REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 36 OF 2020

WILD LIVING COMPANY LIMITED.....APPLICANT

VERSUS

VARIZONE LIMITED .....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Mr. Dennis Kinaro Advocate for the Applicant

Mwadumbo Advocates for the Respondent

RULING

On 25.6.2020 the applicants filed a notice of motion seeking Court permission in terms of Article 159 of the Constitution, Order 9 Rule 9, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A and 79G and 95 of the Civil Procedure Act for the following orders:

> ***(1). That the applicant be granted leave to appeal out of time against the whole Judgment delivered by Hon. Sitati in Kilifi SPMCC No. 325 of 2018 on 17.6.2019.***
>
> ***(2). That there be a stay of execution of the Judgment of the Court pending the hearing and determination of the intended appeal.***

The grounds upon which the application was made are set out in the face of the application and a corresponding supporting affidavit of Simon Mwaniki. The applicant was dissatisfied with the orders made by the trial Court on liability and quantum. The respondent opposed the notice of motion and the reliefs applied for extension of time and stay of execution.

Determination

Section 79 (G) of the Civil Procedure Act provides that where a person desires to appeal under this part against any Judgment or order he shall file a notice of appeal and do so within thirty days period from the date of Judgment entered and signed by the trial Magistrate. It is also clear from the proviso that an expiry of the period set to file an appeal, subject to the applicant showing good and sufficient cause the Court has discretion to grant extension of time to a deserving applicant.

The Court has unfettered discretion under Section 79 (G) and Order 50 Rule 6 and 7 of the Civil Procedure Act and Rules to extend the time of complying with Procedural dictates of filing, amendment, direction, order or appeal on a decision of the Court even if the stipulated time for compliance has since lapsed.

The matters the Courts has to consider are articulated in the following cited authorities **Joseph Mweteri Igweta v Mukira M'Ethare & Another Civil Application No. 8 of 2000 where Lakha J. A** stated as follows:

> ***"The application made under Rule 4 of the Rules is to be viewed by reference to the underlying principles of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of delay, the explanation for the delay, the prejudice of the delay, the explanation for the delay, the merits of the appeal (without holding a mini appeal), the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind the time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them."***

Therefore, in respect of the first challenge raised by the respondent there would therefore be no bar to the granting of an extension of time.

In the words of the Court of Appeal in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application NBI 251 of 1997** it was stated:

> ***"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 the 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."***

In the instant case both parties have responded to the issues raised in the notice of motion. I have perused the reasons and affidavit evidence in which the applicant attempts to explain why time for appeal lapsed as provided under Section 79 (G) of the Act. It's a fact that the impugned Judgment was delivered on 07.6.2019. It was followed with an application for stay of execution before the first instance Court which has since expired. Thereafter, the applicant argues and contends that the lapse of time was caught up with the unprecedented Covid – 19 pandemic. The applicant's explanation for the delay is hinged on the Covid -19 pandemic and the indolence of his previous legal counsel who failed to pursue the extension of time as the intended Appeal has good chances of succeeding.

Although these grounds are viewed by the respondent with suspicion and evidence concocted to deprive him of the fruits of a valid Judgment, the entire application must be considered within the broader context on the criterion of justice and prejudice test.

Indeed, as I have seen in many ways in which a litigant has retained an advocate under Article 50 (2) (G) of the Constitution he is entitled to a full extent of good faith and legitimate expectation to equal benefits of the Law to obtain advantage when exercising bonafide decision to the end. However, that does not mean that there cannot be an honest and genuine concern to follow the course of events in the pending proceedings. Once instructed even with that obligation on the part of a litigant counsel's role throughout the trial is most vital and remains a fundamental constitutional right.

To borrow a principle in **Prosecution v Sam Hinga Norman Moinina Fofanah & Alien Kondowa Case No. SCSL 04 – 14 – T:**

> ***"The role of a defence counsel is institutional and is meant to serve, not only his or her client, but also those of the Court and the overall interest of justice."***

Legal representation as an essential and necessary component of a fair trial, relieves the litigants/parties to a suit the burden to follow though the working of the Court and to assist each one of them to overcome any matters arising in the course of the trial or post Judgment.

