



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 61 OF 2018**

**TONONOKA ROLLING MILLS LIMITED.....APPELLANT/APPLICANT**

**-VERSUS-**

**ALBERT KIOKO MUTUKU.....RESPONDENT**

**RULING**

1. The appellant/applicant in this instance has brought the Notice of Motion dated 6<sup>th</sup> April, 2021 supported by the grounds set out on its face and the facts stated in the affidavit of advocate Karen W. Maina. The applicant sought an order to aside the ruling delivered by this court on 11<sup>th</sup> March, 2021 dismissing the appeal and all consequential order, an order reinstating the appeal, and an order granting a stay of execution of the judgment delivered on 29<sup>th</sup> January, 2018 in Milimani CMCC NO. 939 of 2016 pending the hearing and determination of the appeal.
2. The respondent opposed the Motion by filing the replying affidavit sworn by advocate Joseph Mwachigi Kinuthia on 20<sup>th</sup> April, 2021.
3. At the *inter partes* hearing of the instant Motion, this court gave directions for the parties to file and exchange written submissions.
4. I have considered the grounds set out on the face of the Motion together with the facts deponed in the affidavits supporting and opposing the Motion, and the rival submissions alongside the authorities cited in reliance thereto.
5. It is clear that the orders sought in the instant Motion are two-fold: the first is for the setting aside of the ruling of this court delivered on 11<sup>th</sup> March, 2021 and consequently, the reinstatement of the appeal.
6. In her supporting affidavit, Karen W. Maina states that the applicant has been keen on prosecuting the appeal and has taken reasonable steps in that respect, namely by requesting for certified copies of the typed proceedings, judgment and decree from the lower court to no avail. The deponent further states that, the hearing of the respondent's application dated 14<sup>th</sup> January, 2021 which precipitated the dismissal order, took place in the absence of the applicant and without prior notice, and that the file had not been previously placed before the Deputy Registrar for directions on the hearing of the appeal.
7. The applicant also submits that in dismissing suits/appeals, the court ought to weigh the prejudice that is likely to be suffered by either party against the interest of justice vis-à-vis the right of an appellant to be heard on appeal, borrowing from the case of **Pan African Paper Mills Limited v Silvester Nyarango Obwocha [2018] eKLR** in which the court held that, a party's right of appeal should not be taken away where sufficient cause has been shown.
8. In reply, advocate Joseph Mwachigi Kinuthia states on behalf of the respondent that, the application for dismissal dated 14<sup>th</sup> January, 2021 was duly served upon the applicant, with the hearing date for the said application clearly indicated therein. This was reiterated in the submissions by the respondent, who urges this court to dismiss the instant Motion with costs.
9. On the subject of service of the application for dismissal and/or the hearing notice regarding the same, I find that the same had been addressed by this court and a determination made in its ruling of 11<sup>th</sup> March, 2021. Consequently, this court cannot revisit the issue as it would be sitting on appeal against its own decision.
10. Suffice it to say that upon perusal of the record, I observed that the applicant has annexed to its Motion various letters addressed to the Executive Officer-Chief Magistrate's Court at Milimani Commercial Courts, requesting for copies of the relevant documents to enable it prepare its record of appeal. Similarly, the record shows that the Deputy Registrar-Civil Appeals Division sent similar correspondence on various dates and it is apparent that none elicited any response. Moreover, I have established from the record that the lower court file is yet to be made available to this court.
11. In the circumstances and notwithstanding the delay in prosecuting the appeal, I am convinced that it would be in the interest of

substantive justice to grant the applicant an opportunity to pursue its appeal by setting aside my earlier ruling of 11<sup>th</sup> March, 2021 and by reinstating the appeal.

12. Concerning the second order sought for a stay of execution, it is clear from the record that such order had previously been granted by the lower court on 22<sup>nd</sup> March, 2018 and owing to the decision by this court to set aside its dismissal order which equally vacated the stay order, I find it reasonable to reinstate the stay order in the circumstances.

13. Consequently, the Motion dated 6<sup>th</sup> April, 2021 is meritorious and allowed, therefore giving rise to a grant of the following orders:

**a) The ruling and order made by this court on 11<sup>th</sup> March, 2021 dismissing the appeal is hereby set aside and the appeal reinstated.**

**b) The Executive Officer (Chief Magistrate’s Court-Milimani Commercial Courts) shall avail certified copies of the typed proceedings, judgment delivered on 29<sup>th</sup> January, 2018 and decree in Milimani CMCC NO. 939 OF 2016 to the appellant/applicant within 20 days from this day.**

**c) The appellant/applicant shall thereafter compile, file and serve its record of appeal within 14 days from the date of receipt of the aforementioned documents.**

**d) The Executive Officer shall avail the lower court file to the High Court-Civil Appeals Division within 30 days from this day.**

**e) The parties shall take a date before the Deputy Registrar to confirm availability of the lower court file and to take further directions.**

**f) The order for stay of execution made on 22<sup>nd</sup> March, 2018 in respect to the judgment in Milimani CMCC NO. 939 OF 2016 is hereby reinstated, subject to the conditions set, where applicable.**

**g) Costs of the Motion to abide the outcome of the appeal.**

**DATED AND SIGNED AT NAIROBI THIS ..... DAY OF ....., 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 7TH DAY OF JULY, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent