is aware that rules of procedure are not made for cosmetic value. They are supposed to be obeyed and adhered to. The only reprieve in this area, is that judicial precedent has now handed out decisions, to the effect that where the breach is not fundamental, and does not go to the root of the matter, the court, should lean towards giving substantial justice to the parties as opposed to the adherence to the rules rigidly.

(7) As regards resources of the parties which might be relevant to the delay, the court, is of the opinion that lack of resources has not been urged before this court.

For the reasons given in the assessment, this court, makes the following findings:-

(1) The prayer for stay of execution pending appeal is declined because it is premature as the jurisdiction to grant the same is vested only in the court, appealed from or appealed to. This court, is neither a court appealed from, because the decision sought to be appealed from is a lower courts decision. This court, is neither the court, appealed to as at now as what it is confronted with is a miscellaneous application for leave to file an appeal out of time. Until leave to file appeal out of time is granted, and appeal filed, is when this court, will be rightfully vested with the vesture of an appellate court.

(2) The finding in number 1 notwithstanding, this court, is not devoid of its fountain of mercy from which the affected litigant can drink from, so that, the reprieve granted him by this court, in the first instance is not rendered nugatory. Measures such as temporary reprieve pending regularization of the procedure to access the relief cannot be ruled out. This court, is vested with the power, authority and jurisdiction to make such orders depending on whether the leave to file an appeal out of time is granted. The measure is meant to ensure that the right to seek leave out of time is not defeated.

(3) In the circumstances demonstrated herein, since the court, has ruled that other stakeholders contributed to the delay, it is only proper that the applicant is not penalized for the delay whole sale, by being locked out from the exercise of his undoubted right of appeal. The court, is inclined to allow the applicant leave to file an appeal out of time.

(4) The said leave to file appeal out of time is to be filed forthwith, and in any case, not later than 30 days from the date of the reading of the ruling.

(5) In view of the leave granted in number 4 above, the applicant will have a reprieve of stay of execution for 30 days only from the date of the reading of the ruling. Thereafter, after, filing the appeal, he is at liberty to seek stay of execution pending appeal in the said new appeal file if he so wishes. That is when the court, seized of the matter will deal with the matter as at deems fit.

(6) Thereafter the parties will be at liberty to proceed according to law.

(7) The respondent will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2008

R. N. NAMBUYE

JUDGE