



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 22A OF 2019**

**JEREMIAH KOSKEI BOWEN.....APPLICANT**

**-VERSUS-**

**KENYA COMMERCIAL BANK (K) LIMITED.....RESPONDENT**

**RULING**

[1] The Notice of Motion dated **14 January 2019**, was filed herein by the Applicant, **Jeremiah Koskei Bowen**, pursuant to **Sections 3, 3A and 63(e)**, of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; **Order 42 Rules 6**; **Order 50 Rule 1**; and **Order 51 Rule 1** of the **Civil Procedure Act, 2010**, for orders that:

[a] Spent

[b] Spent

[c] That there be stay of execution of the Judgment and Decree in **Eldoret CMCC No. 335 of 2014 - Kenya Commercial Bank Ltd vs. Jeremiah Koskei Bowen T/A Lomson Enterprises** pending the hearing and determination of the intended appeal;

[d] The Court be pleased to extend time within which to appeal from the decision of **Hon. Barasa** given on **20 November 2018** in **Eldoret CMCC No. 335 of 2014 - Kenya Commercial Bank Ltd vs. Jeremiah Koskei Bowen T/A Lomson Enterprises**; and to grant leave to **Jeremiah Koskei Bowen** to appeal out of time and file a Memorandum of Appeal within 14 days of the order or such period as the Court may determine;

[e] The costs hereof be costs in the appeal.

[2] The application was supported by two affidavits, namely, the Applicant's affidavit and the affidavit of his Counsel, **CS Dennis K.N. Magare**, both sworn on **21 January 2019**. The main plank of the depositions is to the effect that Judgment was delivered on **20 November 2018** in the absence of the Advocates for the Applicant and that no notice was given of such delivery, since Judgment had initially been set for delivery on **31 October 2018**. It was further averred that the said Judgment was against the Applicant for a debt allegedly owed by a limited liability company. Thus, it was the contention of the Applicant that the intended appeal is arguable and will be rendered nugatory if execution proceeds as is intended. It was further averred that the application has been made timeously and that the Applicant is willing to give security for the due performance of the decree.

[3] In the second Supporting Affidavit, it was averred that Counsel first received notice that judgment was to be delivered on **8 November 2018**, but the same was not so delivered; that judgment was delivered on **20 November 2018** in his absence and without any notice to him, granted that, after **8 November 2018** he left for the Republic of Rwanda for pilgrimage. Counsel further averred that he only got to learn of the Judgment on **15 January 2019** when the Bill of Costs was placed on his desk for perusal; and that he thereafter proceeded with diligence to apply for a copy of the Judgment and to file the instant applicant.

[4] On behalf of the Respondent, **Kenya Commercial Bank (K) Ltd**, a Replying Affidavit was filed herein on **31 January 2019**, sworn by the Respondent's Credit Manager stationed at the Eldoret Branch, **Mr. Justus Wambua**. The contention of the Respondent was that its dealings with the Applicant were all done in his individual capacity as a director of **Lomsons Enterprises Ltd**; and therefore, that the lower court suit was in that capacity. It was further the averment of the Respondent that both the Applicant and his Counsel were well aware of the date of judgment but chose not to attend court when judgment was delivered. A copy of the Notice of Judgment was annexed to the Replying Affidavit to support the assertion that the Applicant was simply indolent, granted that it took two months for him to apprise himself of the contents of the said judgment; and that his application is therefore an afterthought, having been brought after execution commenced.

[5] With regard to the appeal, it was averred that the Memorandum of Appeal is a sham and that interrogating the same would, not only be a waste of judicial time and resources, but would also be unfair as the Court is not in possession of all fact and documentation contained in the

record of the subordinate court's proceedings.

[6] In response to the averments in the Respondent's Replying Affidavit, a Further Affidavit was filed by the Applicant on **13 February 2019**, reiterating the contention that the last notice served on him was that of **8 November 2018**; and that he was awaiting a further notice, granted that Judgment was not delivered as scheduled. **Mr. Magare** further averred that it was discourteous, and a sign of bad faith for the Respondent to commence execution without notifying him, as the Applicant's Counsel, that Judgment had been delivered in his absence.

[7] The application was canvassed by way of written submissions and on the part of the Applicant, his Counsel filed written submissions herein on **15 February 2019**, setting out the facts on which the application has been premised, and adding that the Respondent knowingly went ahead and commenced execution process against a limited liability company which was not a party to the suit. The case of **Butt vs. Rent Restriction Tribunal [1982] eKLR** was cited for the general principles applicable to applications of stay pending appeal. As to whether or not there was inexcusable delay, the Applicant relied on **Florence Hare Mkaha vs. Pwani Tawakal Mini Coath & Another [2014] eKLR** and **Paul Musili Wambua vs. Attorney General & 2 Others [2015] eKLR** and urged the Court to exercise its discretion in favour of the Applicant and allow the application as prayed.

[8] The Respondent's written submissions dated **5 March 2019** were to the effect that the Applicant had not satisfied the three prerequisite conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules**. In particular, the cases of **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR**; **Gachie t/a Joska Metal Works vs. Simon Ndeti Muema [2012] eKLR**; **Equity Bank Ltd vs. Taiga Adams Company Ltd; Masisi Mwita vs. Damaris Wanjiku Njeri [2016] eKLR** and **Machira T/A Machira & Co. Advocates vs. East African Standard (No. 2) [2002] KLR 63** were cited to demonstrate that it is not sufficient for the applicant to merely state that he will suffer substantial loss if the decretal sum is paid; and that tangible substantial loss must be proved.

