



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Case 767 of 2006

FIRESTONE E.A.(1969) LTD APPLICANT

VERSUS

MOHAMED GADANI RESPONDENT

RULING

The applicant intended appellant filed this application under Order 49 rule 5, order 50 rule 1 of the Civil Procedure Rules, Section 79G and 3A of the Civil Procedure Act. It sought reliefs:-

- (1) The application to be certified as urgent and service thereof to be dispensed with in the first instance and the matter be heard exparte.
- (2) There be a temporary stay of execution of decree dated 9th May 2006, order and certificate of costs in Nairobi Resident Magistrates Court No.732 of 2000 **MOHAMED GADANI VERSUS FIRESTONE E.A. (1969) LIMITED** pending hearing and determination of the application.
- (3) That the applicant be granted leave to serve hand written copy of order and application on the respondent upon grant of prayer two(2) above.
- (4) That there be enlargement of time allowing the applicant/defendant to lodge an appeal against the judgment and order dated 9th May 2006.
- (5) That there be stay of execution pending hearing and determination of the intended appeal.
- (6) That the applicants be granted leave to deposit the decretal sum of Kshs 417,648/= all inclusive in a joint interest earning account in the name of the advocates on record for the applicant and respondent respectfully or as the court may direct.
- (7) That costs be provided for.
- (8) Prayers 1,2,3,6, are spent. The decretal sum was ordered to be deposited within a specified period on 5.10.2006. Interim stay of execution was granted temporarily in the first instance. But on 7.3.2006 Khamoni J. ordered it to remain in place till the hearing of the application. The remaining substantive prayers are No.4 and 5 seeking enlargement of time within which to file appeal and stay of execution.

The grounds in support are set out in the supporting affidavit and the written skeleton arguments which are that:-

- (1) They were not informed of the delivery of the judgment contrary to the provisions of order XX rule 1 and only came to learn of it when execution was levied against them.
- (2) That since then the applicants have been vigilantly pursuing the release of the said judgment which has not fruited to date.
- (3) Paragraph 3 of the replying affidavit which purports to demonstrate that parties were notified of the hearing date should be ignored as the deponent does not disclose the source of that information in the first instance, and in the second instance, the alleged clerk who allegedly gave notice of delivery of judgment to the parties has not sworn an affidavit to confirm the averments. This being the case, their assertion that they were not notified of the date of the delivery of the judgment stand unchallenged.
- (4) The court is urged to invoke the provision of order L rule 1 and grant stay as the provisions of Order 41 rule 4 cannot be invoked at this stage as the intended appeal has not yet been filed.
- (5) The Court is also urged to invoke the inherent powers of the court enshrined in Section 3A of the Civil Procedure Act and make such order as may be necessary for ends of justice to be met. This is necessary in so far as stay of execution is concerned because in the absence of stay orders the Respondent will proceed to execute to their detriment.
- (6) They have already deposited the judgment sum in an interest earning account in the joint names of Counsels of both parties and if the stay order is not granted the said deposited amount will be released to the Respondent and if this is done it will be difficult to recover the same should he succeed on his appeal.

