



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL APPLICATION NO 306 OF 2018**

**CHINA WU YI COMPANY LIMITED.....APPELLANT**

**VERSUS**

**RONALD MUSINGISI OKARI.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Appellant's Notice of Motion application dated 25<sup>th</sup> May 2018 and filed on 29<sup>th</sup> May 2018 was filed pursuant to the provisions of Order 22 Rule 22, Order 51 of the Civil Procedure Rules (2010), Sections 3A of the Civil Procedure Act and Section 7 of the Appellate Jurisdiction Act. Prayer Nos (1) and (3) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. THAT the Appellant be allowed to file the Appeal out of time.**

**3. Spent.**

**4. THAT there be a stay of execution of the award of the Principal Magistrate Court delivered on the 10<sup>th</sup> April 2018 against the Appellant herein in favor of the Respondent pending the hearing and determination of this appeal.**

**5. THAT costs of this application be provided for.**

2. The Appellant's Written Submissions were dated and filed on 26<sup>th</sup> September 2018 while those of the Respondents were dated 11<sup>th</sup> October 2018 and filed on 12<sup>th</sup> October 2018.

3. When the matter came before the court on 6<sup>th</sup> November 2018, the parties requested it to render its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPELLANT'S CASE**

4. The Appellant's present application was supported by an Affidavit of its Deputy Manager, Chen Rongbo, that was sworn on 25<sup>th</sup> May 2018.

5. The Appellant stated that judgment was entered against it in favour of Respondent in the sum of Kshs 402,000/= being general and special damages. It said that at the time the judgment was delivered, the Learned Trial Magistrate read a part of it necessitating it to be furnished with a copy of the entire judgment to determine if it would pay the decretal sum or appeal against the said judgment.

6. It contended that its advocates obtained a copy of the said judgment after the stipulated period for filing an Appeal had lapsed. It was therefore its averment that the delay in filing the appeal within the period stipulated by the law was not intentional.

7. It also pointed out that its appeal had high chances of success, that it was ready to abide by any reasonable terms that the court would set as security and that its appeal would be rendered nugatory if a stay of execution of the judgment that was delivered in the lower court was not granted and it became successful because the Respondent's financial means were unknown.

8. It therefore urged this court to allow its application as prayed.

### **THE RESPONDENT'S CASE**

9. In response to the said application the Respondent's advocate, Michael B Mwangi, swore a Replying Affidavit on 22<sup>nd</sup> June 2018. The same was sworn on 25<sup>th</sup> June 2018.

10. The deponent stated that the Appellant had delayed in filing the present application as judgment was delivered on 10<sup>th</sup> April 2018. He pointed out that only applied for the typed copies of proceedings and judgment on 25<sup>th</sup> April 2018 and forwarded its letter calling for the said documents on 30<sup>th</sup> April 2018 which defeated the urgency it wanted this court to believe the request had been made.

11. He was emphatic that it had failed to explain the circumstances of the delay and thus had dirty hands which disentitled this court from exercising its discretion in its favour.

12. He stated that the appeal stood no chances of success but added that if this court was inclined in granting it leave to file an appeal out of time, then it ought to deposit the entire decretal sum of Kshs 464,715/= plus costs of Appeal in the sum of Kshs 150,000/= in an interest earning account in the names of the advocates in any bank of the Respondent's choice.

### **LEGAL ANALYSIS**

13. Notably, the Appellant's application had ideally sought two (2) distinct orders; one that it be granted leave to file an appeal out of time and two, that it be granted an order of stay of execution pending the hearing and determination of its intended Appeal.

14. It relied on the case of **Stanley Kahoro Mwangi & 2 Others vs Kanyamwi Trading Co Ltd [2015] eKLR** where it was held that an applicant seeking an extension to file an appeal out of time under Rule 4 of the Rules (**sic**) had to explain to the satisfaction of the court that it should exercise discretion in his favour.

15. It also relied on the case of **Mwangi vs Kenya Airways Ltd [2003] KLR 486** where the holding was that under Rule 4, all that a court would be required to do in an application to extend time was to exercise its discretion judiciously.

16. It submitted that it was necessary for its and/or its advocate to study the judgment to consider what cause of action it would take and that it was therefore in the interest of justice that its application be allowed.

17. On its part, the Respondent submitted that the period of fifteen (15) days that the Appellant took to apply for the certified copies of the proceedings and the judgment, was unjustified and cause of delay not explained adequately. He was emphatic that there was no probability of success in the Appeal and that he would suffer great prejudice if the application was allowed.

18. It was therefore his submission that leave to appeal should not be granted as he would suffer prejudice.

19. Notably, every person is entitled as envisaged under Article 50 of the Constitution of Kenya to have a fair trial. The said Article 50 of Constitution of Kenya provides as follows:-

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

20. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

21. Appreciably, **“equity aids the vigilant and not the indolent.”** However, it was the view of this court that a delay of about two (2) months in bringing the application seeking leave to file an appeal out of time was not inordinate. The fifteen (15) days delay in the Appellant having applied for the certified copies of the proceedings and judgment were not inordinate as it was well within the statutory period of thirty (30) days to file an appeal. This court did not see the prejudice **the** Respondent suffered. If he suffered any prejudice, then he did not demonstrate the same.

22. In view of the fact that judgment was delivered on 10<sup>th</sup> April 2018, the Appellant had until 10<sup>th</sup> May 2018 to file its Appeal. Indeed, there is no provision of the law that stipulates that a party must apply for certified copies of proceedings and judgment within a certain period after delivery of judgment.

23. Accordingly, having considered the parties affidavit evidence, their respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that there would be more injustice in the Appellant being denied an opportunity to ventilate its case on merit.

24. Turning to the issue of the stay of execution, the Appellant relied on the cases of **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR**, **Kenya Commercial Bank Ltd vs SunCity Properties Ltd & 5 Others [2012] eKLR** and **Kenya Shell Ltd vs Kibiru** where the common thread was that a stay of execution pending appeal will only be granted if an applicant satisfies all the three (3) conditions set out in Order 42 Rule 6 of the Civil Procedure Rules.

25. It submitted that since the Respondent had not filed any Affidavit of Means, it was not aware of his ability to repay the decretal sum in the event it was successful in its Appeal.

26. It placed reliance on the case of **Siegried Busch vs Music Copyright Society of Kenya [2013] eKLR** to buttress its argument on why a stay of execution pending appeal ought to be granted.

27. Further, it relied on the case of **Butt vs Rent Restriction Tribunal [1982] KLR 417** which gave guidance on the furnishing of security either on the application of the parties or by the court on its own motion.

28. The Respondent did not submit on the question of this court granting an order for stay of execution. He merely stated that if this court was to allow the Appellant's application seeking leave to appeal out of time, then it ought to deposit the sum of Kshs 476,715/= in a joint interest earning account and that security of costs of the suit in the sum of Kshs 150,000/=.

29. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:-

**“No order for stay of execution shall be made under subrule (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.”**

30. An applicant seeking a stay of execution must demonstrate:-

**a. That he will suffer substantive loss if the order for stay is not granted;**

**b. That he had filing his application for a stay of execution timeously; and**

**c. That he was willing to provide security.**

31. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.

32. Notably, the Respondent did not attach any Affidavit of Means to demonstrate that if he was paid the entire decretal sum and the Appellant succeeded in its Appeal, he would be able to refund the same.

33. It was the considered view of this court that any difficulties in recovering decretal sum upon an appeal succeeding could be deemed to amount to substantial loss. As it was not clear how the Respondent herein, who had been the Appellant's employee, would repay the decretal sum in the event the Appellant herein succeeded in its appeal, this court was satisfied that the second limb under Order 42 Rule 6 (2) of the Civil Procedure Rules had been satisfied.

34. In respect of the third condition, the Appellant submitted that it was ready and willing to abide by any conditions given by the court. The Respondent did not appear averse to this proposal only adding that the Appellant ought to deposit the decretal sum and costs of the Appeal. This court therefore found and held that the third condition herein had been satisfied.

35. It was not clear to this court how the Respondent arrived at the sum of Kshs 464,715/= and Kshs 150,000/= as the decretal sum and costs respectively. It appeared from the Appellant's affidavit that judgment was for the sum of Kshs 402,000/= being general and special damages but exclusive of costs and interest thereon. The failure by the parties to annex evidence that showed the current state of the matter posed a challenge to this court.

36. Having said so, it would not be unreasonable to order the furnishing of the judgment award exclusive of costs and interest thereon pending the hearing and determination of the Appeal.

## **DISPOSITION**

37. For the foregoing reasons, the upshot of this court's Ruling was that the Appellant's Notice of Motion application dated 25<sup>th</sup> May 2018 and filed on 29<sup>th</sup> May 2018 be and is hereby granted in terms of Prayer No (1) therein. The Applicant is hereby directed to file her Memorandum of Appeal within fourteen (14) days from today.

38. Prayer No (4) is hereby allowed in the following terms:-

**1. THAT the Appellant shall deposit into an interest earning account in the joint names of his advocates and those of the Respondents, the sum of Kshs 402,000/= within the sixty (60) days from the date hereof i.e. by 15<sup>th</sup> April 2019.**

**2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 38 (1) hereinabove, the conditional stay**

of execution shall automatically lapse.

**3. The Appellant is hereby directed to file and serve its Record of Appeal within sixty (60) days from today i.e by 15<sup>th</sup> April 2019.**

**4. The Deputy Registrar High Court of Kenya Milimani Law Courts is hereby directed to facilitate the placing of the typed certified proceedings and lower court file to enable the Appellant comply with Para 38 (3) hereinabove.**

**5. Costs of the application herein shall be in the cause.**

**6. Either party is at liberty to apply.**

39. It is so ordered.

**DATED and DELIVERED at NAIROBI this 12<sup>th</sup> day of February 2019**

**J. KAMAU**

**JUDGE**