[9] The Respondent also blamed the Applicant for willful inordinate delay in bringing this application, which in its view has not been sufficiently explained. Counsel dismissed the assertion that **Mr. Magare** had left the country for a pilgrimage in **Ruanda** as being a non-issue. Likewise, the Court was urged to ignore the explanation that no notice of judgment was served; granted that the lower court did give a general notice which was placed in conspicuous places in the courthouse. It was therefore submitted that had the Applicant's Counsel been diligent by following up the matter after it was rescheduled he would have known the outcome. And as no security has been offered, the Court was urged to dismiss the prayer for stay of execution.

[10] On the second limb of the application, namely whether extension of time to file appeal should be granted, it was the submission of Counsel for the Respondent that the Applicant has not met the conditions set out in the case of **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others, SC Appl No. 16 of 2014**; and therefore that no basis exists to warrant the favourable exercise of the Court's discretion in this instance. Counsel also placed reliance on **Lemanken Aramat vs. Harun Mutembei Lempaka & 2 Others [2014] eKLR** and **Eldoret CA No. 154 of 2010: Ramji Devji Vekaria vs. Joseph Oyula** for the proposition that **Article 159(2)(d)** of the **Constitution** is not a panacea for incompetence, illegalities, abuse of court process or lack of proper attention in handling matters before the lower court. Accordingly, it was the Respondent's prayer that the Applicant's application be dismissed with costs.

[11] In the light of the foregoing, the two issues for determination herein are: whether a good case has been made for enlargement of time to file appeal, and whether stay pending the hearing and determination of the intended appeal should be granted. Thus, having given due consideration to the application, the affidavits filed herein together with their annexures, I take the following view of the matter:

**On Enlargement of Time to File an Appeal:**

[12] **Section 79G** of the **Civil Procedure Act** is explicit. It provides as follows:

**"Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period any time which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal."**

[13] In the light of the aforesaid provision, **Order 50 Rule 6** of the **Civil Procedure Rules, 2010** stipulates that:

**"Where a limited time has been fixed for the doing of any act or 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..."**

[14] Clearly therefore, the Court does have the discretion to enlarge time where necessary; the only consideration being whether sufficient cause has been shown for the exercise of the discretion under the aforementioned provisions. And, it is now settled that some of the guiding principles are:

[a] That there be a good and reasonable explanation for the delay;

[b] That the application be brought without undue delay;

[c] That no prejudice will be suffered by Respondent.

[15] There appears to be no controversy that the lower court Judgment was delivered on **20 November 2018** in the absence of the Applicant and his Counsel. It is on this basis that the Applicant contends that he has good cause for complaint. The Respondent discounted this argument and asserted that notice was indeed given, a copy whereof was annexed to the Replying Affidavit as **Annexure "JW-1"**. It is noteworthy however that is a general notice that made no particular reference to a specific case. Secondly, it is in reference to the cases that were due for Judgment and Ruling on **15 November 2018**; whereas in the averments made herein, the subject suit was for Judgment on **8 November 2018**. I would therefore agree with the explanation proffered by the Applicant that failure by his Counsel to attend court on **20 November 2018** as being plausible in the circumstances; and there is no gainsaying that the application was brought without undue delay from the time the existence of the Judgment was brought to the attention of Counsel.

[16] On the question of prejudice, it is imperative for the Court to weigh the competing interests and rights of the parties; and having done so, I take the view that the party that would suffer the most prejudice would be the Applicant, should he be denied a chance to pursue his appeal. I say so because, the Respondent already has a Decree in his favour; and the delay in its enjoyment will invariably be compensated for by costs as well as interest on the principal sum, should the appeal turn out to be frivolous. I would, in the premises, find instructive the position taken by the court in **Banco Arabe vs. Bank of Uganda [1999] 1 EA 22** that:

**"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."**

In the result, I would be inclined to rule in favour of extension of time, which I hereby do.

**On Stay Pending Appeal:**

[17] **Order 42 Rule 6 of the Civil Procedure Rules** pursuant to which the instant application has been brought provides that:

**"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereof as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside..."**

**(2) 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."**

[18] Accordingly, in an application of this nature, it is imperative for an applicant to satisfy the Court that:

**[a] he stands to suffer substantial loss unless the order is made;**

**[b] that the application has been made without unreasonable delay, and**

**[c] that such security as the court orders for the due performance of such decree has been given.**

[19] The rationale for the aforesaid conditions has been considered in various cases such as **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63**, in which it was held that:

**"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."**

[20] I note that, in this matter, leave has been given for the proposed appeal to be filed out of time; and since it is now settled that the mere fact that execution is imminent is no proof of substantial loss, it was imperative for the Applicant to demonstrate that the Respondents are persons of straw and that they are no financial state to refund the decretal sum if paid. In the circumstances, it would only be fair that the Applicants be required to make some payment to the Respondents as a condition for stay. Thus, while I would allow the application on both limbs, I would issue orders as hereunder:

**[a] That there be stay of execution of the Judgment and Decree in Eldoret CMCC No. 335 of 2014 - Kenya Commercial Bank Ltd vs. Jeremiah Koskei Bowen T/A Lomson Enterprises pending the hearing and determination of the intended appeal on condition that the Applicant deposits half of the decretal amount, now standing at **Kshs. 7,539,521.88** in a joint interest earning account in the names of Counsel on record within 30 days from the date hereof;**

**[d]** That time within which to appeal from the decision of **Hon. Barasa** given on **20 November 2018** in **Eldoret CMCC No. 335 of 2014 - Kenya Commercial Bank Ltd vs. Jeremiah Koskei Bowen T/A Lomson Enterprises**; be and is hereby extended; and that leave be and is hereby granted to **Jeremiah Koskei Bowen** to appeal out of time and file a Memorandum of Appeal within 14 days from the date hereof;

**[e]** The costs of the application shall be costs in the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 7<sup>TH</sup> DAY OF JUNE, 2019**

**OLGA SEWE**

**JUDGE**