On the basis of the foregoing Counsel for the applicant urged the Court to grant the reliefs sought. To fortify their case the Court was urged to be guided by the case law quoted. In the case of **SEVENTH DAY ADVENTISTS CHURCH EAST AFRICA LTD PASTOR NYAKEGO AND E.N. ADUKE VERSUS M/S MASOSA CONSTRUCTION COMPANY KISUMU C.A. 349 OF 2005**. At page 3-4 Waki J.A. made observations that *“there was a delay of 115 days and without any explanation that delay would obviously be inordinate and would militate against the grant of the prayers sought”*. At page 5 line 4 from the bottom the learned judge observed that *“he had looked at the decisions of the Court of Appeal cited on both sides showing varying periods of delay which had either been excused or rejected by the Court. These go to confirm that each case must be decided on its own peculiar facts and circumstances”*. At page 6 lines 1 from the top, that *“it is neither feasible nor reasonable to lay down a rigid yard stick for measuring periods of delay. Explanation for such delays are also as many and varied as the cases themselves”*. At line 4 from the top, the learned judge went further to stay that *“the explanation given by the applicant related to a ruling of the court in respect of which the court was prepared to accept that it was not supplied to the applicants counsel until 29.09.05.”* The court noted that *“the purpose of the ruling was for consultation between clients and counsel.”* Further that *“the decisions to take steps needed to be taken by the church administrations and delays in making such decisions was inevitable.”* At line 8 from the bottom the court stated *“At all events and the main reason for favourable consideration of this application, the respondent has already recovered all the decretal sum and costs attendant to the litigation so far. The right of appeal is a strong right. It is only rivaled by the right to enjoy the fruits of judgment, and a proper balance has to be struck between the two. The respondent has enjoyed his right in full. I see no prejudice if an opportunity was given to the applicants to enjoy theirs too even if as they state, it is on a matter of principle. I have looked at the grounds put forward by the appellant and I cannot say that the appeal is frivolous.”*

The case of **JETHUA VERSUS SHAH T/A SUPREME STYLES (1989) KLR 198** where the Court of Appeal inter alia an application for stay that as the applicant had a money decree against him besides demonstrating that any success in the intended appeal would be rendered nugatory, the applicant had to persuade the court that the respondent was so impecunious, that the applicant would never be able to get his money back. Further that the purpose of an application for stay is to preserve the subject matter in

dispute so that the rights of an appellant who is exercising his in doubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.

In the case of **Wanguhu Versus Kania (1987) KLR 51** where the Court of Appeal held inter alia that the Court is not powerless. It has inherent power in it to control its process for the ends of justice. Under section 3A Civil Procedure Act it is within the courts discretion to dismiss for want of prosecution and to re-instate the application. The jurisdiction under Section 3A of the Civil Procedure Act is a residual jurisdiction which should only be used in special circumstances in order to put right that which would otherwise be a clear in justice. By way of obiter, that it would lead to very serious injustice if a court could not control a party who appeared to be failing to prosecute an application. Equally it would be a serious failure of justice not to restore the application to hearing if there were good reasons why the applicant had been prevented from taking or applying to the court.

In the famous Court of Appeal decision of **KENYA SHELL LTD VERSUS KIBIRU AND ANOTHER (1986) KLR 410**, on an application for stay the Court held inter alia that *“in an application for stay under rule 5 of the Court of Appeal rules there is no requirement that the applicant gives security for due performance of the decree, all that is required is that a notice of appeal has been filed. That in considering an application for stay, the court doing so must address its collective mind to the question of whether to refuse, it would render the appeal nugatory. In an application for stay the Court should balance two parallel propositions, first that a litigant if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory. In this case the refusal of stay would not render the appeal nugatory as the case involved a money decree capable of being repaid. In actions for damages it is not enough for the Plaintiff to write down particulars, they must prove the damages.”*

The Respondents countered the applicant’s submissions by grounds in the replying affidavit as well as arguments in their written skeleton arguments. The main points are:-

(1). In their considered opinion only prayer 4 and 5 remain for disposal, orders having been made *exparte* in the first instance for stay conditioned on provision of security by the applicant and subsequently after due compliance with the said condition a further order was made continuing the stay granted until the outcome of the applicants application dated 5th October 2006.

(2). On an enlargement of time, they contend the applicant has not brought himself within the ambit of the provisions of Section 79 G of the Civil Procedure Act as him applicant has not demonstrated by any credible evidence any good and sufficient cause for not filing the appeal within the time prescribed by the Act. More so when there is no rebuttal of the respondents deponement that notice of delivery of the judgment was relayed by phone calls by a court clerk to the respective offices of the Advocates for the parties. It is their view that an affidavit by the Court clerk would have settled the issue as to whether parties were notified and in the absence of such an affidavit as evidence a presumption arises in the circumstances that had such evidence of the court clerk been called it would have been adverse to the applicants claim that notice had not been given to the applicant or its Advocates.

