



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 476 OF 2018

IMARA STEEL MILLS LIMITED.....APPLICANT

VERSUS

JONDU ENTERPRISES LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant's Notice of Motion application dated 12th September 2018 and filed on 13th September 2018 was brought pursuant to the provisions of Orders 21 Rule 12 (2), Order 42 6(1) (2) (1) (a) (b) (3), Order 50 rule 6 of the Civil Procedure Rules and Section 1A (1) 3A, 79(A) of the Civil Procedure Act, Rule 3 (2) of the High Court (Practice and Procedure) Rules, Sections 1A, 1B and 3A, Section 95 of the Civil Procedure Act. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent. Subject Motor Vehicle

3. THAT this honourable court be pleased to extend the time frame for filing the Appeal as per the draft Memorandum of Appeal annexed to the Supporting Affidavit.

4. THAT upon hearing of this application inter-partes, this Honourable Court be pleased to stay execution of the decree issued on 5th September 2018 and all the consequential orders pending the hearing and determination of the Appeal filed herein.

5. THAT the costs of this application do abide the outcome of the appeal.

2. The Applicant's Written Submissions were dated 8th November 2018 and filed on 19th November 2018 while those of the Respondent and List of Authorities were both dated 27th November 2018 and filed on 28th November 2018.

THE APPLICANT'S CASE

3. The Applicant's application was supported by the Affidavit of Lawrence Wanjohi, its Chief Executive Officer, that was sworn on 12th September 2018.

4. The Applicant contended that the Learned Trial Magistrate erred in law and in fact when she allowed the Respondent's application seeking summary judgment against it because it had raised many triable issues with very strong chances of success.

5. It stated that the Ruling of the Learned Trial Magistrate was to be delivered on notice after it was deferred several times but no such notice was issued.

6. It pointed out that its appeal would be rendered nugatory if the stay was not granted more so because the Respondent had already extracted the decree and instructed an auctioneer to proclaim its property.

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

THE RESPONDENT'S CASE

8. In response to the said application, Johnson Ndung'u Njau, the Respondent's Director, swore a Replying Affidavit on 9th October 2018. The same was filed on even date.
9. The Respondent averred that the Applicant's application was misconceived, incompetent, an abuse of the court process and as a result, it ought to be dismissed with costs to it.
10. It was emphatic that the Applicant had not preferred any plausible explanation why it did not file its Appeal on time and urged this court not to aid the Applicant who had been indolent.
11. It pointed out that the Applicant always delayed to file its documents in the lower court and had sought several adjournments. It was categorical that the failure to inform the Applicant of the delivery of the Ruling was not its fault because it was the exclusive duty of the Trial Court to have informed it of the same. It averred that the notices were issued to the Applicant's advocates but that they failed to attend court on the date the Ruling was delivered.
12. It contended that the Applicant ought to have demonstrated the triable issues before the Trial Court but that it instead relied on mere denials in its Defence. It was its contention that the draft Memorandum of Appeal did not raise any triable issues.
13. It stated that execution was a lawful judicial process and ought not to be stopped. It further said that nonetheless the Applicant had not demonstrated that its present application had been filed on time or the loss it stood to suffer or offered any security for the due performance of the decree.
14. It was, however, its averment that it stood to suffer prejudice if this court exercised its discretionary power in favour of the Applicant and allowed it to file an appeal out of time and if it granted an order for stay of execution.
15. It therefore asked this court to dismiss the said application.

LEGAL ANALYSIS

16. In support of its argument that this court should exercise its discretion and allow it to file an appeal out of time, the Applicant relied on the case of **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** where the Supreme Court held as follows:-

“It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. We derive the following as the underlying principles that a court should consider in exercising such discretion:- 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; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

17. It submitted that it had an arguable appeal with high chances of success and that it would suffer irreplaceable loss and damage if it paid the Respondent the sum of Kshs 11,951,974/= on the ground that the same did not reflect the evidence on court record and further, that the Respondent would not be able to refund the said sum if its Appeal was successful.
18. It further relied on the case of **Johnson Mwiruuti Mburu vs Samuel Macharia Ngure Justice Nyamu** (sic) (citation not given) where it was held that a party's inability to pay the decretal sum was sufficient to justify the grant of a stay of execution pending appeal.
19. On the other hand, in its argument that the Applicant did not give a plausible reason why it did not file its appeal within the time lines provided in Section 79G of the Civil Procedure Act, the Respondent placed reliance on the case of **Paul Musii Wambua vs Attorney General & 2 Others [2015] eKLR** where it was held that the judge exercises unfettered discretion to extend time to a party to file an appeal but that the court must consider the delay, the reason for the delay, the chances of the appeal succeeding if the application was granted and the degree of the prejudice a respondent would suffer if the application was allowed.
20. It also relied on the case of **Haywood vs Cope [1858] 25 BEAV 140** where Lord Romilly stated that:-

“...the person who seeks an equitable remedy must be prepared to act equitably...”

21. It further urged this court to rely on the cases of **Chris Munga N Bichage vs Richard Nyagaka Tongi & 2 Others [2013] eKLR**, **Kinyunjuri Muguta vs Wotuku Muguta [2018] eKLR** amongst other cases where the common thread was that an applicant must satisfy all the conditions of Order 42 Rule 6 (2) of the Civil Procedure Rules before it can be granted a stay of execution pending appeal.
22. It was emphatic that a court must weigh the right of a party to appeal against the right of another to enjoy his fruits of judgment.

23. It submitted that the Applicant had not demonstrated that it had met the requisites of Order 42 Rule 6 of the Civil Procedure Rules so that it could be granted an order for stay of execution pending appeal.

24. Having looked at the parties' respective Written Submissions, it appeared to this court that the issues that had been placed before it were:-

1. Whether or not the Applicant should be granted leave to file its Appeal out of time; and

2. Whether or not the Applicant should be granted a stay of execution pending appeal.

25. In addressing the first issue hereinabove, this court noted that 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.”

26. 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.

27. Appreciably, **“equity aids the vigilant and not the indolent.”** The Ruling of the Learned Trial Magistrate was delivered on 17th August 2018. The present application was filed on 13th September 2018. The Certificate of Costs and Decree was given on 17th July 2018 but issued on 5th September 2018. The Warrants of sale of movable property in execution of decree for money was given on 7th September 2018. The date of the proclamation was not clear as the Proclamation was illegible. However, this must definitely have been after the issuance of the aforesaid Warrants.

28. Bearing in mind that the present application was filed on 13th September 2018, it was the considered view of this court that a delay of two (2) months after the Ruling was delivered was not inordinate. This court did not also see the prejudice the Respondent had suffered or was likely to suffer. If it had suffered or would suffer any prejudice, then it did not demonstrate the same.

29. As this court did not see the prejudice the Respondent would suffer if the Applicant was granted leave to appeal against the aforesaid Ruling out of time, it came to the firm conclusion that there would be more injustice in the Applicant being denied an opportunity to ventilate its case on merit.

30. Turning to the second issue in respect of the granting of an order for stay of execution pending appeal, 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.”

31. 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.

32. 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.

33. Notably, the Respondent did not attach any evidence to demonstrate that if it was paid the entire decretal sum and the Applicant succeeded in its Appeal, it would be able to refund the same.

34. 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.

35. Notably, the Applicant herein could not purport to obtain a stay of execution pending appeal without meeting the third prerequisite in Order 42 Rule 6 (2) of Civil Procedure Rules. This court noted that it did not indicate willingness to deposit security for the due performance of the decree. However, failure to demonstrate willingness to deposit such security is not fatal to an applicant's case as the court can, on its own motion, impose the conditions when granting a stay. Indeed, the provision refers to **“such security as the court orders.”**

36. This court was satisfied that it was in the best interests of justice that it considers this condition notwithstanding that the Applicant did not offer security for the reason that it gave the Applicant the benefit of doubt as regards the issuance of the notice of delivery of the subject Ruling.

37. This court came to this conclusion because the Respondent did not deny that a notice was to be issued for the delivery of the said Ruling. As the Respondent correctly pointed out, it is that the duty of the court to issue notices for delivery of decisions that are to be delivered on notice. It would be completely unfair and prejudicial to condemn the Applicant for not having attended the court for delivery of the aforesaid Ruling when there was no proof before this court that indeed notice of its delivery was issued as had been expected and anticipated by the parties herein.

38. The Respondent's assertions that the Applicant's advocates were served with the notice had no basis as it was not supported by any documentary proof. This court attached very little weight to that assertion as, its Director did not disclose where he obtained the said information from.

DISPOSITION

39. For the foregoing reasons, the upshot of this court's Ruling was that the Applicant's Notice of Motion application dated 12th September 2018 and filed on 13th September 2018 was merited and the same is hereby granted in terms of Prayer No (3) therein on. The Applicant is hereby directed to file its Memorandum of Appeal within fourteen (14) days from today.

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

1. THAT the Applicant shall deposit into an interest earning account in the joint names of his advocates and those of the Respondents, the sum of Kshs 3,000,000/= within the sixty (60) days from the date hereof i.e. by 14th June 2019.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 39 (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 14th June 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 39 (3) hereinabove.

5. Either party is at liberty to apply.

41. Costs of the application herein shall be in the cause.

42. It is so ordered.

DATED and DELIVERED at NAIROBI this 9th day of April 2019

J. KAMAU

JUDGE