



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 78 OF 2020

FLIGHT SOURCE INTERNATIONAL LIMITED.....APPLICANT

VERSUS

NATION MEDIA GROUP LIMITED.....1ST RESPONDENT

FAMILY BANK LIMITED.....INTERESTED PARTY/2ND RESPONDENT

RULING

1. The application dated 7th February, 2020 principally seeks orders **that the Intended Appellant/Applicant be granted leave to file the Memorandum of Appeal out of time against the whole ruling of honourable D.W Mburu (SPM) delivered on 29th November, 2019.**
2. Secondly, **that there be a stay of execution of the court's ruling dated and delivered on 29th November, 2019 and Family Bank Limited and the Interested Party herein be estopped from releasing the Ksh.10,000,000/= held as security pursuant to the guarantees issued to the Defendant/1st Respondent and the Interested Party/Respondent be estopped from demanding the said Ksh.10,000,000/= from the Applicant pursuant to the said guarantee pending the hearing and determination of the intended Appeal.**
3. Thirdly, **that the Memorandum of Appeal annexed hereto be deemed as duly filed upon payment of the requisite fees.**
4. It is stated in the grounds and the two affidavits in support of the application that the ruling of the Lower Court was delivered on 29th November, 2019. The delay in filing the Appeal is blamed on the time taken by the court to supply the Applicant with a copy of the ruling. It is further stated that the Advocate handling the matter on behalf of the Applicant left the firm without properly handing over the matter and it was only upon a perusal of the file that the ruling was discovered and the Applicant informed of the same.
5. It is further stated that the Applicant is dissatisfied with the ruling and wishes to Appeal. That following the impugned ruling, Family Bank Ltd the Interested Party/2nd Respondent is in the process of releasing the Bank guarantees amounting to Ksh.10,000,000/= issued to the 1st Respondent in favour of the Applicant. It is further contended that the delay is not inordinate and its excusable. That the Applicant stands to suffer substantial loss as the matter involves his life savings and immovable property. That the Appeal has high chances of success and raises arguable issues. It is further stated that the Applicant has deposited Ksh.10,000,000/= with Family Bank Ltd as security for the performance of its obligations.
6. In a further affidavit sworn on 18th February, 2020 in support of the certificate of urgency, it is stated that Family Bank Limited has gone ahead and unilaterally released the Guarantee of Ksh.10,000,000/= to the 1st Respondent and debited the Applicant's Account with the said sum of Ksh.10,000,000/=.
7. A Notice of motion dated 30th March, 2020 was also filed seeking directions that the application dated 7th February, 2020 do proceed by way of written submissions. Directions have since been given herein and the application is therefore spent. What remains for the consideration by this court is therefore the application dated 7th February, 2020.
8. The application is opposed. In a replying affidavit filed by the 1st Respondent's Legal Officer, it is stated that in the suit filed by the Applicant, the claim was for a permanent injunction to restrain the Defendants from claiming monies arising from a bank guarantee, general damages, costs and interest. That the plaint was served upon the 1st Respondent without the Summons to Enter Appearance and was struck out by the Lower Court. That the 1st Respondent proceeded to recall the sum of Ksh.10,000,000/= from Family Bank Ltd which money was remitted to the 1st Respondent's Bank Account. That therefore the orders being sought are not capable of being complied with as they have been overtaken by events. The 1st Respondent contended that the delay in the filing of the application herein is inordinate and inexcusable

and that no reasonable explanation has been given for the delay.

9. The 2nd Respondent, Family Bank Ltd filed a replying affidavit in opposition to the application. It is stated that the monies that had been secured by the guarantee were released by the Bank (2nd Respondent) to the 1st Respondent. That the Bank therefore has a right of reimbursement from the Applicant herein. That the Bank is an innocent by-stander, having issued a Bank Guarantee to the Applicant.

10. It is further contended that the Applicant came to court with dirty hands after being informed by the bank that the Guarantee monies would be released. That the delay is inordinate, inexcusable and reflects lack of diligence on the Applicant's side. That the delay has not been sufficiently explained and that the intended Appeal has no chances of success.

11. The Applicant filed a further affidavit in response to the above averments. It is stated that the application dated 7th February, 2020 was placed before the court on 10th February, 2020. That unknown to the Applicant, the Bank had on 5th February, 2020 unilaterally debited the Applicant's account with the sum of Ksh.10,000,000/= being the amount of the recalled Guarantee. That the court on 20th February, 2020 issued *Status que* orders. That this matter was thereafter delayed following the outbreak of the COVID 19 pandemic. That the delay is not inordinate and has been explained. That the Title Deed for the property LR No. Nairobi/Block 93/541 was deposited with the Bank as security for the Guarantee in question and the same can be held as security herein. It is further stated that the Memorandum of Appeal raises triable issues and is arguable and that the ruling the subject matter of the application did not make any orders directing the Bank to release the Guarantees.

12. I have considered the application, the response to the same and the submissions filed by the respective Counsel for the parties.

13. Under Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 the conditions for stay of execution are as follows:

“No order for stay of execution shall be made under sub-rule (1) unless –

(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.”

14. On enlargement of time, the principles applicable were set out by the Supreme Court of Kenya in the **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** as follows:

“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 under-lying 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 for 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. Whether there is a reasonable reason 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 consideration for extending time.”

15. The application at hand was filed on 10th February, 2020. The ruling of the trial court was delivered on 29th November, 2019. That is a period of slightly over two months. No details of the Advocate who was previously handling the matter have been given. It is stated that the Applicant wrote to the court on 4th December, 2019 requesting for a typed copy of the ruling. The letter has been exhibited herein but bears no receiving stamp. However, there's another letter dated 6th February, 2020 stamped as received in court on 17th February, 2020 still requesting for the ruling and typed proceedings. A receipt for the sum of Ksh.1,140/= dated 17th February, 2020 is also exhibited. Between the Applicant's Counsel and the court, it is not very clear where the blame for the delay in the obtaining of the ruling and proceedings falls.

16. What is at stake is stated to be a sum of about Ksh.10,000,000/=. There are no allegations that the Respondents are not capable of refunding the said amount. It is not disputed that the said sum of money is in the 1st Respondent's account while the Applicant's Title Deed is with the bank (2nd Respondent). There is therefore security in the hands of the Respondents.

17. I have perused the draft Memorandum of Appeal. The same is arguable.

18. To balance the competing interests of the parties herein and without undue regard to technicalities of procedure, this court is persuaded to allow the application to the extent that the *Status quo* orders herein are hereby maintained pending the hearing and determination of the Appeal. The Applicant is hereby granted leave to file the Memorandum of Appeal. Same to be deemed as duly filed upon payment of the requisite court fees within 7 days from the date hereof. Costs to the Respondents.

Dated, signed and delivered in Nairobi this 15th day of Oct., 2020

B. THURANIRA JADEN

JUDGE