



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 484 OF 2013

SECUREX AGENCIES KENYA LIMITED.....APPELLANT

-VERSUS-

PAUL OTIENO WAMBEDHA.....RESPONDENT

(An appeal from the judgment delivered by Ole Keiwua (Mr.) Chief Magistrate

on 23rd August, 2013 in Milimani Chief Magistrate's Civil Case No. 2474 of 2004)

RULING

The ruling herein relates to two applications both brought by the Appellant; one is dated the 12th day of April, 2019 while the other one is dated the 16th day of May, 2019.

The application dated the 12th day of April, 2019 is brought under Section 3A of the Civil Procedure Act, Order 50 Rule 5 and 6 of the Civil Procedure Rules seeking the order that the time stipulated in the order of the court made on the 29th November, 2018 be extended until such time as the certified copy of the decree in the Lower court is made available to the Appellant and that the Appellant be allowed a period of 15 days from receipt of the decree to lodge a supplementary record of appeal. The Respondent has also sought for the costs of the application.

The same is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit of Pramod Patel Advocate, Sworn on 12th April, 2019.

In the said affidavit, Mr. Pramod Patel Advocate depones that the compilation of Supplementary Record of Appeal and the prosecution of the appeal has been delayed by failure on the part of the Lower Court Registry to furnish the Appellant with a certified copy of the decree as the lower court file could not be traced. That despite numerous attempts by his clerk to follow up the file at the Lower Court Registry, the decree has not been made available due to the missing lower court file. That as a result, he has not been able to compile the required Supplementary Record of Appeal in the absence of the decree.

The Respondent has opposed the application vide a replying affidavit sworn by Caleb Odhiambo Jaoko on the 13th day of May, 2019 in which he has deponed that, he approved the draft decree on 13th June, 2014 and that a copy of the same was issued by the court on the 25th April, 2018 contrary to the Appellant's assertion that the decree has never been issued.

He avers that the Appellant did not attach any evidence to show that the lower court file has been missing as it alleges and that since the 13th June, 2014, to date, there is no valid explanation or excuse to justify the delay on the part of the Appellant to extract the Decree. That further, the Appellant has not complied with the court order made on 20th September, 2013 requiring it to deposit the decretal sum, accrued interests and costs in a joint interest bearing account despite various correspondences between the Appellant's and the Respondent's firms of Advocates to facilitate the opening of an account

The deponent has also contended that the application has been made after inordinate delay. That the appellant has delayed and continues to deny the Respondent from enjoying the fruits of litigation by filing a frivolous and vexatious application.

By way of a further affidavit filed on 16/05/2019, counsel for the Appellant, who is the deponent, has reiterated the contents of the supporting affidavit with regard to the efforts that he has made in pursuing the decree. On security, he averred that the decretal sum was deposited in imperial Bank which collapsed and which his client had no control over.

On the other hand, the application dated 16th May, 2019 is brought under Order 22, Order 40 Rule 1(a), Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and it seeks for an order for stay of execution of the judgment and decree pending the hearing and final determination of the application dated 12th April, 2019.

The application is premised on the grounds that the applicant has an arguable appeal with a high probability of success, that the Respondent has moved to proclaim the Appellant's assets and that if stay of execution is not granted, the Appeal shall be rendered nugatory.

In his replying affidavit sworn on 29th May, 2019 and filed in court the same day, counsel for the Respondent substantially reiterates the contents of his affidavit sworn on 13th May, 2019 save to add that the Appellant obtained interim orders of stay of execution without full disclosure of material facts regarding the status of the decretal sum that was to be deposited in NIC Bank after Imperial Bank was put under receivership. He has urged the court to discharge the stay orders that were granted on the 16th May, 2019.

By way of a further affidavit sworn by Casper Musonye Khayeka on 5th July, 2019, the deponent has averred that there were difficulties in having the decree certified and obtaining monies from Imperial Bank.

The applications were canvassed by way of written submissions.

From the foregoing, the following are the issues raised in the application dated the 12th day of April, 2019.

- a) Whether the Appellant/Applicant merits extension of time as prayed.
- b) Whether the Appellant has been indolent in bringing the application
- c) Who should bear the cost of the application.

