



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 436 OF 2017

BETWEEN

JOHN MUGAMBI T/A

MUGAMBI & COMPANY ADVOCATES.....1ST PLAINTIFF

BEATRICE KARIUKI T/A

BEATRICE KARIUKI & ASSOCIATES.....2ND PLAINTIFF

AND

SHOWCASE PROPERTIES LIMITED.....DEFENDANT

RULING NO. 3

Introduction

1. By the Notice of Motion dated 12th October 2020, the Defendant has moved the court, inter alia, under **Order 50 rule 6** and **Order 42 rule 6** of the **Civil Procedure Rules** seeking the following order:

[2] THAT this Honourable Court do enlarge time within which the Defendant/Applicant is to avail the bank guarantee for the sum of Kshs. 5,000,000.00 for a further period of thirty (30) days from 24th September 2020 (i.e up to 24th October 2020).

Submissions

2. The application is supported by the affidavit of the Defendant's director, Francis Muhoro Gachanja, sworn on 12th October 2020 and the grounds set out in the face of the application. Mr Muhoro deponed that on 24th August 2020, this court delivered a ruling allowing the Defendant's application to set aside judgment on terms that it procures a bank guarantee for Kshs. 5,000,000.00 within 30 days. It immediately applied to Equity Bank ("the Bank") on 31st August 2020 and on 1st September 2020, he forwarded the documents required by the Bank to furnish the guarantee. On 22nd September 2020, the Bank issued the Defendant with a letter of offer and on 9th October 2020, he informed the Bank to issue the guarantee in favour of the Plaintiffs' Advocates. Mr Muhoro states that after the current application was filed, the Bank informed him that the Guarantee would be ready within 14 days hence it seeks extension of time within which the Defendant would comply with the court orders.

3. The application was opposed by the Plaintiffs through the affidavit of John Mugambi sworn on 15th October 2020. The Plaintiffs submitted that the time for compliance with the order made on 24th August 2020 lapsed on 24th September 2020 and since the Defendant had not complied with the order, the default judgment was automatically reinstated in accordance with the said orders. The Plaintiffs urged that the Defendant has not given good reasons for the delay in complying with the court order.

4. The Plaintiffs argued that the delay in seeking the orders was neither justified nor explained as the process of securing a Guarantee

commenced on 12th October 2020, 7 days after the court rendered its ruling. Further, the present application was filed 18 days after the lapse of the 30-day period granted by the court despite the fact that the Defendant received the letter of offer from the Bank on 22nd September 2020 by which time it would have applied for enlargement of time.

5. In relation to the Guarantee dated 13th October 2020 issued by the Bank, the Plaintiffs, upon inquiry from Bank by a letter dated 14th October 2020, found that the application for the Guarantee was made by *Gachanja Muhoro and Sons Limited* and not the Defendant and that it was tenable for one year and set to expire on 11th October 2021. In the circumstances, the Plaintiffs submitted that the Guarantee is an unsuitable and incompetent security.

6. The Plaintiffs also stated that the Defendant could not obtain a Guarantee from any reputable bank as its credit status confirmed by letters dated 14th October 2020 from Credit Rating agencies; Transunion and Metropol show that it has been blacklisted and cannot get a facility and/or borrow monies from any reputable bank. The Plaintiffs added that the Defendant's inability to pay its debt led to them filing an Insolvency Petition against the Defendant namely; **Insolvency Petition No. E172 of 2019 (Re Showcase Properties Limited)** that is still pending in Court.

7. Based on the totality of the information provided, the Plaintiffs submitted that even if the 30 days being sought is granted, the Defendant will still not be in a position to provide a valid and suitable Guarantee and the result will be delaying this suit occasioning further prejudice upon the Plaintiffs.

8. In his supplementary affidavit sworn on 27th October 2020, Mr Muhoro deponed that the period of 7 days taken to commence the application process for the guarantee is not inordinate given that the Defendant had to informally consult on favourable terms and that the application was only filed when the Bank confirmed that it would issue the Guarantee on 13th October 2020. Contrary to the Plaintiff's assertions, he confirmed that the Guarantee is genuine and is issued in favour of the Plaintiffs and in line with banking practice it is issued for a period of 1 year and is renewable upon expiry. Mr Muhoro complained the information on the Defendant's credit status was issued without his consent and in any case the reports are not relevant to issue at hand. He also stated that the Insolvency Petition was stayed pending the hearing and determination of the suit.

