REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CIVIL APPLICATION NO. 56 OF 2019

NATION MEDIA GROUP LIMITED.....APPLICANT

VERSUS

FAITH MUTHONI NJIRU.....RESPONDENT

RULING

1. The applicant herein moved this court by way of a notice of motion dated 22.07.2019 and wherein it basically seek for enlargement of time to file its appeal against the judgment, decree and orders of Hon. Gicheru Mr. (Chief Magistrate) passed on 3.09.2018. Further, the applicant prayed for the orders of stay of execution of the said judgment, decree and orders pending the hearing and determination of the appeal and for the costs of the application.

2. The application is premised on the grounds on its face and further supported by the affidavit sworn by Sekuo Owino. The applicant's case is that on 16.07.2019 they were served with a proclamation notice of attachment of movable property and warrants of attachment of the same seeking to recover Kshs. 7,350,765/-. Further that, it was not aware (nor was its advocate) of the delivery of the judgment in this matter but only came to know of the same when the execution commenced against it.

3. The deponent deposed that the award by the trial court was excessive and flew in the face of the binding authorities and further that the applicant is willing to furnish such security in a joint account in the names of the parties' advocates pending the outcome of the appeal. That, unless this Honourable Court intervenes, the respondent shall attach and sell the applicant's properties and the applicant may be unable to recover the sums from the respondent if the appeal succeeds. Further that the intended appeal has a high chance of success and that the application has been made without unreasonable delay as it was lodged shortly after the commencement of the execution.

4. The application came up before this court ex-parte and interim orders were granted in terms of prayer 2 of the application (stay of execution pending hearing and determination of the application).

5. The application is opposed by way of a replying affidavit sworn by Morris Gachura Njage wherein he deposed that the judgment was delivered in the presence of the respondent's advocate but in absence of the applicant's advocates. That upon service of the execution instructions, the applicant offered to settle and for which purpose the applicant requested for the respondent's bank account and that of the auctioneers. It was further deposed that the applicant's advocate was present on the day when parties were ordered to file written submissions and further on the day when the matter was mentioned to confirm compliance (21.05.2018). However, on the said date the plaintiff was given time to file her submissions and a further mention date being (23.07.2017) was given to confirm compliance but on the said date the applicant's advocates did not attend court and the judgment date was fixed.

6. That as such, the applicant's advocate was aware of the mention date but chose not to attend. Further that the applicant's advocate would have followed up to know what happened on the date he failed to attend court and further that the applicant's counsel had on previous occasions failed to attend court and thus it could only be concluded that he deliberately chose to abscond from the proceedings after he filed his submissions. That the applicant's advocates ought to have been vigilant after filing his submissions but in the instant case he was indolent. Further that the applicant was guilty of inordinate delay having filed the application one year after the judgment. Further that, the applicant has not filed any appeal from the decree of the Chief Magistrate and that the application is an afterthought.

7. With the leave of the court, the applicant/respondent filed a supplementary affidavit and wherein the deponent denied the existence of the settlement offer or request of the details of the bank account as was deposed by the applicant herein. In short the deponent controverted the depositions in the replying affidavit and reiterated the averments in the application.

8. The respondent proceeded to file an application dated 16.03.2021 and wherein she sought for orders that this Honourable Court be pleased to order that its orders of 23.09.2019 has lapsed; that this court be pleased to discharge and set aside the said orders and that the costs of the application be provided for. The respondent's case in support of the said application (as can be deduced from the grounds in support of the

same and from the supporting affidavit sworn by Morris Guchura Njage) is that since the said orders were granted, the applicant herein has not moved the court to dispose of the subject of the suit. That, its unacceptable and contrary to the law that the applicant herein (respondent in the application) should continue to enjoy ex parte orders for a period of more than twenty (20) months while the applicant (respondent herein) is languishing as she cannot enjoy the fruits of her judgment.

