REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. E222 OF 2020

AL GINZA AUTOMOBILES LIMITED.....APPLICANT

-VERSUS-

CYRUS NDERITU KARIUKI Alias

TECK KARIUKI.....1ST RESPONDENT

VITALIS OCHIENG.....2ND RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 20th July, 2020 taken out by the applicant herein and is supported by the grounds set out on its body and the facts deponed in the affidavit of **Muhammed Hanif** in which the applicant sought for the orders hereinbelow:

i. Spent.

ii. Spent.

iii. Spent.

iv. THAT this Honourable Court be pleased to grant the applicant leave to appeal out of time against the judgment and decree delivered on 26th July, 2019 in CMCC No. 6157 OF 2015.

v. THAT pending the hearing and determination of the intended appeal, this Honourable Court be pleased to stay execution of the decree of the court.

vi. THAT the judgment and decree of the court dated 26th July, 2019 entered against the applicant be set aside entirely.

vii. THAT costs of the application be provided for.

2. In opposing the said Motion, the 1st respondent raised a notice of preliminary objection and put forward the following grounds:

i. THAT this Honourable Court lacks jurisdiction to extend time within which to appeal against the judgment delivered on 26th July, 2019 as the application dated 20th July, 2020 has been framed under Order 12, Rule 6; Order 42, Rule 6 and Order 50, Rule 6.

ii. ***THAT the application dated 26th July, 2020 is fatally defective as the orders sought cannot be granted as the applicant failed to include the mandatory Section 79G and 95 of the Civil Procedure Act which is substantive in nature.***

iii. ***THAT the application is res judicata and this Honourable Court is functus officio as the subordinate court delivered a ruling on 8th of November, 2019 which the applicant had sought to set aside the judgment delivered on 26th July, 2019.***

iv. ***THAT the application is fatally defective in substance and form as the applicant cannot seek to appeal out of time and set***

aside the judgment delivered on 26th July, 2019 as they subsequently filed another application which is pending before the subordinate court.

v. ***THAT the application offends the mandatory provisions of Order 9, Rules 9 and 10 of the Civil Procedure Rules and the issue is yet to be determined before the subordinate court therefore sub judice.***

vi. ***THAT this court lacks jurisdiction to grant any stay, amend or vary the orders of 18th November, 2019 and the judgment delivered on 26th July, 2019.***

vii. ***THAT the application is fatally defective in substance and form as the applicant cannot seek to appeal out of time and set aside the judgment delivered on 26th July, 2019.***

3. In reply to the preliminary objection, **Eileen Imbosa** learned advocate swore a replying affidavit.

4. When the Motion came up for interparties hearing before this court, the respective advocates for the parties made brief oral submissions. *Mr. Mugun* learned advocate for the 1st respondent indicated that he was abandoning ground (v) of the preliminary objection and would rely on the remaining grounds.

5. *Ms. Imbosa* learned counsel for the applicant argues that the notice of preliminary objection does not qualify as a preliminary objection in the real sense of the word, and relied on the grounds in the Motion and the facts stated in the supporting affidavit.

6. In reply, Mr. Mugun submits that the issue of mistake of advocate and the substantive law are not stated in the Motion.

7. The 2nd respondent did not file any documents and neither did he participate in the hearing of the Motion.

8. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavit supporting the Motion; the notice of preliminary objection; and the rival oral arguments made by learned counsels.

9. Before considering the merits of the Motion, I wish to first determine the preliminary objection. in the case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** the court defined the term 'preliminary objection' in the following manner:

> ***"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion."***

10. The above definition was further advanced by the Supreme Court in the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** as follows:

> ***"It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law."***

11. The *first* limb of the preliminary objection touches on jurisdiction of this court to hear and determine the Motion. While the 1st respondent is of the view that this court lacks jurisdiction to entertain the Motion for the reasons afforded in the preliminary objection, the applicant through the replying affidavit of Eileen Imbosa stated that this court has jurisdiction and may exercise its discretion in extending the time required for a party to file an appeal and in issuing an order for a stay of execution pending appeal.

