



REPUBLIC OF KENYA



**Empower Installations Limited v Eswari Electricals (Pvt) Limited (Civil Case 106 of 2013)
[2021] KEHC 330 (KLR) (Commercial and Tax) (3 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 106 OF 2013
DAS MAJANJA, J
DECEMBER 3, 2021**

BETWEEN

EMPOWER INSTALLATIONS LIMITED PLAINTIFF

AND

ESWARI ELECTRICALS (PVT) LIMITED DEFENDANT

RULING

1. The application before the court is the Defendant's Notice of Motion dated 6th September 2021 seeking an order of stay of execution pending appeal from the judgment and decree dated 30th January 2021. It also seeks leave to appeal out of time against the said judgment and decree and that the Notice of Appeal filed on 26th February 2021 be deemed as duly filed within the prescribed period. The Defendant also seeks an order that the Garnishee orders nisi issued herein on 18th August 2021 be vacated.
2. The application is supported by the affidavit of Rathnaraj Joenathan Ebenezer, the Defendant's Country Manager, sworn on 6th September 2021. The application is opposed by the Plaintiff through the affidavit of its director, Steven Gikera, sworn on 5th October 2021.
3. I have considered the submissions by the parties and I find that the issue for consideration are whether the court should grant leave to appeal out of time and stay execution pending appeal. The Defendant has also raised the issue that garnishee proceedings which were in execution of the decree were commenced without leave of the court as the costs of the suit were ascertained by taxation of the party and party bill of costs contrary to section 94 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya).



4. On the issue of execution without leave, I would only state that the application for garnishee orders as argued interparties and upon being satisfied that the orders were warranted, I made the same absolute hence I decline to vacate the orders absolute which have already been executed.
5. The High Court has jurisdiction to consider to grant leave out of time under section 7 of the Appellant Jurisdiction Act (Chapter 9 of the Laws of Kenya). Although the Defendant did not invoke it in the Notice of Motion, I will nevertheless consider the substance of the application in the interests of justice. The principles upon which the court exercises its jurisdiction have been explained in several cases among them *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* CA Civil Application No. Nai 255 of 1997 (UR) where the Court of Appeal observed as follows:

It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.

The court further noted that:

The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.....

6. The judgment in this matter was delivered on 30th January 2020. The Defendant lodged the Notice of Appeal on 26th February 2020 and thereafter filed this application for condonation on 6th September 2021. It is not in dispute that a party intending to appeal must file the Notice of Appeal within 14 days from that the date of the decision appealed from as provided in Rule 75(2) of the Court of Appeal Rules. In this case, the notice was filed on the 26th February 2020.
7. In substance, the Defendant states that it failed to lodge the Notice of Appeal within time because, “it was difficult to access the Court Registry to access documents or services owing to the Covid-19 pandemic and intermittent closure of offices of Court Registry/Premises.”
8. In response, the Plaintiff submits that the Defendant has not explained why it took more than one year and about seven months to apply for stay of execution and or seek leave to appeal out of time. It states that the Notice of Appeal was filed out of time without leave of the court and the Defendant did not regularize the said position until it was served with Garnishee proceedings. It asserts that the delay is so inordinate and unreasonable and no proper reasons have been given by the Defendant.
9. In considering the application, I think two periods are key. The first is when the Defendant filed the Notice of Appeal and the second, the period from filing the Notice of Appeal and to the date of filing the application for condonation. While I am prepared to condone the late filing of the Notice of Appeal on account of Covid-19 related difficulties, I am not sure that the same reasons can be advanced for filing the application for extension of time in September 2021, over a year and seven months after filing its Notice of Appeal late.
10. There is nothing on record to show or demonstrate the difficulties the Defendant was having in filing the application for extension of time especially given that there were active proceedings in the matter



during that period. For this reason, I decline to grant the application for extension of time to lodge the Notice of Appeal out of time and for the Notice of Appeal so filed to be deemed as duly filed.

11. Having declined to condone the Defendant's late filing of the Notice of Appeal, there is no basis upon which I can grant an order of stay pending appeal. The jurisdiction to grant an order of stay pending appeal hinges on the intention of the party to appeal. Having declined leave to file the Notice of Appeal out of time, there is no intention to appeal hence no jurisdiction to grant an order of stay.
12. For the reasons I have set out above, the Notice of Motion dated 6th September 2021 is dismissed with costs to the Plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Ms Lusweti instructed by Abdulrahman, Saad and Associates Advocates for the plaintiff.

Mr Ongondi instructed by Shah and Shah Advocates for the defendant.