9. The said application is opposed by the respondent herein by way of a replying affidavit sworn by Sekou Owino and wherein it was deposed that the application was brought under Order 40 Rule 6 of the Civil Procedure Rules which deals with interlocutory orders of injunctions pending appeal whereas no prayer in the said application sought such orders and as such, the application is brought under the wrong provisions of the law and the orders sought cannot be granted. Further that, contrary to the respondent's assertions, the applicant herein has taken steps to prosecute its application as its stay application had been scheduled for mention for directions on 10.02.2020 and on which date, the matter was mentioned before the Deputy Registrar and the court ordered that parties do take a date for highlighting of submissions. However, the applicant herein was not able to fix the matter for highlighting due to closure of court registries as a measure to mitigate Covid-19 spread. But that notwithstanding, it was able to write a letter to the Deputy Registrar requesting for a hearing date of the application for stay.

10. Further that the delay in prosecuting its application for stay was occasioned by the respondent's action of filing Notice to Show Cause in the lower court and which was filed despite the respondent's advocates being aware of the existence of the interim orders of stay. As such the delay in prosecuting the application for stay was justified. The applicant herein deposed that since the interim orders of stay would be dispensed with just in case the application for stay is dismissed, the respondent's application for setting aside the ex-parte orders ought to be held in abeyance pending the determination of the application for stay.

11. The two applications were ordered to be heard together and by way of written submissions. The applicant in support of the application for leave to file the appeal out of time and for stay of execution submitted that the court ought to grant orders enlarging time to file the appeal against the judgment, order and decree of the lower court and in doing so, invoke its discretionary powers. It was reiterated that the applicant was not aware of the judgment of the trial court until it was served with a proclamation and warrants of attachment. Further that, the applicant was not served with the judgment notice as required by law.

12. That if at all there was any laxity or mistake on the part of the applicant's advocate, then the said mistake should not be visited on the applicant. Reliance was made on the case of **ECNG –vs- FNN (200) eKLR, Phillip Keptoo Chemwolo & another –vs- Augustine Kubende (1986) eKLR and CMC Holdings Ltd –vs- James Mumo Nzioki (2004) eKLR**. Further that the respondent herein would not suffer any prejudice if the orders enlarging time are granted but the applicant stands to suffer prejudice if the same is denied. As for the orders of stay of execution, it was submitted that the applicant had proved that the application was made promptly, timeously and without inordinate delay. Further that the applicant stands to suffer significant financial loss (Kshs. 7,350,765/- being the decretal sum and Kshs. 500,000/- being the auctioneer's fees).

13. Further that the applicant may not be able to recover the decretal sum from the respondent if the intended appeal succeeds and if the orders of stay are not granted. Reliance was made on the case of **Amal Hauliers Limited –vs- Adbulnasir Abukar Hassan [2017] eKLR**. Further that the applicant has evinced its intentions to furnish security in a joint account in the names of the parties' advocates or this Honourable Court pending the hearing of the appeal; that the intended appeal is arguable and the same shall be rendered nugatory if the stay is not granted. Reliance was placed on the case of **Richard Muthusi –vs- Patrick Gituma Ngomo & another (2017) eKLR and Kenya Tea Growers Association & another –vs- Kenya Plantation and Agricultural Workers Union (2012) eKLR** amongst other authorities.

14. The respondent in opposing the application seeking stay of execution and leave to appeal raised a point of law on jurisdiction of this court by virtue of the fact that there was no appeal which had been filed yet the applicant seeks stay of execution of the decree under Order 42 Rule 6 which requires that an appeal must be in place. Further that the conditions for setting aside had not been fulfilled as sufficient cause has not been shown as is required pursuant to the decision in **Mbogo –vs- Shah (1968) EA 93.** That the applicant has not attached the proceedings of the lower court to the application, or the letter requesting for typed proceedings to show its intentions to appeal against the said decree. Further that despite the applicant having blamed its advocate the mistake of the said advocate has not been stated.

15. On enlargement of time, it was submitted that the applicant did not prove that its advocate was not aware of the judgment date. Further that the applicant has not proved that it had applied for proceedings or decree after the judgment or even after the execution of the decree or at the hearing of the application and as such, the application ought to fail. It was further submitted that the application is an afterthought and was triggered by the execution process. As regards the application dated 16.03.2021, the respondent submitted that when the parties appeared before the Deputy Registrar on 19.08.2019, the Deputy Registrar ordered the file to be returned back to the registry and further extended the ex-parte orders. That the Deputy Registrar did not have jurisdiction or authority to interfere with the judge's orders. Reliance was made on the judgment in **Civil Appeal No. 131 of 2016 Keren Buaron –vs- Sony Holdings Limited, Nakumatt Holdings Limited & another** and submitted that the orders of the Deputy Registrar to extend the orders were a nullity.