(3). That the courts discretion to enlarge time is a fettered one, the burden falling on the party who desires exercise of such jurisdiction in its favour to show evidence to the satisfaction of the honourable court, circumstances sufficient to cause the failure to file the appeal in time.

They maintain that it is the applicant and not the respondent who has to demonstrate to the satisfaction of the court good and sufficient cause of the failure to file the appeal in time.

(4). That the prayers for stay of execution are misplaced because under order 41 rue 4 Civil Procedure Rules the Court appealed from has jurisdiction to stay the decree. The Court appealed to only acquires jurisdiction only after the appeal has been filed and on this account this honourable court has no jurisdiction to entertain the issue of stay and the same should be dismissed.

(5). Since there are clear provisions in order 41 rule 4 Civil procedure Rules on the circumstances under

which stay of execution can be entertained, the applicant cannot rely on the provisions of Section 3A Civil Procedure Act to aid him and any attempt to urge the court to do so amounts to an abuse of the due process of the Court on this point the court was urged to be guided by the decision of Nyarangi J. as he then was in the case of **WANGUHU VERSUS KANIA (1987) KLR 51** at page 60 line 1 to 8. The salient principles enunciated therein are:-

“(i) when a matter is dealt with in the rules, the courts should regard that as excluding their inherent power some of the exceptions being where there is evidence of new and important matter or evidence.

(ii) Inherent powers cannot be invoked where there is another remedy available.

(iii) Invocation of the inherent power jurisdiction can only be properly exercised not always but after a basis is laid to prevent abuse of court and to avoid injustice.”

6. The Court of Appeal decision of the **SEVENTH DAY ADVENTIST CHURCH EAST AFRICA (supra)** cited by the applicant does not help the applicant because it is anchored on the Court of Appeal Rules which do not require a party to show sufficient cause in order for stay to be granted thus giving the Court of Appeal an unfettered jurisdiction to grant stay. In contrast to this Section 79G of the Civil Procedure Act only donates a fettered discretion to the court in the exercise of its jurisdiction to grant or not to grant stay as the applicant has to show sufficient cause that he deserves the courts discretion.

7. The supporting affidavit as defective if it does not state the place of abode of the deponent and for deponing to contentious matters of the impecuniosities of the Respondent.

On case law counsel has relied on the case of **KYUMA VERSUS KYEMA (1988) KLR 185**. In this case the aggrieved party applied for a certified copy of the proceedings one month after the delivery of the judgment 5.12.86 – 5.1.87. the proceedings were later supplied under cover of a certificate of delay stating that preparation of the record was from 5.1.87 to 2.4.87. The appellant thereafter applied for leave to file appeal out of time. Extension of time to appeal out of time was granted on condition that he deposits some money in court within specified period of time which he failed to comply with necessitating his appeal to be struck out. Further course of rejection of the appeal was due to the fact that the certificate of delay related not to the period for the preparation of the decree or order but of the certified copies of the proceedings and judgment, the appeal was out of time and therefore there was no pending appeal on record.

On appeal the Court of Appeal held inter alia that:-

(1). The right of appeal from a subordinate court to the High Court is conferred by the civil procedure Act (Acp.21) Section 65 and the time for filing appeal is governed by Section 79G of that Act.

(2). An appellant is required within thirty days from the date of the decree or order or within a period extended by a certificate of delay to file a memorandum of appeal in the prescribed form and a copy of the formal order of the Court if available. Under the Civil Procedure Rules Order 41 rule 1A the latter document can be filed as soon as possible and in any event within such time as the Court may order.

(3). A certificate of delay within the true intendment of Section 79G of the Civil Procedure Act (Cap.21) must certify the time it took to prepare and deliver to the appellant a copy of the order of the magistrate.

(4). The certificate of delay exhibited by the appellant did not speak of an order and no such order was sought or extracted. What the appellant had mistakenly sought and what the court had supplied were the proceedings and judgment.

