REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 28 OF 2019

TIMBER TREATMENT INTERNATIONAL LTD..............APPELLANT

-VERSUS-

KALENJIN AUTO & HARDWARE LIMITED..................RESPONDENT

RULING

[1] This Ruling is in respect of the Notice of Motion dated **21 March 2019.** It was filed herein by the Applicant, **Timber Treatment International Ltd**, pursuant to **Sections 3A and 79G and 95,** of the **Civil Procedure Act**, **Chapter 21** of the **Laws of Kenya; Order 42 Rules 6(1) and Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that:

[a] That the application be certified urgent and be heard ex parte in the first instance;

[b] That service be dispensed with in the first instance;

[c] That the proposed Appellant be granted leave to appeal out of time against the Judgment of the Principal Magistrate in **Civil Case No. 385 of 2014** delivered on **5 February 2019**;

[d] That pending the hearing and determination of this application *inter partes*, the Court be pleased to grant an order of stay of execution of the orders of the lower court in **Civil Case No. 385** of **2014** delivered on **5 February 2019**;

[e] That the Court do set aside all the orders of the lower court in **Civil Case No. 385 of 2014** delivered on **5 February 2019;**

[f] That the Court do order for a stay of Proclamation of the attachment of movable property by Seventy Seven Auctioneers dated **14 March 2019;**

[g] That the Memorandum of Appeal annexed to the application be deemed as duly filed;

[h] That the costs of and incidental to the application be costs in the intended appeal.

[2] The application was premised on the grounds that Judgment was entered in **Civil Case no. 385 of 2014** in favour of the Respondent herein; and the Appellant is of the humble view that the same was not proved on a balance of probabilities. It was further the contention of the Appellant that the learned Magistrate did not fully consider the defence evidence; and therefore, that the appeal is arguable and has a high probability of success. These and other grounds set out on the face of the application were expounded on in the Supporting Affidavit sworn by the Appellant's General Manager, **Alex Kiplagat Koskei**, sworn on **21 March 2019**. One of the averments therein is that the Appellant is ready to furnish security by way of a Bank Guarantee for the due performance of the decree should the appeal be found wanting in merits.

[3] The Respondent opposed the application on the grounds that it is fatally defective and that the law firm of **M/s Muga Apondi & Associates**, is not properly on record. The Respondent also contended that the Appellant is seeking infinite orders which the Court lacks jurisdiction to grant; and that it has not given any reasons to warrant the grant of the orders being sought herein.

[4] Subsequently, the Appellant filed another application dated **16 August 2019** seeking orders that the firm of **Muga Apondi and Associates** be granted leave to come on record on behalf of the Defendant in place of the firm of **Magare Musundi & Co. Advocates**; and that the costs of the application be costs in the cause. The record shows that, on the basis of that second application, leave was granted to **M/s Muga Apondi & Associates** to come on record as prayed; and with that, the second application was deemed as spent.

[5] The application dated **21 March 2019** was urged before me on **19 September 2019**; and while Counsel for the Appellant made oral submissions in support, **the Respondent's Counsel, Ms. Kuiyaki,** relied on the written submissions filed herein on behalf on the Respondent on **17 September 2019**. Counsel for the Appellant relied on the grounds set out in the application and highlighted the Appellant's assertion that the Respondent did not prove its case before the lower court on a balance of probabilities; and that the defence of the Appellant was not given sufficient attention by the lower court. He was therefore of the view that the proposed appeal is arguable; and therefore that the Appellant should not be denied its constitutional right to a hearing.

[6] Counsel for the Respondent, on the other hand, took the view that the application is incompetent on the ground that it was filed by the firm of **Muga Apondi & Associates** before a Notice of Change of Advocates was served as required by **Order 9 Rules 9** of the **Civil Procedure Rules**; granted that the Appellant was previously represented by the firm of **Magare Musundi & Co. Advocates**. Counsel relied on **Stephen Mwangi Kimote vs. Murata Sacco Society** [2018] eKLR for the submission that the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** are not mere technicalities. Counsel further faulted the Supporting Affidavit for want of compliance with **Section 4** of the **Oaths and Statutory Declarations Act**. She submitted that it was wrong for the Supporting Affidavit to be commissioned by **Mr. Muga Apondi**, the very Advocate on record herein for the Appellant.

[7] Having given due consideration to the application in the light of the proceedings herein and the submissions made by the parties, it is manifest that most of the prayers are spent. Thus, prayers 1, 2, 3 and 4 of the Notice of Motion dated **21 March 2019** are no longer tenable. Prayer 5 seeks the setting aside of the orders of the lower court issued on **5 February 2019**, which, in my respectful view, is a matter that properly belongs to the proposed appeal. Accordingly, from prayers 6 and 7, I gather that the only issues in contention are, firstly whether a stay of execution should be issued pending appeal and secondly, whether the appeal should be deemed duly filed.

[8] By its ruling dated **24 October 2019**, the Court dealt with the two preliminary points of law raised by the Respondent, on whether the application offends the provisions of the **Oaths and Statutory Declarations Act** and **Order 9 Rule 9** of the **Civil Procedure Rules;** and, pursuant to the court order that the irregularity be rectified, Counsel for the applicant has since filed a compliant affidavit. In the premises, the issues for consideration are whether sufficient cause has been shown for enlargement of time to appeal and for stay of execution.