12. Upon perusal of the Motion, I note that the same has been brought under the provisions of Order 12, Rule 7 (on the varying and/or setting aside of a judgment/dismissal order); Order 42, Rule 6 (on stay of execution pending appeals); and Order 50, Rule 6 (on enlargement of time) of the Civil Procedure Rules ("the Rules").

13. As concerns the setting aside and/or varying of the impugned judgment, it is clear that the judgment in question was delivered by the lower court and not by this court. It is therefore clear that this court cannot vary or set aside the said judgment save by way of an appeal, which is not what this court is dealing with at the

moment. Consequently, I agree with the 1st respondent that order (vi) of the Motion cannot stand.

14. In regard to the remaining orders sought, it is apparent that this court has the discretion to enlarge the time required for a party to perform any act under the Civil Procedure Act ("the Act") and the Rules. It is therefore not correct; as the 1st respondent seems to suggest; that this court lacks jurisdiction to extend time.

15. Further to the foregoing, I am of the view that the Motion would not be fatally defective by the mere fact that the applicant did not come under the headings of Sections 79G and 95 of the Civil Procedure Act providing for the timelines for appealing to the High Court and for the enlargement of time, respectively.

16. The afore-cited provisions are replicated under Order 50, Rules 5 and 6 of the Civil Procedure Rules which are cited in the Motion and moreover, the rules of substantive justice enjoin this court to consider the substance of the Motion without undue regard to procedural technicalities. Consequently, grounds (i), (ii) and (vi) of the preliminary objection fail.

17. The second limb of the preliminary objection concerns itself as to whether the Motion is *res judicata*. In her replying affidavit, Eileen Imbosa stated that the Motion is not *res judicata* neither is this court *functus officio* since its right of appeal stands.

18. Upon perusing of the record and the material placed before this court, I observed that though reference was made to a ruling delivered on 8th November, 2019 before the trial court in which the applicant allegedly sought to have the impugned judgment set aside, none of the parties availed a copy of the same before me for consideration. I therefore have no basis on which to find that the instant Motion is *res judicata* or that this court is *functus officio*. Ground (iii) of the preliminary objection cannot therefore stand.

19. Under the *third* limb of the preliminary objection, the 1st respondent brought forward the argument that the Motion is fatally defective since there is a similar application pending before the trial court, to which the applicant averred that the application in question is seeking to arrest the impending execution and to obtain injunctive orders from the court.

20. Again, none of the parties availed a copy of the referenced application to this court and there is nothing to indicate that the orders sought in the instant Motion are similar to the application which is said to be pending before the subordinate court. Even if this were the case, this court is not prevented from considering a fresh an application seeking a similar order for a stay of execution.

21. In the circumstances, grounds (iv) and (vii) of the preliminary objection fail and consequently, the notice of preliminary objection is for dismissal which I hereby order with no order as costs. However, I concur with the argument of the 1st respondent that order (vi) of the Motion on the setting aside of the judgment delivered by the trial court on 26th July, 2019 cannot be granted at this stage.

22. It is evident that the orders being sought in the Motion are two- fold: first is the order seeking for enlargement of time to appeal and for leave to appeal out of time against the impugned judgment and decree.

23. **Section 79G** of the **Civil Procedure Act** sets the timelines for lodging an appeal against the decision of a subordinate court as 30 days from the date of the decree or the order being appealed against. The provision goes on to express that an appeal can be admitted out of time where sufficient cause has been shown.

24. Further to the above, under the provisions of **Section 95** of the **Civil Procedure Act** and **Order 50, Rule 5** of the **Civil Procedure Rules**, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.

25. The courts have developed various conditions to offer guidance in deciding whether to extend the period for filing an appeal out of time. In the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** the Court of Appeal illustrated the conditions to be met and which I shall address hereunder.

