



**The Executrix of the Estate of Sharma v Swami Investments Limited (Commercial Appeal E173 of 2022) [2023] KEHC 18811 (KLR) (Commercial and Tax) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18811 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E173 OF 2022  
JWW MONG'ARE, J  
JUNE 19, 2023**

**BETWEEN**

**THE EXECUTRIX OF THE ESTATE OF RAMESH CHANDER  
SHARMA ..... APPLICANT**

**AND**

**SWAMI INVESTMENTS LIMITED ..... RESPONDENT**

**RULING**

1. The applicant has moved this court by a notice of motion dated 14/11/2022 brought under Order 42 Rules 6, Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010; section 79G of the [Civil Procedure Act](#) cap 21, Laws of Kenya, and all enabling provisions, seeking the following orders;
  - a. Spent
  - b. That there be a stay of execution of the Ruling in CMCC No. E11313 of 2021 at Milimani Chief Magistrates Court; Swami Investments Limited against Violet Maranga t/a legal representative of the firm of Ramesh Sharma and the Estate of Ramesh Sharma) all the consequential orders pending the inter-partes hearing and determination of this application.
  - c. That this honourable court be pleased to grant leave to the Applicant to file an appeal out of time against the ruling delivered by Honourable D.W. Mburu, Senior Principal Magistrate, delivered on the July 8, 2022 at Nairobi in CMCC No. E11313 of 2021 at Milimani Chief Magistrates Court; Swami Investments Limited against the Violet Maranga t/a legal representative of the firm of Ramesh Sharma Advocate and Estate of Ramesh Sharma) and the said appeal be admitted out of time.



- d. That upon granting of the orders in prayer No. 3 above this honourable court be pleased to set aside the ruling and all the consequential orders delivered on 8/7/2022 in CMCC No. E11313 of 2021 by Hon. D. W. Mburu SPM pending the hearing and determination of the Appeal filed or to be filed in respect thereof.
2. The application is supported by the grounds set on its face and the supporting affidavit of Marion Rabongo sworn on 14/10/2022. The application is opposed and the respondent has filed a replying affidavit sworn on 24/2/2023. Both parties have filed written submissions which they sought to rely on and made oral highlights of the same before this court.
  3. The applicant has moved the court seeking leave to file an appeal out of time having been dissatisfied by the decision of the trial court in CMCC No. E11313 of 2021, where according to the Applicant, the court issued final conservatory orders in an interim application without hearing the matter in full. The applicant argues that the reason for delay was occasioned by the respondent who invited the applicant to settle the matter out of court only to abandon the negotiations once the period for appeal lapsed.
  4. The applicant argues that it has an arguable appeal and should be allowed to file the same to have the issues adjudicated on at an appellate level and that the delay to bring this application is not inordinate. Further, the applicant states that no prejudice will be suffered by the Respondent if leave is granted.
  5. The respondent opposes the application for leave to file an appeal out of time and argues that the appellant had adequate time to file the appeal from the time when the ruling was delivered on 8/7/2022 and that the applicant waited until 16/11/2022 to file this application. The respondent denies having been the reason for the delay and denies engaging the applicant in any out of court negotiations. The respondent argues that the orders sought to be appealed against were to preserve the status quo and that there is great prejudice to be suffered since the matter is yet to be canvassed before the trial court. The respondent urged the court to dismiss the application and allow the trial to proceed at the trial court to determine the suit in substance.

#### **Analysis and Determination:**

6. I have considered the pleadings filed by the parties and written submissions and oral highlights made before me by the parties and note that the only issue before the court is “whether the application for leave to file an appeal out of time is merited”. I note from the intended Memorandum of Appeal that the applicant avers that the trial court conservatory orders were final and granted without hearing both parties, whose effect is to greatly prejudice the applicant.
7. The applicant in its submissions stated that the respondent acted in bad faith when it led the applicant to assume that the matter would be settled amicably only to drop the negotiations as soon as the time allowed for appeal lapsed. Order 42 Rule 6(1) gives the power to appellate court to order a stay of execution pending the hearing of an appeal. The said section of the law provides;-

“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 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 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.”



8. I have considered the arguments by both parties. No material has been placed before me to demonstrate the prejudice that the respondent stands to suffer if leave is granted to the applicant to file the intended appeal out of time. I am persuaded that the applicant has made a case to be granted leave to appeal out of time. I therefore find and hold that the application before me has merit and I shall allow it with costs to the Applicant. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF JUNE 2023

.....

J.W.W. MONG'ARE

**JUDGE**

**In the Presence of:-**

PARA 1.

Ms. Wanjau holding brief for Mr. Hassan for the Applicant.

PARA 2.

Ms. Gachera holding brief for Mr. Bungei for the Respondent.

PARA 3.

Sylvia- Court Assistant

<b>HCCOMM APPEAL NO. E173 OF 2022 – RULING</b>	0
--	---

