



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC.APPLICATION NO. E30 OF 2021

STANDARD CHARTERED BANK OF KENYA LTD.....APPLICANT

VERSUS

NADEEM IQBAL MOHAMED.....RESPONDENT

RULING

1. The applicants **Notice of Motion** dated **16th February 2021** prays for the following orders;

a) This court does grant leave to the applicant to appeal out of time against the judgement delivered on 21st July 2020 in Nakuru cmcc no. 1307 of 2018

b) This court does grant stay of execution of the judgement delivered on 21st July 2020 in Nakuru cmcc no. 1307 of 2018 pending the filing, hearing and determination of the applicants proposed appeal.

c) The court be pleased to lift and set aside the warrants of attachment dated 9th February 2021 in furtherance of the judgement in Nakuru cmcc no 1307 of 2018.

2. The applicant prayed for costs as well. The application is supported by the affidavit of **Stephen Muriithi** advocate sworn on the same date as well as the grounds on the face of the application.

3. The said affidavit states that the lower court matter was concluded and it was to come up for filing of submissions on **3rd April 2020** but the same could not proceed as the court was closed because of Covid 19. The court notified the applicant upon inquiry via email that a new date was to be communicated.

4. He went on to state that no date was ever communicated but on **15th February 2021** a notice of execution was served upon the applicant. It was apparent that judgement was delivered in the absence of the applicant. It was therefore too late for the applicant to mount any appeal within time prescribed by law hence this application.

5. The applicant heaped blame upon the trial court for failure to communicate to it in regard to the judgement date and further averred that the respondent in any case was to issue notice in respect to the decree as provided under **Order 21 rules 8(2,3, and 5) of the Civil procedure rules**. He said that at any rate there was no evidence that should the respondent be paid the taxed costs he will refund in the event that the appeal succeeds as his credit worthiness was unknown.

6. In his replying affidavit dated **24th February 2021** the respondent has strongly opposed the application on the grounds inter alia that the applicant was indolent and failed to pursue its matter diligently. That the 8 months taken by the applicant to file this application was too long and inexcusable.

7. That there is nothing to be suffered by the applicant since the amount in question is taxed costs after the applicant's suit was dismissed and that the same is too little and negligible considering the applicants balance sheet of about \$16.6B.

8. The court ordered parties to file written submissions which they have. They have also attached various legal authorities which I have had the advantage of perusing.

9. The issue at hand is clear and straightforward, namely whether the applicant's failure to file its appeal out of time was excusable. In other words, was it its own indolence as claimed by the respondent?

10. The court has perused the annexed email correspondences between the applicant and the courts registry. It appears that due to Covid 19

and the restrictions and closures that followed it was not possible for the parties as well as the courts to operate normally. This court as a matter of fact takes judicial notice of this.

11. The said emails promised the that ***“the date will be communicated in due course. Kindly be checking also the courts cause list published.”***

12. Eventually it turned out that the trial court proceeded to deliver its judgement without according the applicant the chance to file its submission and issuing date for judgement. The only time the applicant got to know the position of the matter was when the auctioneers struck. The above position was never rebutted by the respondent who in any even did not according to the applicant offer any defence at the trial court.

13. The question whether to grant the applicant the opportunity to challenge the lower court judgement out of time is a question entrenched in the statutes and various authorities by this court and the courts above it. In **NICHOLAS KIPTOO ARAP SALAT V. IEBC (2014) eKLR** the Supreme Court cemented the same when it stated that;

14. ***“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 underlying 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...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) [where] there is a reasonable [cause] 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.”

15. Taking cue from the above authority this court is satisfied that the reasons raised by the applicant are meritorious and worth consideration. The failure to file its submissions was occasioned by the trial courts failure to serve notice to the applicant as promised.

16. Secondly the date for judgement was not served upon the applicant least of all the respondent who apparently did not participate in the proceedings. It was therefore not its choice not to attend court.

17. The respondent’s argument that the applicant has come to court too late in the day is true. However, it appears that it was not aware of the proceedings since the email by the court indicated that it shall be notified. How the respondent got to know that the suit was dismissed is however within his knowledge.

18. There is nothing the respondent shall suffer if stay is granted. In any case and in respondent’s own admission the applicant is liquid enough to repay the assessed costs in his favour in any event.

19. Finally, on the issue of decree it is apparent that the respondent as a matter of practice and in line with Order 21 rule 8 of the Civil Procedure Rules ought to have sent the decree to the applicant for approval or otherwise. This procedure though one may find it discretionary is critical for the simple reason that it grants the opposite party notice that the matter had been concluded and therefore the need to approval the decree. Had the respondent done this there might have been possibility that this application was not going to be necessary in my view.

20. For now, the court in its widest discretion finds that the application is merited. The same is allowed as hereunder;

a) The applicant is granted leave to file its appeal out of time and serve within 14 days from the date herein and in default execution to proceed.

b) The warrants of attachment and the proclamation herein of the applicant’s goods are hereby set aside for all intent and purposes.

c) Costs shall await the outcome of the appeal.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 23RD DAY OF SEPTEMBER 2021.

H K CHEMITEI

JUDGE.