16. I have considered both applications, the responses and the submissions filed herein. As I have already noted, the applicant in its application dated 22.07.2019, seeks stay of execution and leave to appeal out of time. However, the respondent filed an application dated 16.03.2021 seeking vacation of the ex-parte orders made by this court (Muchemi J) on 23.07.2019. In my view and as the applicant herein deposed in opposition of the application dated 16.03.2021, what needs to be determined first is the application dated 22.07.2019 as the outcome of the same would determine whether the subsequent application is worth consideration.

17. The said application seeks two substantive prayers; that of stay of execution and leave to appeal out of time. In my view, the prayer for leave to appeal out of time ought to be determined first since if the same is denied, there will be no basis of considering the prayer of stay of execution. Based on the above, the issues for determination are; -

1. Whether the applicant should be granted leave to appeal out of time against the decision of the trial court

2. If the answer to the issue number 1 is in the affirmative, whether there ought to be stay of execution of the order, judgment of the

trial court pending the hearing and determination of the appeal

18. As to whether the applicant should be granted leave to appeal out of time against the decision of the trial court, when it comes to appeals from the subordinate court to the High Court, the applicable provision is Section 79G of the Civil Procedure Act which expresses that appeals must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section, however, allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.

19. In exercise of that discretion, the court is supposed to take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. (See **Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported)** and **Thuita Mwangi –vs- Kenya Airways Limited [2003] eKLR**.

20. As for the length of the delay, it is not disputed that the judgment of the trial court was delivered on 3.09.2018. The application was filed on 23.07.2019 which is more than ten (10) months from the date of the judgment. However, the applicant deposed that it became aware of the judgment on 16.07.2019 when it was served with the warrants of attachment and proclamation notice. The failure to serve the judgment notice was not denied by the respondent. It is my considered view that the delay of seven (7) days was not inordinate or excessive.

21. As for the reasons for the said delay, the applicant's case is that it was not aware of delivery of judgment and only came to learn of the same when the execution process commenced and after which discovery, the instant application was swiftly filed. The respondent in opposition of this, averred and deposed that the applicant's advocate missed court on the crucial date when the matter was fixed for mention to confirm filing of submissions and which action was deliberate. It was further deposed that common sense dictates that the applicant's advocates on record ought to have perused the court file so as to ascertain what transpired on the date of mention. Whereas I agree with the respondent's reply to this issue, it is my view that the respondent being the plaintiff in this matter had the duty to serve the applicant's advocates with the judgment notice. This is bearing in mind that the said advocates did not attend court on the mention date.

22. As for the chances of the intended appeal succeeding, it is the applicant's case that the appeal is premised on the fact that the damages awarded (decretal sum was excessive and flew in the face of the binding authorities). I note that the applicant did not attach a draft memorandum of appeal to the application. However, as the Court of Appeal in Nairobi held in **Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR** (Nambuye J.A) while quoting with approval the case of **Richard Nchapi Leiyagu vs. IEBC & 2 Others** (supra); **Mbaki & Others vs. Macharia & Another [2005] 2EA 206** and the Tanzanian case of **Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003**, right to be heard is not only constitutionally entrenched but it is also the corner stone of the Rule of law; a valued right; and is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of rules of natural justice. The Learned Judge of Appeal held that in the absence of a draft memorandum of appeal the Court can gauge the arguability of an intended appeal from other supportive evidence.

23. In the instant case, the applicant intends to challenge the decretal sum awarded to the respondent (for the reasons that the same is excessive) and has clearly made that intention known. In my view, that in itself is arguable notwithstanding that it may not succeed. It is trite that in deciding whether an appeal is arguable or not, the court is bound to consider whether the said intended appeal raises a bona fide issue for determination by the Court. In my view, the issue as to whether the decretal sum awarded to the respondent herein was excessive or otherwise (as can be gathered from the application herein) is arguable notwithstanding that it may not succeed.