On Enlargement of Time to File an Appeal:

[9] In **Section 79G** of the **Civil Procedure Act,** it is the law that:

> **"Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:**
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> **Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal."**

[10] Thus, the impugned orders of the lower court having been made on the **5 February 2019**, the Appellant had up to **4 March 2019** to lodge its appeal. The record shows that the Memorandum of Appeal was filed by the firm of **Magare Musundi & Company Advocates** on **6 March 2019**; and was therefore out of time by two or so days. The Appellant has averred that, being dissatisfied with the decision of the lower court, it immediately gave instructions to its Advocates to file an appeal but that due to circumstances beyond its control, the appeal was not lodged in time.

[11] Granted the proviso to **Section 79G** aforestated, there is, in my view a plausible explanation for the two days' delay. Moreover, **Order 50 Rule 6** of the **Civil Procedure Rules, 2010** also does recognize that:

> **"Where a limited time has been fixed for the doing of any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed..."**

[12] Although the application was made on the **21 March 2019**, there is no questioning that the appeal was lodged as soon as could possibly be done; and in the circumstances I would say that the application was brought without undue delay. And, having weighed the competing interests of the parties, it is manifest that the party that would suffer the most prejudice would be the Appellant, should it be denied a chance to pursue its right of appeal. I say so because, the Respondent already has a Decree in his favour; and the delay in its enjoyment, if any, will invariably be compensated for by costs as well as interest on the principal sum, should the appeal turn out to be frivolous. I would, in the premises, find instructive the position taken by the court in **Banco Arabe vs. Bank of Uganda [1999] 1 EA 22** that:

> **"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."**

[13] Hence, I would be inclined to extend time for filing appeal from the Judgment and Decree of the Principal Magistrate in **Eldoret CMCC No. 385 of 2014: Kalenjin Auto and Hardware Limited vs. Timber Treatment International Ltd** as prayed, and order that the Appellant's Memorandum of Appeal filed herein on **6 March 2019** be deemed duly filed.

On Stay Pending Appeal:

[14] In prayer 6, the Appellant simply prayed for stay of the Proclamation of the attachment of its movable property by **Seventy Seven Auctioneers**. Accordingly, Counsel for the Respondent argued that the prayer **"…is hopelessly dead and not even Article 159 of the Constitution or the Oxygen Rules can resuscitate [it]."** My view, however, is that that prayer has to be taken and understood within the context of, not only the application itself and the pertinent affidavits, but also the appeal. The appeal seeks the setting aside of the Judgment and Decree of the lower court; and in the Supporting Affidavit, it was expressly deposed in paragraphs 3, 4, 5, 7 and 10 that it stands to suffer irreparable loss should the attachment be proceeded to conclusion before the hearing and determination of the appeal.

[15] **Order 42 Rule 6 of the Civil Procedure Rules** pursuant to which the instant application has been brought provides that:

> **"(1) "…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 thereof as may to it seem just, and any person aggrieved by an order of stay made by the court 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 subrule (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 unreasonable 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."**

[16] Accordingly, in an application of this nature, it is imperative for an applicant to satisfy the Court that:

> **[a] he stands to suffer substantial loss unless the order is made;**
>
> **[b] that the application has been made without unreasonable delay, and**
>
> **[c] that such security as the court orders for the due performance of such decree has been given.**

[17] The rationale for the aforesaid conditions has been considered in various cases such as **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63,** in which it was held that:

> **"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."**

[18] It was therefore imperative for the Appellant to demonstrate that the Respondent is in no financial state to refund the decretal sum if paid. And, in this respect the Court of Appeal held in **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another [2006] eKLR**, that:

> **"This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge."**

[19] Thus, it was expected of the Respondent to allay the Applicant's apprehensions by demonstrating that it is sound enough financially to repay the decretal funds should it be required to. As it is, the Respondent opted to file Grounds of Opposition and therefore did not respond to or rebut the factual aspects of the application as deposed to by the Applicant in his Supporting Affidavit. In the circumstances, the Appellant's apprehension that it stands to suffer substantial loss cannot be said to be without basis. It is nevertheless a requirement of **Order 42 Rule 6(2)** of the **Civil Procedure Rules** that such security as the Court may deem appropriate be given. Thus, while I would allow the application dated **21 March 2019** on both limbs, which I hereby do. It is accordingly ordered as hereunder:

> **[a]** That time for filing appeal from the Judgment and Decree of the Principal Magistrate in **Eldoret CMCC No. 385 of 2014: Kalenjin Auto and Hardware Limited vs. Timber Treatment International Ltd** be and is hereby extended as prayed, and that the Memorandum of Appeal filed herein on **6 March 2019** be and is hereby deemed duly filed.
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> **[b]** That there be stay of execution of the Judgment and Decree in **Eldoret CMCC No. 385 of 2014: Kalenjin Auto & Hardware Limited vs. Timber Treatment International Ltd** pending the hearing and determination of the intended appeal on condition that the Applicant deposits half of the decretal amount in a joint interest earning account in the names of Counsel on record within 30 days from the date hereof;
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> **[c]** The costs of the application shall be costs in the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF MAY, 2020

OLGA SEWE

JUDGE