In their submissions, counsels for the respective parties have substantially reiterated the contents of their affidavit in support of and in opposition to the application. On the issue of the delay, counsel for the appellant has contended that it's the lower court file that went missing and therefore his inability to file the record of appeal as the decree had not been availed to him.

Counsel for the Respondent on his part has disputed that contention and has averred that he approved the decree way back on 13th June, 2014 and that no basis has been laid to the satisfaction of the court to extend time.

The principles applicable in an application for extension of time were laid down by the Supreme Court in the case of *Aviation and Allied Workers Union Vs Kenya Airways Limited* (2015) eKLR which are that:

- 1. 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.**
- 2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court.**
- 3. Whether the court should exercise discretion to extend time, is a consideration to be made on a case to case basis.**
- 4. Where there is a good reason for the delay, the delay should be explained to the satisfaction of the court.**
- 5. Whether there will be any prejudice suffered by the respondent if the extension is granted.**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like Election Petitions, the Public Interest should be a consideration for extending time.**

Being guided by the above principles, the court has noted its orders made on 8th November, 2018 and the reasons given by the Appellant for the delay in complying with the court order and in filing the application herein. Annexed to the replying affidavit in support of the application dated 12th April, 2019 is a letter dated 14th November, 2018 by counsel for the Appellant/Applicant to the Executive Officer, Chief Magistrate's Court Milimani enclosing a duly amended decree for signature to enable him file a Supplementary Record of Appeal following the court ruling on 8th November, 2018.

Though there is no other evidence by way of a letter to show the efforts taken by the Appellant to follow up the court file, on record is the further affidavit sworn by Casper Musonye Khayeka in which he has explained the efforts he made in doing so. In the said affidavit, he has deponed that after their letter to the Executive Officer dated 14th November, 2018, he amended the decree as directed by the clerk at the registry but the decree was not signed until April, 2019, as the court file was not available. That they eventually got the decree which was sent to their office by counsel for the respondent by which time, the period given by the court had expired.

In my considered opinion, counsel for the Appellant has laid a basis for the orders sought although, as submitted by counsel for the Respondent, there are no correspondences from the registry to confirm that the court file was missing. However, in view of the contents of the further affidavit by Casper Musonye who is the clerk who was following up the file at the registry and in the interest of justice, I am prepared to find and I do hereby find that a basis has been laid by the applicant to the satisfaction of the court for the granting of the orders sought.

With regard to the application dated the 16th May, 2019, the principles that guide the court in dealing with an application for stay of execution are set out under Order 42 Rule 6(1) of the CPR which requires that an applicant must satisfy the court that he will suffer

substantial loss if the stay order is not granted, he has to furnish security and the application should be brought without undue delay.

In this case, a stay of execution was in force until the appeal stood dismissed after non compliance by the appellant with the orders made on 8th November, 2018.

However, the decretal sum was deposited at Imperial Bank which is currently under receivership. The Respondent has commenced execution and the Appellant is apprehensive that if stay is not granted, the appeal shall be rendered nugatory and it will suffer substantial loss.

The court has carefully considered the replying affidavit by the Respondent and the only apprehension and prejudice noted is that the security that was deposited with Imperial Bank will not be available to him should the appeal fail to succeed. The court has seriously noted that prejudice. However, the Appellant has offered to deposit security as the court may order. It is not in issue that Imperial Bank is under receivership and there is no guarantee that in the event the appeal does not succeed, the Respondent will readily get the money.

In the premises, and in balancing the interests of both parties, I do hereby order the Appellant to deposit the decretal sum plus interest and costs all amounting to Kshs. 449,150 as shown in the decree issued on 25th April, 2018 in a joint interest account in the names of Counsels for the Appellant and Respondent. The money to be deposited within 30 days from the date of this ruling failing which the stay order shall lapse.

The appellant is hereby granted leave to file a further Supplementary Record of Appeal to include the decree. The same to be filed within seven (7) days from the date of the ruling.

A further order is hereby made that, time within which to prosecute the appeal be and is hereby extended for a further 45 days from today.

The costs of both applications are awarded to the Respondent and are assessed at a total of Kshs. 15,000/- to be paid within 15 days from the date of this ruling.

Dated, signed and delivered at Nairobi this 7th Day of October, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent