REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

MISC. CIVIL APPLICATION NO. 44 OF 2020

DIAMOND TRUST BANK KENYA LIMITED.....APPLICANT

VERSUS

RONAK AGROVET LIMITED.....RESPONDENT

RULING

Before me is a Notice of Motion Application dated 8th September 2020 which seeks the following orders;-

1. Spent

2. That the honourable court be pleased to stay the execution of the judgment and decree issued by the Chief Magistrate's Court at Bungoma on 30th April, 2020 in ***Bungoma CMCC No. 528 of 2018-Ronak Agrovet Limited Vs Diamond Trust Bank Kenya Limited*** pending the inter-partes hearing and determination of this application.

3. That the Honourable Court be pleased to extend time to file an appeal to this honourable court against the judgment delivered by the Chief Magistrates Court at Bungoma on 30th April, 2020 ***in Bungoma CMCC No. 528 of 2018-Ronak Agrovet Limited Vs Diamond Trust Bank Kenya Limited***.

4. That the Honourable Court be pleased to stay the execution of the judgment and decree issued by the Chief Magistrate's Court at Bungoma on 30th April, 2020 in Bungoma CMCC No. 528 of 2018-***Ronak Agrovet Limited Vs Diamond Trust Bank Kenya Limited*** pending the hearing and determination of appeal.

5. That costs of this Application be provided for.

The application is supported by the affidavit of FRANCIS KARIUKI, the applicant's Legal Officer. The application is opposed through the respondent's replying affidavit sworn on 28/9/2020. Parties filed written submissions in respect of the application.

I have carefully considered the application, the affidavits on record, the rival submissions and the authorities cited. I am of the opinion that the following are the issues that will dispose of this matter.

1. Whether the applicant has made out a case to warrant and extension of time to file appeal out of time.

2. Whether or not to grant orders of stay of execution pending appeal to this court.

On the first issue, judgement in Bungoma CMCC No. 528 of 2018-**Ronak Agrovet Limited Vs Diamond Trust Bank Kenya Limited** was delivered in open court on 30th April 2020 in the absence of both parties. The instant application was filed on 8th September 2020.

Section **79G** of the **Civil Procedure Act** states;

> ***Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

The applicant argues that judgment was to be delivered on **6th March, 2020** but deferred to 27th March, 2020. In between, the first Corona Virus case was announced and government issued directives for closure of all public places including the courts. Notice was then to issue inviting parties to take the judgment.

That on 6/8/2020 having waited for long, the applicant through its counsel wrote an email to the court registry enquiring on the same. The email was not responded to promptly.

On 17/8/2020 the applicant received a Taxation Notice and the bill of costs whereupon counsel asked for a copy of the judgment and to their surprise judgment had been delivered on 30th April, 2020. Upon this discovery, the applicant preferred the instant application.

Counsel has cited the decision in ***Samuel Mwaura Muthumbi Vs Josephine Wanjiru Ngugi & Another*** **(2018)eKLR**, ***Efraim Yossef Vs Rosemary W. Kihiu*** **(2018)eKLR** and ***Stanley kangethe Kinyanjui vs Tony Ketter & 5 Others*** **(2013)eKLR**, in support of its submissions.

The respondent on its part submits that the applicant is using the downscaling of court operations as a blanket issue to cover its indolence arguing that court operations were upscaled on 15/6/2020.He argues that a period of 5 months has lapsed and the applicant has not explained the delay.

Counsel cited ***Samuel Ngugi Njenga Vs Coastal Kenya Enterprises Ltd-Civil Application*** **242/2018(Machakos)**, ***Daphne Parry Vs Murray Alexander Carson*** **(1963) EA 546** and ***First American Bank Of Kenya Ltd Vs Gulab P Shah & 2 Others*** **(2002) 1EA 65**.

The courts have pronounced on this matter through several decisions. I will set out a few.

In ***Nicholas Kiptoo Arap Korir Salat Vs. The Independent Electoral and Boundaries Commission & 7 Others*** **(2014) eKLR** the Supreme Court held that :-

> ***This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:***
>
> ***1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***
>
> ***2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court***
>
> ***3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
>
> ***4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
>
> ***5. Whether there will be any prejudice suffered by the respondents if the extension is granted;***
>
> ***6. Whether the application has been brought without undue delay; and***
>
> ***7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

In ***Habo Agencies Limited vs Wilfred Odhiambo Musingo*** **(2015) eKLR Waki JA** citing ***Fakir Mohamed vs Joseph Mugambi & 2 Others Civil Appl. 332/04 (UR)*** the court stated:-

> ***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: ".***

As the exercise of the power to extend time is discretionary, subject to the applicant giving satisfactory reasons for the delay. This court notes that the registry should have given parties sufficient notice of the day judgment was to be delivered. There is no fault or indolence on the part of the applicant as the reasons given are sufficient.

The second issue, as to whether or not to grant stay; the court has to balance the interest of all the parties.

Order 42 Rule 6(1) and (2) of the Civil Procedure Rules states: -

> ***1) 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.***
>
> ***2) No order for stay of execution shall be made under subrule (1) unless***
>
> ***i. 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;

ii. 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."

In ***Mohammed Salim T/A Choice Butchery –Vs- Nasserpuria Memon Jamat (2013)*** **eKLR**, the court in upholding the decision in **M/S Portreitz Maternity –Vs- James Karanga Kabia Civ. Appeal No. 63/1997** stated: -

"That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favor. There must be a just cause for depriving the plaintiff of that right

In an application of this nature, the Applicant must: -

i. Demonstrate that if the order for stay is not granted, he might suffer substantial loss.

ii. That the application has been filed without unreasonable delay.

iii. That the Applicant has offered security for the due performance of any decree or order that may be binding on him.

The first condition to be satisfied by the applicant is proof of substantial or irreparable loss. It should not be just a mere allegation that an applicant will suffer loss.

In ***James Wangalwa & Another Vs Agnes Naliaka Cheseto*** **(2012 eKLR** it was sated: -

"The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. That is what substantial loss would entail.'

The applicant submits that the appeal will be rendered nugatory if the decretal sum is paid to the respondent. That the respondent has not shown how it will pay the decretal sum if paid and finally the appeal succeeds and that this is the substantial loss the applicant shall suffer if the orders sought are not granted.

The applicant must establish that the application was made without unreasonable delay. Judgement in this matter was delivered on 30th April 2020 albeit without notice to the parties. The applicant having waited for notice for a while wrote an email to the court on 6/8/2020. On 17/8/2020, the applicant is served with the taxation notice and bill of costs. The applicant requests for copy of judgment which is supplied on the same date. The applicant files his application on 9/9/2020.

The court notes that the applicant took approximately 23 days to lodge the instant application. Counsel explains that they had to seek instructions on whether to appeal or not.

I don't think that the delay is inordinate as this has been explained satisfactorily.

The last issue regards the deposit of security by the applicant for the due performance of any binding decree.

It was held in ***Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others*** [2015] eKLR that -

'… the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words 'ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.'

The applicant depones in paragraph 14 of his affidavit that it is ready and willing to deposit the decretal sum in a joint interest earning account pending the hearing and determination of the intended appeal. The applicant has satisfied this condition.

For the reasons given this court makes the following orders; -

1. The applicant is granted leave to appeal to this court within **30 days**.

2. That the applicant deposits the decretal sum in a joint interest earning account in a reputable bank in the names both counsel within **30 days** from the date of ruling failure to which the orders herein shall automatically lapse.

It is so ordered.

DATED AT BUNGOMA THIS 10TH DAY OF MARCH, 2021.

S. N RIECHI

JUDGE