Determination

9. The application for consideration is one for extension of time to comply with orders issued by this court. Under **section 95 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)**, the court has power to extend time for complying with any court order whether or not the time for compliance has expired. It provides as follows –

95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

10. The aforesaid provision is augmented by **Order 50 rule 6 of the Civil Procedure Rules** which provides as follows –

50(6) Where a limited time has been fixed for 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; provided that the costs of any application to extend such time and for any orders made thereon shall be borne by the parties making such application, unless the court orders otherwise.

11. The principles applicable for extension of time were summarized by the Supreme Court in **County Executive of Kisumu v County Government of Kisumu, SCK Civil Appl. No. 3 of 2016 [2017] eKLR** where it cited its decision in **Nicholas Kiptoo arap Salat v Independent Electoral and Boundaries Commission and & others [2014] eKLR** as follows:

[23] It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated 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 a consideration for extending time.”

12. It is in light of the aforesaid provisions and principles that I turn to consider the application. On 24th August 2020 I delivered a ruling where I allowed the Defendant’s Amended Notice of Motion dated 8th June 2020 seeking to set aside judgment on the following terms:

(a) *The default judgment entered against the Defendant be and hereby set aside.*

(b) *The Defendant shall file and serve its defence within 14 days from the date hereof.*

(c) *As condition for (a) above the Defendant shall deposit Kshs. 5,000,000.00 in a joint account in the names of the parties advocates or in court or provide a bank guarantee in favour of the Plaintiffs for the said amount from a reputable bank within 30 days from the date hereof.*

(d) *In the event of default of any of the conditions aforesaid, the default judgment shall be deemed reinstated.*

(e) *The Defendant shall bear the costs of the application.* [Emphasis mine]

13. Before the lapse of the period for compliance, the Defendant filed an application dated 10th September 2020 seeking to review the terms imposed in the order of 24th August 2020. I heard the application interparties and dismissed it on 2nd October 2020. It is after the determination of this application that the Defendant commenced the process of seeking a guarantee. Although the Plaintiff describes the application for review as a misadventure, I do not think the Defendant should be penalized for exercising his right to seek legal relief in a manner provided by law. Since the ruling came after the time limited for compliance had lapsed, this is a proper case for extension of time notwithstanding the time limited for compliance had expired.

14. The present application was filed on the 12th October 2020, 11 days after the application for review was dismissed. In the interim period, Mr Muhoro, being a director of the Defendant, has shown how he took steps to commence the process of obtaining a guarantee as evidenced by the emails exchanged with the Bank. I cannot say that the time for making application is inordinate or that the delay was deliberate or intended to delay or defeat the cause of justice. Moreover, a guarantee has now been issued in favour of the Plaintiff.

15. The Plaintiff has raised various questions about the guarantee; its validity, who obtained it, the capacity of the Defendant to obtain it amongst other concerns. In my view, the essential issue is whether the Guarantee issued by the Bank is a valid and sufficient security for purposes of compliance with the order. It must be borne in mind that a guarantee is an independent undertaking by a bank, issued at the request of its customer to pay a sum of the money to a third party upon demand. In this case, I have no doubt that the Guarantee document which the Bank issued falls within the meaning of a guarantee and complies with the order of 24th August 2020 hence I agree with the Defendant that its antecedents are not a relevant consideration. What is important, in my view, is that the Plaintiffs’ position is secured by the guarantee which is in force. Nor do I accept that the force of the Guarantee is diminished merely because it is time limited for a year. As the Defendant has explained it is in line with banking practice and renewable on demand.

Disposition

16. Having considered the application and the facts laid before the court, I am inclined to allow the Defendant’s application. The Plaintiff’s position shall be assuaged by an award of costs for the application. I therefore order as follows:

(a) The time for compliance with the order of 24th August 2020 and in particular the time for furnishing a bank guarantee in favour of the Plaintiffs for the sum of Kshs. 5,000,000.00 be and is hereby enlarged and that the Guarantee issued by Equity Bank in favour of the Plaintiffs be deemed to have been furnished within the time so limited.

(b) The Defendant shall bear the costs of this application.

DATED and DELIVERED at NAIROBI this 2nd day of NOVEMBER 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mbobu with him Mr Otenyo instructed by Makhandia and Makhandia Advocates for the Plaintiff.

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Defendant.