In similar reasoning the conclusion may be reached that a mistake or omission, or negligence of a legal counsel failure to fulfil legitimate expectations not to extend advise to the person adversely with the Judgment to accord him an opportunity to make informed choices appropriately tailored to comply with procedural timelines can be taken into account as a relevant consideration. Taking this view in **Attorney General v Keron Mathews {2011} UKPC 38** held that:

> ***"Timeliness in conducting litigation must be observed by a litigant but an attorney's error can be a good reason for missing a deadline and applying for an extension of time to appeal, however the applicant must show that the delay was substantially due to the conduct of the attorney and the litigants must show some degree of vigilant in protecting their own interest. Factoring to make at least penoetic enquiries with an attorney can result in the Court being of the view that the attorney's conduct may have contributed to the delay, but it was not the substantial reason.."***

In the present case it is deponed by **Mr. Mwaniki** of **Abson Motors Limited** that his previous advocate failed to give timely legal advise on the decision of the trial Court and the time frame stipulated in the Law to prefer an appeal. That he came to know of existence of the Judgment. Upon being served with warrants of attachment and proclamation notice annexed as ***SM – 5***.

The respondent went on to argue that there are ways to deal with such errant lawyers and extension of time is not one of the avenues available to the applicant which would severely prejudice him from accessing the fruits of legally obtained Judgment. He contended that if the execution proceedings were to be stayed any prejudice suffered by the applicant would be far less than that suffered in being denied payment of the decretal sum.

As explained earlier in the cited authorities, the Courts of Law have unfettered discretion to extend time, particularly for a litigant to exercise his or her constitutional right of appeal in granting declarations to extend time. As they do so freely, Courts are required always to bear in mind not to assist a party who is guilty of laches or an application geared towards obstruction or delay in the administration of justice.

It is fair to say that under the pressure of arguments intermediate positions were taken by both sides, but in the main rejoinder the arguments are stuck in the Courts exercise of discretion to further the process of execution. But it does not follow from this, as the applicant asserts that the reliefs ought not to be refused.

The dictum by the **Privy Council in Lindsay Petroleum Company v Hurd {1874} LR 5 pc 221** is of relevance to this contested matters before me the board observed interalia:

> ***"The doctrine of laches in Courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waivering, that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of***

time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence or appeal must be tried upon principles substantially equitable and on the merits. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy ….."

With respect to the position of the applicant the failure to comply with timelines was not intentional and in the affidavit evidence a good and sufficient cause has generally be placed before the Court to constitute directions towards, grant of the relief to entitle him leave to appeal.

Therefore, having weighed all matters asserted in the affidavits supporting the notice of motion and the rejoinder affidavit opposing grant of any relief to the applicant, I take the view that length of the delay and reasons for not filing of the notice of appeal has been adequately addressed to warrant exercise of discretion to enlarge time. The contention by the respondent that the claim has taken quite considerable period of time to be heard and concluded is weighty enough to persuade this Court to decline exercise of discretion. That ground taken into account with other factors can only be persuasive but not binding to fetter the Courts inherent power and discretion to render justice in a matter.

The legal proposition in the **Commissioners of Customs and Excise East Wood Care Homes {2001] EWHC CH 456 Lightman** said:

"the position, it seems to me has been fundamentally changed, by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rules is now set out in part1, namely to enable the Court to deal with cases justly, and there are set out thereafter a series of factors which are to be borne in mind in construing the rules, and exercising any power given by the rules. It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each applicant must be viewed by reference to the criterion of justice."

It was often laid down in the past by the Supreme Court in **Hassan Nyanje Charo v Khatib Mwashetani & 3 others {2014} eKLR:**

"Would it be in the interest of justice, seen to turn away an applicant who has prima facie exercised all due diligence in pursuit of his cause but is impeded by the slow – turning wheels of the Courts administrative machinery? We think not."

Therefore, the procedural deficiencies that occasioned undue delay to hear and determine the primary suit will not suffice to outweigh the factors underlying the Courts discretion to permit extension of time to lodge an appeal.

