



**Geodis South Africa (PTY) Ltd v Pinnacle Group Kenya Limited
& another (Miscellaneous Civil Application E797 of 2021)
[2023] KEHC 3685 (KLR) (Commercial and Tax) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E797 OF 2021**

JWW MONG'ARE, J

MAY 2, 2023

BETWEEN

GEODIS SOUTH AFRICA (PTY) LTD PLAINTIFF

AND

PINNACLE GROUP KENYA LIMITED 1ST DEFENDANT

SUSAN WANJIKU LEE 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 25th October 2021 brought under Order 42 Rule 6 and Order 50 Rule 6 of the *Civil Procedure Rules*, 2010; Sections 1A, 1B and 3A, 79G of the *Civil Procedure Act*. The Application supported by the Supporting Affidavit of Susan Wanjiku Lee, the 2nd Defendant and seeks the following orders;
 - a. Spent
 - b. Spent.
 - c. That the Applicants be granted leave to file an appeal out of time against the Ruling emanating from the orders in CMCC 4764 of 2019- Geodis South Africa(Pty) -v- Pinnacle Group Kenya Limited and Susan Wanjiru Lee as delivered by Hon. D.W Mburu on 27th August 2021.
 - d. That pending the hearing and determination of the intended Appeal, there be a stay of execution of the orders emanating from the Ruling delivered by Hon. D W Mburu on 27th August 2021 in CMCC 4764 of 2019- Geodis South Africa(Pty) -v- Pinnacle Group Kenya Limited and Susan Wanjiru Lee.



2. The application is supported by the grounds set on the face of it and the supporting affidavit of Susan Wanjru Lee sworn on 25th October 2021. The application is opposed and the Respondent a Replying Affidavit sworn by Heike Stienen, the Finance Director of the Plaintiff/Respondents.
3. Both parties have filed written submissions, which they seek to rely on, and their respective List of Authorities and have orally highlighted their submissions in court.

The Applicants' Case:

4. The Applicants have moved this court for leave to bring an appeal challenging the lower court's decision out of the time allowed by law and also to have the execution of the said decision stayed pending the hearing and determination of the appeal. The Applicants states that they filed the present application on 27th September 2021. The Applicants argues that the delay was only for 30 days and the same was necessitated by the need for the Company's Board of Directors to meet and make a resolution to appeal the said decision. The Applicants have urged the court to find that they offer a plausible explanation for the delay and that the same was not inordinate.
5. The Applicants have annexed to their application a draft Memorandum of Appeal. The said Memorandum they raise questions revolving around the tenability and appropriateness of the summary judgment. That the said judgment was entered in error and without considering the issues raised in the defence by the Applicants. The Applicants further argues that the appeal will allow the Defendants a platform to present their defence and to have the issues considered afresh. The Applicants further argue that no prejudice will be suffered by the Respondent and none has been demonstrated so far.
6. The second limb of the Applicants' application is for Stay of Execution of the Orders emanating from the decision of the lower court. The same having been brought under Order 42 Rule 6(2), the Applicants submit that this being an equitable order, they are willing to comply with any orders of this court and are ready to deposit a security to cater for costs should they not be successful on appeal. They urge this court to allow the application and have cited several decisions to buttress their arguments.

The Respondents' Case

7. The Respondent filed a Replying Affidavit opposing the application herein. The Respondent further filed written submissions as well, which they seek to rely on and orally highlighted the same. In opposing the application, the Respondent argues that the delay in bringing this application was inordinate and the same amounted to an afterthought. The ruling of the lower court was delivered on 27th August 2021 but the Applicants waited for 60 days to move this court which they did on 25th October 2021.
8. The Respondent further argues that the Applicants had shown very little interest in the suit in the lower court. According to the Respondent, the Applicants failed to appear when in court when the ruling was delivered and neither did they follow the matter on the e-filing platform to collect the judgment once the same was released, a factor that led to their late filing of the Memorandum of Appeal. Further, despite having filed the application, the Applicant's took no further action on the same. They failed to serve the Respondent with the application for leave to appeal out of time nor prosecute the said application and waited for 8 months till when the court listed it down for Notice to Show Cause why the same should not be dismissed for want of prosecution to serve the same and list it down for hearing. The directions to prosecute the application was issued on 28th November 2022. To the Respondent, this is a clear indication that the Applicants have no interest in prosecuting the matter. The sole purpose is to frustrate the Respondent in enjoying the fruits of its judgment.



