



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

HCCC NO. 1914 OF 1999

TAMIL ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

OFFICIAL RECEIVER & LIQUIDATION OF CONTINENTAL

CREDIT FINANCE LTD.....1ST DEFENDANT/RESPONDENT

KISAUNI PROPERTIES LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to the application dated 12th February 2019 in which the applicants seeks two main prayers namely; that the court grants the applicant leave to file a Notice of Appeal out of time and to deem the Notice of Appeal dated 10th December 2018 as duly filed and secondly; that there be a stay of execution of the ruling rendered on 22nd November 2018 and the decree resulting there from.
2. The application is brought under Order 50 Rule 6, Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules (CPR) and is supported by the affidavit of the applicants director one Mr. **Bipin Vora** sworn on 12th February 2010.
3. The applicant attributes the delay in filing the Notice of Appeal to the fact that it received the typed copy of the ruling almost five days after the ruling was delivered and that it required a resolution of its Board of Directors in deciding whether or not to lodge the appeal. It is the applicants case that the 4 days delay in lodging the Notice of Appeal is not inordinate and that the respondents will not suffer any prejudice if the orders sought are granted.
4. At the hearing of the application, the applicants counsel, Mr. Ochieng, submitted that the applicant had furnished sufficient grounds to warrant the granting of the orders sought. Counsel referred the court to the Supreme Court's guidelines in the case of **Aviation Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others [2015] eKLR** wherein the court took the view that a 4 months delay was not unreasonable.
5. Counsel attributed the delay in filing he application to the fact that the applicant opted to change advocates which change had to receive the approval of the applicant's board through a resolution.
6. On the issue of stay of execution pending appeal, counsel submitted that the award in the decree is a substantial sum of kshs 26,000,000 whose payment could cripple the applicant's operations and that the appeal may, as a consequence, be rendered nugatory if the applicant is compelled to pay the decretal sum before the appeal is heard. For this argument, counsel relied on the decision in the **Oraro & Rachier Advocates vs Cooperative Bank Kenya Ltd. [2000] eKLR** where the court held that the payment of Kshs 10 million would put the law firm in jeopardy whereas the bank was a reputable organization whose operations would not be affected if the stay of execution is granted.
7. The respondents opposed the application through the replying affidavit of Judy W. Mugo, a Senior State Counsel in the Office of the Official Receiver, sworn on 13th March 2019 wherein she avers that the application is brought in bad faith, is a delaying tactic and is aimed at preventing the respondents from enjoying the fruits of the ruling delivered on 22nd November 2018.
8. She further avers that the applicant has not demonstrated that it has an arguable appeal with any chances of success and has been in the habit of persistently abusing the court process through inordinate delays.
9. At the hearing of the application, Miss Mugo, learned counsel for the respondent, submitted that the instant application is an abuse of the court process as the applicant had not shown that it had a Record of Appeal and that the Notice of Appeal did not contain the court's

endorsement stamp.

10. Counsel maintained that the applicants numerous applications dating back to the 1990's had all been dismissed and reiterated the adage that litigation must come to an end.

Determination

11. I have considered the instant application, the response filed by the respondents together with the parties' submissions and the authorities that they cited. The main issue that falls for determination is whether the applicant is entitled to the orders sought in the application.

12. Starting with the first prayer for leave to file the Notice of Appeal out of time, I find that not only was the delay in presenting the said notice not inordinate but that it is a right of every litigant to exploit all the avenues available to him in pursuing justice before the court which right includes the right of appeal against decisions that they do not agree with. In this regard, I am inclined to grant the applicant's plea for leave to file the Notice of Appeal out of time.

13. Turning to the prayer for stay of execution pending appeal, I note that order 42 Rule 6 of the Civil Procedure Rule stipulates as follows on the subject of stay pending appeal.

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 thereon 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

14. In the instant, I have already found that the delay in lodging the Notice of Appeal was not inordinate and I will therefore move to determine the two remaining conditions for grant orders of stay of execution pleading appeal which are the issues of substantial loss to be suffered by the applicant if stay is not granted and the issue of the furnishing of security for the due performance of the decree.

15. On substantial loss, the applicant submitted that its operations and financial position would be gravely affected if it was compelled to pay the decretal sum before it exhausts the appeal avenue. The applicant did not however present a copy of its statement of accounts or financial status so as to confirm to the court that the decretal sum is so substantial that it would probably bring its operations to a halt if it was to pay it only for the appeal to be successful in the end. It was further not demonstrated that the respondents will not be in a position to refund the decretal sum to the applicant in the event that the appeal succeeds. This was the position taken in the case of **Lucy Nyamu Kimani -V- Lawrence Mburu Muthiga (2006) eKLR** wherein it was held that:

“An applicant demonstrates substantial loss by showing that the respondent is not a person of means and payment in decretal sum prior to appeal would put the same beyond reach of the applicant.”

16. In the case of **Socfinac Company Limited -V- Nelphat Kimotho Muturi (2013) eKLR, and Van Den Berg (K) Limited -V- Charles Osewe Osodo (2015) eKLR** it was stated that it is the applicant who has the burden to prove that the decree holder is a man of straw are persuasive decisions. Once the applicant alleges that the respondent is a man of no straw who cannot refund the decretal sum, the evidential burden shifts to the respondent.

17. On the last condition for consideration which is security for the due performance of the decree, I note that the applicant did not offer any such security. In **Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates** Gikonyo J. stated as follows:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such

decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

18. My take is that an offer by the applicant to provide security for the due performance of the decree is not only a statutory requirement but also a sign of good faith and a demonstration that the application for stay is not just intended to deny or delay the respondent's realization of the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.

19. The above position notwithstanding courts have held the view that in applications for stay of execution pending appeal, the court must be alive to the completing the interests of both the applicant, to the right to appeal and of the respondent to the enjoyment of the fruit of its decree and to balance the twin interests . In the present case, as I have already noted, the applicant did not offer any security fir the due performance of the decree which would have had the effect of dispelling the respondent's fear that the instant application is yet again one of the applicant's attempts to delay its realization of the fruits of the decree.

20. Be that as it may and having regard to the finding that I have already made regarding the balancing of the interests of both parties in considering the issuance of orders of stay of execution pending appeal, I will allow the instant application as follows;

a) That the applicant is granted leave to file the Notice of Appeal out of time.

b) That there shall be stay of execution of the ruling rendered don 22nd November 2018 and the decree arising there from pending appeal but on condition that:

i. The applicant pays the sum of Kshs 8,558,942/40 to the respondents being part of the decretal sum within 30 days from the dated of this ruling.

ii. That the applicant furnishes a bank guarantee for the balance of the decretal sum as security for the due performance of the decree within 30 days from the date of this ruling.

c) That in the event of failure to comply with conditions in Orders b (i) and b (ii) above, the stay of execution orders will automatically lapse and the respondent will be at liberty to execute the decree for the full decretal sum.

d) I award the costs of the application to the respondents.

Dated, signed and delivered in open court at Nairobi this 4th day of July 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Dondo for Kamande for the plaintiff.

Mr. Wafula for Mugo for the official receiver

Court Assistant – Margaret