Further, in the articulated notice of motion, this Court not sitting on appeal has to horizon its mind towards the material in the intended appeal. Here is a question for one to have a paranomic view of the trial Court record and the supposed impugned Judgment. The principle at this stage is whether the intended appeal is an arguable one and if no extension is granted the applicant would be highly prejudiced. In the cases of **Mutiso v Mwangi {1999} 2 EA 23 and Mwangi v Kenya Airways Ltd {2003} KLR 486** the Court of Appeal stated:

"It is clear that the other issue of consideration, namely, the chances of the appeal succeeding if the applicant is granted is merely stated as something for a possible consideration, not that it must be considered. This is understandable because the, chances of an appeal succeeding is a normally dealt with by this Court under the rubric of an arguable appeal, or an appeal which is not frivolous and the full Court normally considers that issue under rule 5 (2) (b) of the rules when the question is whether or not, there should be a stay of execution, an injunction and so on."

The requirement for the consideration of whether an intended or proposed appeal has any chances of success appear to have its support in the case of ***Bhaichan Ghagwanji Shah v Jamnadas & Company Ltd {1959} EA 838 where the Court said:***

"It is essential in my view that, an applicant for an extension of time under Rule 9 should support his application by a sufficient statement of the nature of the Judgment and of his reasons for desiring an appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice."

The chances and prospects of an intended appeal succeeding test does play an integral part of the factors to bear in the mind of the Court while exercising judicial discretion to effectively dispose off an application for extension of time. In so far as the chances of the appeal succeeding is concerned, the applicant in his affidavit deposes that all proceedings commenced prior to the appointed day of execution of Judgment quite deliberately left out substantive issues which adversely affected the outcome of the claim.

Thus for instance the applicant seeks to challenge the issue of ownership of the offending motor vehicle subject matter which gave rise to the findings on liability. Therefore, the dispositive question interalia on appeal would be whether the trial Court made an error of fact or Law to occasion a substantial miscarriage of justice. Here the nub of this matter, the merits of the appeal though said in relation to the extension of time both parties would have their day in Court to the extent provided by the Law to advance their respective legal positions.

It is plain from the foregoing that the applicant has satisfied the ancillary requirement premised under the proviso of Section 79 (G) of the Civil Procedure Act and Order 50 Rule 6 and 7 of the Civil Procedure Rules to grant leave for extension of time to file an appeal.

The other issue which arises falls within the rubric of Order 42 Rule 6 of the Civil Procedure Rules is on stay of execution. There is also the power of the Court donated under Section 3A of the Civil Procedure Act on inherent jurisdiction. Together these provisions are sufficient to give effect to the overriding objective in Section 1A of the Act which is to ensure that the Court in exercising powers of case management gives special attention to the principles on just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act for the interest of the parties and for the ends of justice.

To summarize the overall position under Order 42 Rule 6 of the Civil Procedure Rule at the time of the application is being served there are circumstances that ought to justify grant of stay of execution.

1. ***The application must be supported by evidence on affidavit that it has been filed without undue delay.***

2. ***That the applicant would suffer substantial loss unless the order of stay is granted.***

3. ***That there is such security as the Court orders for the due performance of the ultimate decree or order of the Court.***

In the first condition on undue delay given the purposed approach taken in the applicant showing sufficient cause for extension of time, its undoubtedly clear that he has passed that hurdle. What is more pertinent is the fulfilment of the condition on substantial loss. In this regard, the applicant must at any rate show that substantial loss will be occasioned if the decretal sum is paid out before the appeal is heard and determined.

In support of this arguments and what really constitutes substantial loss various decisions such as **Silverstein N. Chesoni {2002} IKLR 867 James Wangalwa & Another v Agnes Naliaka Cheseto {2012} eKLR.**

> ***"The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory."***

The perspective which is necessary to understand the substantial loss context is embodied in the case of **Antoine Ndiaye v African Virtual University {2015} eKLR** where the Court held:

> ***"The onus of proving substantial loss and in effect that the respondent cannot repay the decretal sum if the appeal is successful lies with the applicant. It follows after long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the Court to show that the respondent is not able to refund the decretal sum should the appeal succeed."***

The purpose of it all is obvious because the plaintiff in the primary suit typifies the right to enjoy the fruits of his Judgment while a denial of its benefit is to be balanced with intended applicants right of appeal. Put differently for the purposes of Order 42 Rule 6 of the Civil Procedure Rules on substantial loss the conventional assumption that the pleader should render credible and cogent evidence to address the impecunious nature of the respondent not to refund the decretal sum in this statutory context difficult to conceive. That I say so, is merely an interpretative exercise for the condition taken to its logical conclusion the respondents financial means is a matter within his or her personal knowledge. In that broad formulation the test by its very nature rests on the respondent to discharge the burden that from his stand point on the appeal being litigated, the question of refund will almost inevitably accrue in the event the appeal is allowed.

