



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 468 OF 2015**

**JAMES MWANGI NGATIA.....1<sup>ST</sup> PLAINTIFF**

**JONIMA FARM INVESTMENTS LIMITED.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**CHINA ROAD & BRIDGE**

**CORPORATION (KENYA) LIMITED.....DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 23<sup>rd</sup> July 2020 brought under order 9 rule 9(a) and 10, order 51 rule 1, order 50 rule 6, order 42 rule 6 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act, Cap.21 of the Laws of Kenya, article 159(2d) of the Constitution and all other enabling provisions of the law.

2. It seeks orders:-

*(a) Spent.*

*(b) Spent.*

*(c) Spent.*

*(d) Pending the hearing and determination of the defendant/applicant's intended Appeal, the honourable court be pleased to order a stay of execution of the judgment of the honourable court dated and delivered virtually on 28<sup>th</sup> May, 2020.*

*(e) The honourable court be pleased to enlarge time within the defendant/applicant may file and serve the Notice of Appeal against the judgment of the honourable court dated and delivered on 28<sup>th</sup> May, 2020.*

*(f) The honourable court be pleased to enlarge time within which the defendant/applicant may file and serve the request for the typed copy of the court proceedings in this matter and take any other steps to file and serve the appeal.*

*(g) The honourable court be pleased to issue an order directed at the Deputy Registrar, that in computing the time within which the appeal is to be instituted and in preparing the certificate of delay, there shall be excluded the time beginning 28<sup>th</sup> May 2020 to the date when this application shall be determined and disposed of.*

*(h) The honourable court be pleased to grant such orders or further orders as it shall deem fit and just to grant.*

*(i) Costs be provided for.*

3. The grounds are on the face of the application and are set out in paragraphs 1 to 19.

4. The application is supported by the affidavit sworn by Wang Xihui, the Human Resource and Public Relations Manager of the defendant/applicant sworn on the 23<sup>rd</sup> July 2020. There is also a supporting affidavit sworn by Geoffrey Manyara Mokua Advocate, on the 23<sup>rd</sup> July 2020.

5. The application is opposed. There is a replying affidavit sworn by James Mwangi Ngatia, the 1<sup>st</sup> plaintiff/respondent sworn on the 25<sup>th</sup> August 2020.

6. The application was canvassed by oral submissions on the 25<sup>th</sup> January 2021.

7. I have considered the notice of motion and the affidavits in support. I have also considered the replying affidavit and the oral submissions. The issues for determination are:-

***(i) Whether the defendant's/applicant's application meets the threshold for grant of orders of stay of execution pending appeal.***

***(ii) Who should bear costs?***

8. It is the defendant's/applicant's assertion that neither its advocates nor its representative were notified of the date of delivery of judgment. It is true that the judgment was delivered virtually on 28<sup>th</sup> May 2020. This was due to the ensuing Ministry of Health protocols aimed at combating the spread of the Covid 19. It is also true that the judgment was due for delivery on the 27<sup>th</sup> February 2020. On the said date Mr. Manyara for the defendant appeared but there was no appearance for the plaintiff. The said judgment was then fixed for 21<sup>st</sup> May 2020. The same was not delivered on 21<sup>st</sup> May 2020.

9. Notices were then posted on the Kenya Law Website notifying that judgment would be delivered on 28<sup>th</sup> May 2020. The said notice was considered sufficient notice as this was the mode used during that time when open court operations had been scaled down. Judgment was delivered in the absence of both counsel on the 28<sup>th</sup> May 2020.

10. Be that as it may the defendant/applicant is given the benefit of doubt. It is their assertion that they became aware that judgment had been delivered on 8<sup>th</sup> July 2020 by which time for filing Notice of Appeal had lapsed. I hereby exercise this court's discretion in their favour and enlarge the time by which to serve and file a Notice of Appeal against the judgment dated 28<sup>th</sup> May 2020. I find that they have given sufficient explanation to warrant an enlargement of such time.

11. The principles guiding the grant of orders of stay of execution pending appeal are well settled. **Order 42 rule 6(2)** of the Civil Procedure Rules, 2010 provides:-

***"No order for stay of execution shall be made under subrule (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."***

It is clear from the above provisions that for an order of stay of execution pending appeal to be granted, specific conditions must be met by the applicant.

12. I have considered the notice of motion herein and I find that it has been brought almost two months after judgment had been delivered. I find that the delay has been explained. I find the reasons given in the supporting affidavit to be sufficient.

13. It is the defendant's/applicants' case that it is apprehensive that it may not recover the decretal sum if it is paid out to the 1<sup>st</sup> plaintiff/respondent, in case it succeeds on appeal. It is the 1<sup>st</sup> plaintiff's/respondent's case that the defendant/applicant has failed to demonstrate that he lacks the means to refund the said monies should the defendant/applicant succeed on appeal.

14. I have considered the oral submissions and I find that the defendant/applicant has demonstrated that it will suffer substantial loss if these orders are not granted.

15. Wang Xihui, in his supporting affidavit sworn on 23<sup>rd</sup> July 2020 depones in paragraph 18:

***"That the Applicant is ready and willing to deposit a suitable bank guarantee as the court may order for the due performance of such decree or order as may ultimately be binding on the applicant".***

16. I have considered the circumstances of this case. I find that the defendant's/applicant's application meets the requirements as set out under order 42 rule 6 of the Civil Procedure Rules.

17. In conclusion, I find merit in this application and I grant the orders sought namely:-

***(a) That an order of stay of execution of the decree emanating from the judgement delivered on 28<sup>th</sup> May 2020 is hereby granted pending the hearing and determination of the intended appeal on condition that the defendant/applicant do deposit kshs.4,300,000/- in a joint earning account in the names of the 1<sup>st</sup> plaintiff's counsel and the defendant's counsel within forty five (45) days from the date of this ruling. In default the order of stay shall automatically lapse.***

*(b) That the defendant/applicant do file and serve the notice of appeal against the judgment of this honourable court dated and delivered on 28<sup>th</sup> May 2020 within fourteen (14) days from the date of this ruling.*

*(c) That the defendant/applicant do file and serve the request for the typed copy of the court proceedings in this matter and take other steps to file and serve the appeal within fourteen (14) days from the date of this ruling.*

*(d) That an order is hereby issued directing the Deputy Registrar that in computing the time within which the appeal is to be instituted and in preparing the certificate of delay, there shall be excluded the time beginning 28<sup>th</sup> May 2020 to the date of this ruling.*

*(e) That costs of this application be borne by the defendant/applicant.*

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 18TH DAY OF MARCH 2021.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Waiganjo for the plaintiffs

Mr. Obok for the Defendant

Phyllis - Court Assistant