



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 25 OF 2018**

**LUCY WAIRIMU MUTE.....PLAINTIFF**

**VERSUS**

**1. SLEEK TRADING LTD**

**2. MARY WANJIRU WERU t/a TIGWOODS AUCTIONEERS.....DEFENDANTS**

**R U L I N G**

1. Both parties filed separate applications which the court directed to be heard together. The judgment debtor was the first to file its application dated 10/7/2019 seeking stay pending appeal, extension of time to file a notice of Appeal and to deem a notice filed as properly filed.

2. On the 17/7/2019 the decree holder filed the motion dated the same day and prayed that the court be pleased to lift the corporate veil of the judgment-debtor and to issue warrants of arrest against its directors; SAHAIB ASIF, ABUBAKAR GATZAR & SARWAD ASIF and MUHAMMAD ASIF.

3. The rationale for the court to have the two applications heard together was grounded on the fact that the decree-holder's application being an execution application would only be due for consideration once the court determines the judgment debtors application and declines it or else if the order for stay be granted then it would be wholly unnecessary to spend court's time considering the same application for execution.

4. With such appreciation of the circumstances of the matter, I propose to deal with the judgments debts application and only delve into decree holders thereafter.

**Application by the Judgment Debtor for extension of time to**

**lodge a Notice of Appeal and Stay pending Appeal**

5. The grounds shown on the face of the application to premise it are that after the judgment was delivered on the 30/5/2019 there was a desire to appeal against it but no notice was filed within the time prescribed and upto the date of filing the application. The reason for delay is said to have been a mix up in the counsel's office during the process of transmitting final judgment to the judgment debtor which was termed inadvertent and not intentional. It was then contended that the decision has aggrieved the judgment debtor who takes the view that the intended appeal has high chances of success and that the typed and certified proceedings had been applied for. Nothing was said to the effect that a notice of appeal had been filed out of time.

6. The Application was opposed by the decree holder by her Replying Affidavit shown on the 25/7/2019. In it, the decree-holder contends that the application is a non-starter, defective, vexatious scandalous and an abuse of the court process in that it was an afterthought purely designed to deny her the fruits of litigation.

7. The deponent then added that the judgment was read in the presence of the parties counsel and since then not even acknowledgment of letter demanding payment had been made. The position was taken that the issues in the suit were straight and no valid ground of appeal existed just as there was no pending appeal to ground stay pending appeal.

8. It was then asserted that the overriding script is to delay and obstruct justice evidenced by the fact that the judgment debtor had closed its showroom and the premises let to a third party during the same business and that the judgment debtor is owned by foreigners being Pakistanis. The application was faulted for having been filed after undue and inordinate delay of some 45 days.

9. In arguing the application the judgment debtor filed two sets of written submissions on the 19/8/2019 and 30/9/2019 while the decree filed hers on the 27/9/2019 together with a separate list of authorities. Those submissions were then highlighted orally by counsel in court. For the judgment debtor a matter was introduced from the bar that its directors were out of Kenya and that by the time they came back time had lapsed by 26 days and that the judgment debtor was prepared to deposit security for the due performance of the decree. The decision in **Nicholas Korir Arap Salat vs IEBC [2013] eKLR** was cited for principles to be applied in an application for extension of time.

10. For the decree holder submissions were offered to the effect that there was no substantial loss disclosed to be capable of visiting the judgment debtor because the sum sought to be recovered was actually money paid to it for purchased of a motor vehicle which it re-took and sold and that the delay was inordinate and unexplained. Reliance was placed on the decision in **Fredrick Kadiriki vs Ziro Orome Mbsa HCCA No. 21 of 2010** where a mistake by counsel deponed to by the client was found to be inadmissible hearsay. It was then added that the cardinal foundation of stay pending appeal being the pendency of an appeal and offer for security were missing here hence no basis to grant stay. On the nationality of the judgment debtors directors, reliance was placed upon CR 12 which showed all of them to be Pakistanis.

11. As said before, in considering the judgment debtors application I must start with the request for extension of time before I can consider whether or not to grant stay.

12. Whether to grant extension of not is a matter in the discretion of the court designed to achieve the purpose of every judicial system to do justice and determine disputes justly and within the notions of fairness. However in order that other attributes of a justice system be met, extension of time is not a matter of right but must be demonstrated to be deserved. Extension of time to appeal, for example, must be viewed to recognize the fact that the applicant has had his day in court, is bound to help the court achieve its objectives to administer justice expeditiously, justly proportionately and with moderated costs. The need to extend time only arises because there has been a default which must be explained to the satisfaction of the court. The default must be the kind that shows no semblance of an attempt to delay, obstruct or frustrate the ends of justice.

13. In this matter the applicant merely says that there was a mix up in the advocates office. That is said by the deponent without disclosing how he came by that information and what was the nature of the mixup. That to this court is not a plausible explanation that can attract the courts discretion to extend time. Like all discretionary powers the power is not designed to aid those not keen to have disputes determined fairly by adopting recalcitrance delay or obstruction to the cause of justice. Where a litigant employs less candour and is scanty with facts, the court is entitled to conclude that good faith is lacking.

14. Over and above the lack of plausible explanation, there is also the acknowledgment by the applicant in the Affidavit in support of the application for extension of time that it did receive the letter of 4/6/2019 demanding the sum of Kshs.3,131,765/=. By the date the letter was received the time to lodge the notice of appeal had not lapsed and there is entirely no explanation why it took the applicant upto the 10/7/2019 to bring the application.

15. I do find that the threshold of grant of extension of time to file an appeal out of time have not been met and therefore the application lacks merit and is hereby dismissed. Having so dismissed it and there having been filed no notice of appeal out of time, there is no appeal pending and there is no basis to grant stay just like there cannot be a basis to deem a notice of appeal not filed to have been filed. The Notice of Motion dated 10/7/2019 is therefore dismissed with costs in its entirety.

#### **Application by the decreeholder to lift the corporate rail**

#### **and provision of security for the due performance of the decree**

16. The application by the decree holder is grounded on the fact that the judgment debtor being controlled by foreigners has moved from its known offices to an unknown location and acted in a manner to suggest that it is hellbent of delay and defeating execution of the decree. To support such assertions there has been exhibited to court the photograph of the said premises as well as a CR 12 from the company to show the nationality of all the four directors of the judgment debtor.

17. In resisting the application the judgment debtor has exhibited a lease and asserted that they merely moved to other premises where they continues to trade as individuals in the name of the limited liability company.

18. I have given due consideration to the matter asserted by both sides in the Affidavits, and submissions as supposed by the cited decisions. I am convinced that in law an individual being separate and distinct from a corporate cannot trade in the name of a limited corporate entirety. That to me casts doubt as to the veracity and authenticity of the annexed lease. It leaves me with the doubt as to how genuine the operations of the judgment debtor are. That doubt buttresses the decree-holders position that the judgement is being evasive to defeat satisfaction of the decree.

19. For that reason, I do accede to the request to lift the corporate rail and direct that the four mentioned directors shall attend court and explain to the court the means and particulars of the assets of the company. That be done on the 10/2/2020. I award to the decree-holder the costs of the application.

**Dated and delivered at Mombasa this 16th day of January 2020.**

**P.J.O. OTIENO**

**JUDGE**