9. As to whether the Applicants have an arguable appeal, the Respondents state that the grounds on the intended draft Memorandum of Appeal attached to the application are vague and vexatious as they do not raise specific issues, in fact or in law, that the court can address. The Respondent will suffer prejudice by the continued and prolonged delay in this case as the cause of action subject matter of the suit before the parties arose in 2018.
10. On the stay of execution of the decree, the Respondent argues that it is entitled to the payment of the judgment sum of USD 87,662 and Kshs.3,699,711/- plus costs and should not be arbitrarily deprived of an opportunity to recover it at the earliest. This being a discretionary order by the court, the same can only be issued if the Applicants demonstrate that if they succeed in the Appeal, the same is irrecoverable. Since no material has been placed before the court to demonstrate the same, the Respondent argues that this is an abuse of the court process. The Respondent urges this court to dismiss the application and allow the execution of the judgment in the lower court.

Analysis and Determination: -

11. I have considered the application before me and read the submissions of the parties and I have identified one issue, to wit “Whether the application has satisfied the threshold for grant of leave to file an appeal out of time and if, so, what should be the security for costs?” Order 42 Rule 6 (2) provides as follows; “(2) 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 Applicants.
12. The Applicants have urged this court to grant it leave to file its appeal out time and that it is willing to comply with any terms as regards to security for costs this court may make. Before considering the issue of costs, this court has a duty to interrogate the intended appeal and determine if a prima facie case is disclosed and if the same was brought in a timely manner, and if there was a delay is it inordinate or was there a just cause for the delay?
13. I have looked at the circumstances surrounding the application before me and I note the following. That the lower court entered a summary judgment in this matter pursuant to an application for judgment on admission based on a settlement agreement signed by both parties to which it was alleged that the Applicants had reneged on. That the said application was defended and the parties were heard by the court. That on 27th August 2021 the summary judgment was passed by the court in the presence of the Respondent but in the absence of the Applicants or their counsel.
14. That the Applicants waited for 60 days from the 27th August 2021 to 25th October 2021 to move the court to set aside the said judgment of the lower court. Subsequently and upon obtaining an order for stay of execution ex-parte, the Applicants took no further action to canvass the issues they raise in their application. It was not until the court, Suo Moto, listed the matter for Notice to Show Cause why the application should not be dismissed for want of Prosecution, that the Applicants then served the Respondents and listed the matter for hearing inter-partes.
15. In the case of *Zacheus Omia Juma v Nicholas Kirangi* (2021) eKLR, the Court of Appeal has set out the considerations that a court must take into account when granting leave to file an appeal out of time and these include;
 - i. The period of delay



- ii. The reason for delay
- iii. The arguability of the appeal
- iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted
- v. The importance of compliance with time limits to the particular litigant or issue; an
- vi. The effect, if any, on the administration of justice or public interest is any is involved.

16. From an analysis of the above, I have considered the facts this matter and I note that this application for leave was fled after 60 days from the decision was delivered. I also note that the explanation given is that 1st Applicant, being a corporate body, was awaiting a Board Resolution on whether to appeal the decision or not. It is not disclosed, however, who in the Company was absent and where they were that took a waiting period of 60 days for them to be traced. A perusal of the settlement agreement annexed to the proceedings reveals that the 2nd Applicant, Susan Wanjiku Lee and a Mr. Paul Mbugua Thairu executed the same for and on behalf of the 1st Applicant. To my mind, if one of the directors was absent from the jurisdiction of the court, the Applicants, seeking to rely on that, should provide evidence of their unavailability to warrant their delay. I find that no good explanation has been provided to this court to explain the delay of 60 days by the Applicants.
17. Secondly and most importantly, this court has noted that the Applicants, upon filing this application and obtaining ex-parte orders, did not move to prosecute it. Instead, they sat on it unserved for almost one year and only moved to have it heard when the court, on its own motion, moved to strike it out for want of prosecution. To my mind, the conduct of the Applicants amounts to a delaying tactic to frustrate the Respondent and ensure that the fruits of the judgment are not realized.
18. Flowing from all the above observations, I am satisfied that the application has not met the first threshold set by the Court of Appeal to warrant this court to examine the other considerations on grant of leave to file an appeal out of time. I therefore find and hold that the application before this court lack merit and I will dismiss it. Having found that the application to be unmerited, I will not consider the second limb of the application for stay of execution pending appeal.
19. The upshot of the above finding is that the application before me lacks merit and is dismissed with costs to the Respondent. The execution of the decree in CMCC 4764 of 2019- Geodis South Africa (PTY) Ltd V. Pinnacle Group Kenya Limited & Susan Wanjiru Lee may proceed to its logical conclusion. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF MAY 2023.

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Saul for Mr. Kinyanjui for the Applicant.
2. Ms. Jemutai holding brief for Ms. Mwago for the Respondent.
3. Sylvia- Court Assistant