In my view, that part of Order 42 Rule 6 on substantial loss calls for the striking of a balance between matters inconceivably within the purview of the intended applicant/appellant on the one side, and those of the respondent the owner of the Judgment on the other. This condition enjoins the Court to exercise discretion for a just and equitable balance to be struck between the rights of the intended appeal and those of the respondent. That would be at odds with the traditional test ***"that he who pleads' must proof".***

A simple strategy under this condition is for the intended appellant to demonstrate when setting out the background in the beginning that at every turn he will be financially ruined if execution is allowed to proceed before the appeal is heard and determined. This to me turns the focus to the respondent to ventilate fully that were the Court to grant effective relief he has the capability to compensate the appellant of the decretal sum. The reality is that there is little reason to assume Judgment money paid out before an appeal is determined is protected to guarantee enforceability of the outcome of the appeal.

It must be stressed however that here the Court is concerned to safeguard the existing right under a valid Judgment and the conditions under which the orders in that Judgment may be varied, substituted or terminated wholly on appeal. I am of the view that under Order 42 Rule (6) the applicant has made it clear in his founding affidavit that he will suffer substantial loss in so far as the impending appeal is concerned. Obviously, the respondent made no efforts to dispute the ground to entitle him the fruits of the Judgment.

Finally, under the same Order 42 of the Civil Procedure Rule the Law sets outs requirement to call for security for due performance of the decree. Clause 42 Rule 6 (1) (2) largely obligates the Court to consider security to be provided for by the applicant/ intended appellant. In the case of **Equity Bank Ltd v Talga Adams Company Ltd {2006} eKLR** the Court made distinctive pronouncement as follows:

> ***"Of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the applicants brought. Let me conclude by stressing that of all the four, not one or some, must be met before this Court can grant an order of stay."***

Drawing on the principles in **Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another {2018} eKLR** the Court further stated:

> ***"Where the applicant proposes to provide security, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of Judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security, but it is the discretion of the Court to determine the security."***

The guiding principle is for a purposive reading of the entire provisions with a view to assuming that every conditions is given effect and validates the conclusions reached by the Court. What then comes to mind after all these reasoning in the instant case. Indeed, in looking at the entire notice of motion and the rationale of the objections raised by the respondent the justice of the matter demands discretion be

exercised in favour of the applicant. Accordingly, the following orders shall abide.

1. ***Based on that criteria leave to extend time in which to appeal out of time against the whole Judgment SPMCC No. 325 of 2018 delivered on 17.6.2019 is hereby granted to the applicant/intended appellant.***

2. ***That in the interim, an order of stay of execution made under Order 42 Rule 6 (1) of the Civil Procedure Rule do issue pending the hearing and determination of the appeal.***

3. ***Similarly, the applicant/intended appellant to offer/deposit security in the sum of the decretal amount of Kshs.3,663,913.20 in a joint earning interest account in the names of both counsels to the suit within forty-five (45) days from today's order.***

4. ***In the alternative a bank guarantee of the same amount from a reputable financial institution redeemable at a short notice be deposited with the Court within the same period in time stipulated above.***

5. ***In that respect the applicant/appellant has thirty (30) days to prepare and serve the record of appeal upon the respondent.***

6. ***To that extent case management directions associated with the appeal be adequately addressed on the 14.9.2020.***

7. ***Lastly, the applicant/intended appellant is condemned to a throw away costs of Kshs.20,000/= payable to the respondent not later than twenty one (21) days.***

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY 2020

.....

R. NYAKUNDI

JUDGE

This ruling has been delivered in terms of Article 48 and 159 (D) of the Constitution and practice directions on the general risks associated with COVID – 19 pandemic and the specific consents signed by both counsels dated **6.7.2020** and **13.7.2020** ***(See Gazette Notice No. 3137 of 17.4.2020)***