



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAROK**

**MISC APPLICATION NO 17 OF 2017**

**TIPILIKWANI MARA CAMP.....APPLICANT**

**VERSUS**

**BERNARD O MUCHENYA ALUKHABA.....RESPONDENT**

**RULING**

**Introduction**

1. The applicant has through its notice of motion dated 15th November 2018 applied for extension of time to comply with this court's order dated 27<sup>th</sup> November 2017. Additionally, the applicant seeks stay of execution of the magisterial order appealed against pending the hearing and determination of the appeal. The application is brought pursuant to the provisions of sections 1A, 1B, 3,3A, and 63 [e] and 95 of the Civil Procedure Act [Cap 21] Laws of Kenya and Order 42 Rule 6 [1] of the 2010 Civil Procedure Rules.

The respondent has opposed the application.

**The case for the Applicant**

2. The applicant's application is supported by both the eight grounds that are set out on the face of the notice of motion and on the 18 paragraphs supporting affidavit. The major grounds in support of the application are as follows. The failure of the applicant to deposit a security in the sum shs.50,000 within 45 days from 27<sup>th</sup> November 2017; was occasioned by a mistake of counsel for the applicant to advise it on the position of the matter. This mistake of counsel should not be visited upon the applicant. According to counsel the appeal has high chances of success. Both the extension of time and an order of stay of execution are applied for to preserve the applicant's right of appeal.

3. The supporting affidavit is prepared by counsel for the applicant. He has deponed to the following major matters. On 27<sup>th</sup> November 2017, this court granted leave to the applicant to file his appeal out of time and an order of stay of execution to preserve his right of appeal, pending the hearing and determination of the appeal. The grant of those orders was subject to the applicant depositing shs. 50,000 as security within 45 days from that date. Following advice from the court registry at Narok law courts, the clerk of counsel for the applicant caused the applicant's insurer [Fidelity Shield Insurance Co Ltd], to draw a cheque in the sum of shs 50,000 in favour of the Chief Magistrate's Court at Narok, instead of the cheque being drawn in favour of the High Court.

**The case for the applicant**

4. When the cheque had been prepared for onward transmission to the court, it was misplaced in his chambers but the same was recovered in April 2018. The cheque was then forwarded to the chief magistrate's court at Narok, but the latter refused to accept the said cheque on the ground that it should have been drawn in favour of the High Court. The registry personnel in the said court also refused to accept the filing of the appeal for the same reason.

5. Furthermore, counsel for the applicant has deponed that the advocate who was assigned to prosecute appeal file sent a representative who approached the respondent's advocate requesting to be indulged and to file a consent allowing them to file the appeal out of time. The representative also requested counsel for the respondent to indulge them in order to deposit the cheque, but the respondent's advocate refused to do so. Additionally, the advocate who was assigned to handle the matter left his firm and failed to communicate to the insurer, the error in the cheque that led to the delay in filing the appeal. He has also deponed that the failure to comply with the court order was occasioned by the mistake of the applicant's counsel; which mistake should not be visited upon the application. Finally, counsel has deponed that the applicant is willing to deposit a security as directed by the court within 2 days if allowed to do so.

**The case for the respondent**

6. Counsel for the respondent has filed a 16 paragraphs replying affidavit in opposition to the application. In that replying affidavit counsel

has deponed to the following major matters. He has averred that Miss Olivia who was an associate at the applicants firm of advocates visited their offices in February 2018 and sought the indulgence regarding the execution of the decree. She pointed out to him that the cheque had wrongly been drawn and they were in the process of correcting the said error. As a result, they indulged the applicant and stopped all the execution proceedings. He has further averred that despite numerous reminders to the applicant to serve them with a copy of the memorandum of appeal, they have not been served with the memorandum of appeal, one year down the line. He has further averred that the respondent only moved to this court after being served with the proclamation notice. Finally, he has further averred that to date, the applicant has not taken any steps towards preparing their record of appeal and have the appeal set down for determination.

7. I have considered both the rival affidavit evidence of the parties, their submissions and in the light of the applicable law, I find the following to be the issues for determination.

1. Whether or not the applicant has made out a case for the extension of time within which to comply with this court's order of 27/11/2017.

2. Who bears the costs of this application?

#### **Issue 1.**

8. The applicant was granted leave to appeal out of time in addition to being granted an order of stay of execution pending the hearing and determination of its appeal. The orders were granted to the applicant on condition that it was to deposit Shs.50,000/= as security in court within 45 days from 27/11/2017. The applicant attempted to comply with the court order by drawing a cheque in favour of the Chief Magistrate's court at Narok. The registry staff at Narok Chief Magistrate's Court refused to accept the cheque on the ground that it was supposed to have been drawn in favour of the High Court. Following that refusal they were unable to comply with the court order. They therefore sought and obtained indulgence from counsel for the respondent. This was in February 2018. According to counsel for the respondent they stopped all execution proceedings in February, 2018.

9. Furthermore, counsel for the respondent deponed in paragraph 8 of his affidavit that despite numerous reminders to the applicant, he has not been served with a copy of the memorandum of appeal.

10. The applicant's counsel has not explained adequately the failure to comply with this court's order dated 11/11/2017. The applicant moved to court following a proclamation issued by the auctioneers. In the circumstances, I find based on the dictum of *Apaloo, J. A, in Philip Keiptoo Chemwolo & Another v. Augustine Kubende (1986) eKLR* that the applicant's counsel made two mistakes. First, by drawing a cheque in favour of the chief magistrate's court at Narok instead of the cheque being drawn in favour of the High Court. Second, the departure of its prosecuting counsel (Ms Olivia) without advising the applicant of the same. These are mistakes which should not be visited on the applicant. In other words, the applicant as a party should not suffer the penalty of not having its case determined on the merits. These mistakes can be compensated by way of costs. Moreover, the applicant is able and willing to deposit the security in the sum of Shs.50,000/= in court.

11. The applicant is hereby granted time to file its appeal in ten days and to deposit the said security within that period. I therefore find that the delay on the part of the applicant is excusable. In the circumstances, I find that the applicant's application has succeeded.

12. The upshot of the foregoing is that the applicant's application is hereby allowed in terms of its prayers 2, 3,4 and 5 of the notice of motion dated 15/11/2018.

#### **Issue 2**

13. Costs will be costs in cause.

Ruling delivered in open court this 17<sup>th</sup> day of January, 2019 in the absence of the applicant and in the presence of Mr. Kiruti holding brief for Mr. Ong'uti for the respondent.

**J. M. Bwonwonga**

**Judge**

**17/01/2019**