24. As for the prejudice which the parties might suffer, the same ought to be weighed as against the right to be heard and which is a constitutional right. The applicant having expressed its intention to be heard, it is paramount that it be granted the said opportunity. The respondent deposed that she has been denied enjoyment of her rightfully obtained judgment. However, this should be viewed within the prism of the applicant's right to be heard. In my view, if the respondent served the judgment notice, the time which lapsed between the delivery of the judgment by the lower court and the filing of the instant application or the appeal would have been shortened. As such the respondent is partly to be blamed for the delay in enjoying the fruits of her judgment.

25. For the above reasons, the applicant herein has satisfied the conditions for grant of leave to appeal out of time. The prayer in that respect (payer 3) is merited and the same is hereby allowed.

26. The prayer for leave to file an appeal out of time having been allowed, this court will then proceed to determine the issue as to whether there ought to be stay of execution of the order, judgment of the trial court pending the hearing and determination of the appeal. The principles upon which the above prayer can be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

> **6(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 appealed from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.**
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> **(2) No order for stay of execution shall be made under sub Rule (1) unless: -**
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> > **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 undue 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 Applicant.

27. In the persuasive decision, the court in the case of **Loice Khachendi Onyango –vs- Alex Inyangu & another [2017] eKLR** held that;

> **"The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly 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…."**

28. In the instant case, I have already found that the applicant has satisfied the requirement for leave to file the appeal out of time and that the delay was not inordinate.

29. As to whether the applicant shall suffer substantial loss, in the case of **Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018** the Court of Appeal pronounced itself to the effect that:

> **"It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."**

(See also the case of **Machira T/A Machira & Co Advocates –vs- East African Standard (No.2) [2002] KLR 63)**

30. The applicant has a burden to show the substantial loss it is likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of **Absalom Dora –v-Turbo Transporters [2013] eKLR}**

31. I note that the decree whose stay of execution is sought is a monetary decree. The applicant deposed that if the respondent proceeds to execute the decree, it will suffer substantial loss as it will not be able to recover the decretal sum from the respondent just in case the appeal succeeds. These averments were never rebutted by the respondent herein. In **Century Oil Trading Company Limited vs. Kenya Shell Limited Nairobi (2008) eKLR**, it was stated that: -

> **"Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment".**

32. In this case, it is clear that the applicant is a limited liability company whereas the respondent is a natural person. The apprehension by the applicant were never rebutted. In my view and taking into consideration the decretal amount, there is indeed a possibility of the respondent not being in a position to refund the amount paid by the applicant if the appeal succeeds. Balancing the interests of the parties herein, it is my considered view that the justice calls for status quo being preserved. In fact, the applicant will suffer prejudice if the respondent is unable to refund the amount already paid to her in execution of the decree. In finding this, however, I am not pre-empting the appeal.

33. As to the issue of security for due performance of the decree, the applicant indeed deposed that it is ready to furnish such security as the court may direct. However, as the court held in **Arun C Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others [2014] eKLR**: -

> **"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor……. Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."**

34. As such, the applicant having offered to provide security, it has satisfied the third condition for grant of stay of execution of the decree of the lower court. However, the security to be deposited must be one which serves the purpose of ensuring that there shall be due performance of the said decree.

35. It is my considered view therefore, that, in the circumstances herein, the applicant has satisfied the conditions for grant of the orders of stay of execution as prayed under prayer (4) of the Application dated 22.07.2019.

36. Having found the prayer for stay merited, it therefore means that the respondent's application dated 16.03.has been overtaken by events.

37. As such, the court makes the following orders; -

1. Time within which the applicant ought to file the appeal is hereby enlarged.

2. That an order of stay is hereby issued staying the execution of the judgment, decree and orders of the lower court made by Hon. Gicheru (CM) on 3.09.2018 in Embu Chief Magistrate's Civil Case No. 176 of 2016 pending the hearing and determination of the intended appeal on condition that the whole decretal sum is deposited in court within a period of 30 days from today failing which the stay order shall lapse.

3. The intended appeal to be filed and presented within 90 days from the date of this ruling.

4. The application dated 16/03/2021 is hereby struck out.

5. Each party shall bear its own costs of its application.

38. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF SEPTEMBER, 2021

L. NJUGUNA

JUDGE

……..……...for the Plaintiff

…….for the Defendant