(5). This meant that the appellant did not file a memorandum of appeal within thirty days and had no valid certificate of delay within the time contemplation of Section 79G.

(6). The appellant could only file a competent appeal if the Court granted him an extension of time. Since such extension was granted on terms and the appellant failed to comply with the terms, the judge was entitled to strike out the appeal. The judge was also right in finding that, there was no pending appeal on which he could grant an injunction.

In the case of **MACHARIA VERSUS MACHARIA (1987) KLR 61** an application for setting aside was dismissed by the superior court. On appeal the Court of Appeal held inter alia that *“in an application to set aside under Order IXB rule 8 the Court has a wide discretion. There are no restrictions on the discretion except that if the judgment is varied, it is done on terms that are just.*

(2). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

(3). The factors that must be considered when exercising this discretion include the facts and circumstances, both prior and subsequent and all the respective merits of the parties together with by material factors which are:-

(a) The nature of the action.

(b) The defence it has been brought to the notice of the cost.

(c) The question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned, and;

(d) Denying a party a hearing should be a last resort.

(4) Discretion any power should be exercised judicially meaning, it should be exercised in a selective manner and not arbitrarily.

In the case of **MACHIRA T/A MACHIRA & CO. ADVOCATES VERSUS EAST AFRICAN STANDARD (NO.2) (2002) 2 KLR 63** on an application for stay pending appeal Kuloba J. as he then was set out the Applicable principle as here under.

(1). In such an application for stay of proceedings the court cannot proceed initial presumption that the appeal or intended appeal shall succeed so prima facie the applicant is the preferred party. The matter must remain in the discretion of the Court to be exercised upon considering all material circumstances and not the interests of one party.

(2). In handling applications for stay of further proceedings or execution one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage.

(3). A successful party at whatever stage should have access to the consequences of that judicial finding and decisions. Any subsequent decision which tends to impeach the normal flow of justice by suspending the enjoyment of the consequential orders can only be rendered in the exceptional circumstances.

(4). In this kind of application for stay it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars.

(5) In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or other evidential material that substantial loss may result.

(6) Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.

- (7) The applicant will obtain a stay of further proceedings if he can show that an impecunious party may surrender what maybe needed restitution or that the subject matter maybe destroyed if the appeal succeeds.
- (8) In granting a stay of proceedings the court may consider a delay in making the application and the requirement of security for due performance.
- (9) The application in this case came late and without good reason, the plaintiff should be allowed to move on.

On the Courts assessment of the facts herein, the court stands guided by principles in the legal prescription relied upon by both sides as well as case law by eminent judges of both the Superior Court and the Court of Appeal of this jurisdiction. As noted by this court and as stressed by the Respondents Counsel, it is only prayer 4 and 5 that qualify for consideration for determination namely:-

- (1) Leave to appeal out of time.
- (2) Stay of execution pending appeal.

The principles set out above all show that there is jurisdiction vested in this court to entertain both on condition that it is procedurally moved and the surrounding circumstances of each case justify the granting of the same, in the first instance, and in the second, instance, that the applicant has satisfied the criteria set out in the case law principles for granting the same.

The first to be dealt with is the one of stay pending appeal. Temporary stay is already in place. Besides case law principles, substantive prescription for it is found in order 41 rules 4(i) Civil Procedure Rules. It reads *“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the appeal or 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 an application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”* The central theme in this provision is that jurisdiction to grant stay of execution is donated to or mandated to only two forums namely the court appealed from and the court appealed to. This court is neither a court appealed from nor a court appealed to. This being the case apparently there is no jurisdiction to grant stay of execution in the manner sought as there is no provision providing for it.

