



**Darima Properties Ltd & another v Meru Central Coffee Co-operative Union Ltd
(Miscellaneous Application 49 of 2022) [2023] KEHC 3028 (KLR) (6 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS APPLICATION 49 OF 2022
EM MURIITHI, J
APRIL 6, 2023**

BETWEEN

DARIMA PROPERTIES LTD 1ST APPLICANT

DANIEL M. RIUNGU 2ND APPLICANT

AND

MERU CENTRAL COFFEE CO-OPERATIVE UNION LTD RESPONDENT

RULING

1. Before the court is a Notice of Motion under certificate of urgency dated 22/8/2022, brought under Section 79 G, 1A, 3 and 3A of the Civil Procedure Rules, where the Applicants seek stay of the sale of their properties pending the hearing and determination of this application for leave to file an appeal out of time.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Daniel M. Riungu, the 2nd Applicant herein, and the 1st Applicant's director, sworn on even date. He avers that he was sued for recovery of Ksh. 11 Million by the Respondent. Although he filed a defence denying the claim, the same was struck out and judgment entered against him for Ksh.11 Million. He then fell sick with severe depression and dementia in 2021 when his wife was diagnosed with cancer, thus affecting his ability to give his advocate instructions on lodging the appeal in time. He has been informed that he has a good appeal and he prays that the sale of his attached properties is stayed pending the hearing of this application. He feels that unless the application is allowed, there will be a miscarriage of justice and he will suffer irreparable loss and damages.
3. The Respondent has opposed the application by grounds of opposition dated 26/8/2022 as follows:

“The order striking out the defence is that of the High Court dated 11/6/2019 which is self-executing; A striking out order from the High cannot be appealed to in the same High Court



which is of concurrent jurisdiction; The claim in the primary suit was liquidated and in the absence of a defence thereto the consequence is entry of a default judgment followed by the issuance of a decree by dint of Order 10 rule 5 of the Civil Procedure Rules, as read with rule 10 thereof; There is no valid supporting affidavit the same having been purported to be sworn by a person of unsound mind who is not fit to testify in court, plead or follow any proceedings per the Doctor's conclusion on page 2 of the medical report annexed as "RDM 11"; There is no medical evidence that the 2nd Applicant was sick as from August, 2021, neither is there any that he has now healed and able to do that which he could not do previously; There is no explanation by affidavit or otherwise why no action was taken by the other Directors of the 1st Applicant within the statutory timelines; No appeal may be filed against the entry of a default judgment under Order 10 rules 4, 5 or 10 of the Civil Procedure Rules without leave by dint of Order 43 rule 1 thereof and no such leave has either been obtained or applied for; The order intended to be appealed from has not been annexed; No proposed memorandum of appeal has been annexed to show the intended grounds thereof and/or prayers; The application is an afterthought, brought too late in the day without plausible cause and should be dismissed with costs."

Submissions

4. The Applicants urge that they have given sufficient cause for the delay in filing this application, and the properties sought to be auctioned are their source of livelihood, thus if stay is not granted, they may suffer substantial loss. They urge that they issued a third party notice and the alleged breach of the agreement was orchestrated by the third party. They urge the court to allow the application with costs, and cite *Michael Ntouthi Mithu v Abraham Kivondo Musau* (2021) eKLR, Stephen Boro Gitihia v Family Finance Building Society & 3 Others Civil Application No. 263 of 2009.
5. The Respondent urges that the order to strike out the defence having been made by the High Court cannot be appealed to a court of concurrent jurisdiction. It urges that the intended appeal would be incompetent for want of leave, as required by Order 43 Rule 1 of the Civil Procedure Rules. It urges that there is no evidence that the 2nd Applicant had a mental illness since August, 2019 when the trial court's decision was made. It urges the court to dismiss the application with costs, because no reason has been given why no other director of the 1st Applicant took the necessary action to file the appeal then.

Analysis and Determination

6. The principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the respondent will not be unduly prejudiced by the order being made. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
7. The ruling sought to be appealed against was made on 27/8/2021 while the instant application was filed on 22/8/2022, approximately one year down the line. Although that delay is inordinate, and the court notes the explanation given for it. It is said that the 2nd Applicant fell ill and was thus unable to instruct his counsel on appealing. A medical report has been exhibited to support that assertion. The doctor is clear in the said report that the 2nd Applicant has been ill since 2021 and even at the time of examination, the 2nd Applicant was not fully recovered. This court is satisfied that the 2nd Applicant has satisfactorily explained his inordinate delay in lodging the appeal in time.



8. The Respondent has asked the court to dismiss the application because the order striking out the defence, having been made by the High Court cannot be appealed against to this court of concurrent jurisdiction. The court notes that the issue of the striking out of the defence is one of the grounds of appeal raised by the Applicants in their Memorandum of Appeal, and to ensure that the court does not preempt the Applicant's appeal, the court refrains from addressing the merits or otherwise of the intended appeal.

Orders

9. Accordingly, for the reasons set out above, the court allows the Applicants' application dated 22/8/2022 in the following terms:
 1. The Applicants are granted leave to appeal out of time.
 2. An order for stay of the sale of the Applicants' properties is granted pending the hearing and determination of the intended appeal.
 3. The Record of Appeal to be filed within 60 days from the date hereof.
 4. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
 5. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 6TH DAY OF APRIL, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S L. Kimathi Kiara & Co. Advocates for the Appellant.

M/S Mwenda Mwarania & Co Advocates for the Respondent.