26. On the first condition on length of delay, the 1st respondent is of the view that the applicant is guilty of inordinate delay

in bringing the Motion, while the applicant did not particularly address this condition.

27. While it is apparent from the record that no copy of the impugned judgment was availed to this court, the parties are in agreement that the aforementioned judgment was delivered on 26th July, 2019 which is about one (1) year prior to the filing of the Motion. In my mind, while there has clearly been a delay in filing the application, I do not find the same to be so inordinate as to result in a grave miscarriage of justice.

28. As concerns the reason for the delay, the applicant explained that it was not informed of the delivery of the impugned judgment by its erstwhile advocate and upon learning of the said judgment, it instructed its erstwhile advocates to lodge an appeal on its behalf but they did not.

29. Upon considering the above explanation and taking into account the legal principle that the mistake of an advocate ordinarily ought not to be visited upon the client, I find the same to be reasonable in the circumstances.

30. As relates to whether or not an arguable appeal exists, it is the applicant's assertion that it has an arguable appeal as indicated in the draft memorandum of appeal.

31. Upon perusal of the grounds of appeal raised in the draft memorandum of appeal annexed to the Motion, I note that the appeal is challenging the finding of the trial court on both liability and quantum. I am therefore satisfied that the applicant has demonstrated arguable points of law and fact in its appeal, regardless of whether or not the appeal succeeds.

32. In addressing the final condition on prejudice, it is apparent that the judgment was in favour of the 1st respondent herein. It therefore follows that the 1st respondent is lawfully entitled to enjoy the fruits of his judgment since the filing of the suit in 2015. Suffice it to say that it would not be in the interest of justice to lock out the applicant who is aggrieved by the judgment of the trial court. I therefore find it reasonable for the applicant to be given the opportunity of challenging the subordinate court's decision on appeal.

33. The second prayer is for stay of execution of the decree pending appeal.

34. The guiding provision is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the following conditions in determining an application for stay.

35. The first condition is that the application must have been brought without unreasonable delay. I am satisfied that this condition was sufficiently addressed hereinabove.

36. Under the second condition, the applicant must show to this court's satisfaction the substantial loss it would suffer if the order for stay is denied.

37. In the supporting affidavit, it was stated that the applicant is apprehensive that unless the order for stay of execution sought is granted, it is apprehensive that its various motor vehicles which have been attached by the 1st respondent will be sold and yet it is still servicing the facilities for the said vehicles. The applicant further stated that the employment of the 1st respondent is unknown and hence it is apprehensive about releasing the decretal amount to him pending the intended appeal.

38. The courts have time and time again discussed the question on who has the burden of proof on the issue of refund of the decretal sum. In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** the Court of Appeal stated as follows:

> ***"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…"***

39. In the absence of anything to ascertain the 1st respondent's financial capacity, I am satisfied that the applicant has reasonably demonstrated that it stands to suffer substantial loss if the order for stay is not granted.

40. The final condition is the provision of security for the due performance of the decree or order. Here, the applicant

expressed its willingness to deposit the logbooks for the motor vehicles stated in the Motion.

41. In my view, I find that it would not be proper in the circumstances for the applicant to be permitted to deposit the logbooks as security. I think the appropriate security is for the applicant to deposit the decretal sum.

42. In the end, the Motion dated 20th July, 2020 is found to be meritorious hence it is allowed in terms of prayers (iv) and (v) thus giving rise to the grant of the following orders:

a) The applicant is granted leave of 14 days to file an appeal out of time.

b) There shall be an order for stay of execution of the judgment and decree issued on 26th July, 2019 pending the hearing and determination of the intended appeal on the condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates within 45 days from the date of this ruling and in default the order for stay shall automatically lapse.

c) Costs of the Motion shall abide the outcome of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 6th day of November, 2020.

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J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

……. for the 1st Respondent

……. for the 2nd Respondent