Failure to provide for jurisdiction to grant stay of execution by a court other than that which is appealed from and appealed to, brings to the fore the inherent jurisdiction of the Court enshrined in Section 3A Civil Procedure Act which empowers the court to do all that is necessary for ends of justice to be met and to prevent abuse of the court process. It is now trite law that the invocation of this residual power is permissible only where there is no provision of an applicable rule. The situation displayed above is such an ideal candidate for the invocation of the same. This court has no doubt that its sister/brother who granted the conditional stay and the one making the conditional say to last till the outcome of the application subject of this ruling were exercising such residual power or jurisdiction in the absence of specific rules governing the particular situation. The prime consideration being that justice to both parties demands it and the court in its absolute discretion deems it fit to grant the same. Counsel for the Respondent has submitted that the discretion exercisable in these circumstances is fettered. True, it is fettered. But the only fetter to it is that it must be exercised judicially, in the manner the other two learned judges exercised their discretion judicially to grant temporary stay in circumstances where rules do not apply, is the same manner that this court can use to order the same stay temporarily pending regularization of the proper forum in which the same can be granted. It will be unfair to redirect the applicant to the court appealed from for the grant of the same.

As for the extension of time within which to file appeal, it is trite law that jurisdiction exists to grant

the same provided for via Order 49 rule 5 of the Civil Procedure Rules. All that a deserving litigant needs to do is to show sufficient cause of failing to file the appeal within the 30 day statutory period. The main reason put forward is lack of notice of the delivery of the judgment. It is alleged by the Respondents that notice was via telephone conversation by the Court clerk. Each side asserts that the other should have availed an affidavit from the concerned court clerk to prove or disprove. This court's observation is that since it is the Respondents counsel who raised it in their replying affidavit, he is the one who should have made attempts to prove the same. As per the principle in the case of **JETHUA VERSUS SHAH T/A SUPREME STYLES (L989) KLR 198** it is not sufficient to merely swear, the respondent should have provided facts through an affidavit of the said court clerk.

Annexure LR NO.1 in a bundle all show that the applicants counsels office was following keenly the delivery of the judgment from 23.02.06 up to 25.05.06 where it is minuted that judgment was to be on notice. There is also on record annexure LR AO 4(a) – 4(c) to show that applicants were following up the delivery of the judgment. A copy of the hand draft judgment shows that LR. AO5 was delivered on 14.7.06. The decree is dated 15.9.06. On 3.10.06 is when the client alerted the counsel that Auctioneers had moved in to execute the decree. There is no notice exhibited.

Turning to the replying affidavit, apart from the deponment in paragraph 2 that delivery of judgment was notified through the telephone by the court clerk, there is no documentary proof. As noted earlier in this ruling, could have been confirmed by annexing an affidavit of the court clerk concerned. In the absence of such an affidavit there is nothing to show that the applicant had notice of the delivery of the judgment in order to be able to file appeal in time. They therefore have a genuine complaint.

As regards the arguability of the appeal, it is on record that only a copy of the draft judgment is exhibited. There is no pleading to enable this court know what the really issues in contention between the parties were. However that notwithstanding there is the appellants right of appeal which as remarked by Waki JA, in the **SEVENTH DAY ADVENTIST CHURCH** case (supra), it should only be withheld where special circumstances for withholding it exist. Herein none exist. The applicant has shown the willingness to meet the decree should they loose on appeal by depositing the decretal sum in a joint interest earning account in the joint names of counsels of both parties.

There is however not traced on record a request for proceedings and certificate of delay. It is this courts view that the absence of these documents is not justification for denial of the right of access to an appeal. Conditions can be placed on the right to appeal to ensure that the applicant does not use the order granted both as a shield and sword at the same time.

For the reasons given the court is inclined to grant the applicant leave to appeal out of time. Since the condition of the lower court record is not known, the appellant, is given 45 days of the reading of this ruling to file an appeal out of time.

(2). As for stay pending appeal, the temporary stay granted herein will only last for 45 days from the date of the reading of this ruling during which time the applicant is expected to have filed the substantive appeal and then seek those orders from the court appealed to failing which the orders of stay granted herein shall stand discharged and the Respondent will be a liberty to execute.

(3). The Respondent will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY 2007.

R. N.NAMBUYE

JUDGE

