



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. APPLICATION NO. 93 OF 2017

LEAH NJERI NJOROGE.....RESPONDENT

-VERSUS-

SIMBA COACH LIMITED.....RESPONDENT

-AND-

SIMBA PLATINUM LIMITED.....OBJECTOR/APPLICANT

RULING

[1] What is coming up for ruling is the Notice of Motion dated **22 August 2017**. The application was filed by **Simba Platinum Limited**, by way of Chamber Summons on **23 August 2017** and is expressed to have been brought under the **Judicature Act, Chapter 8 of the Laws of Kenya, Sections 3A, 79G and 95 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya; Rule 1 of the High Court (Practice & Procedure) Rules; Order 9 Rule 9** as well as **Order 42 Rule 6(1) of the Civil Procedure Rules**. The prayers sought thereby are:

[a] Spent

[b] Spent

[c] That leave be granted by this Court to the applicant to file an appeal out of time;

[d] That the Court do grant an order of stay of execution of the Ruling dated **2 March 2017** by **Hon. Cheronno, SRM**, in **Kapsabet PMCC No. 81 of 2014** and the orders subsequent thereto pending the hearing and determination of this application;

[e] That the Court do grant leave for the firm of **Ochieng', Kokul & Velo Advocates** to come on record in place of **Ipapu P. Jackah & Company Advocates**;

[f] That the costs of the application be in the course.

[2] The application was premised on the grounds that, following an application by the Objector to the attachment of its property in execution of the decree passed in **Kapsabet PMCC No. 81 of 2014**, Counsel for **Leah Njeri Njoro**, the Plaintiff before the lower court, and cited as the Respondent herein, raised a preliminary objection to the same on the grounds of conflict of interest; which objection was upheld by the lower court. Being aggrieved by that decision, the applicant instructed Counsel to file an appeal in terms of the Draft Memorandum of Appeal annexed to the Supporting Affidavit of **Feroz Ahmed**, one of the directors of the applicant. Thus, this application is intended to facilitate that appeal as one of the orders sought is for leave to appeal out of time. The application is supported by the said affidavit and the annexures thereto, which include a copy of the lower court ruling dated **2 August 2017**.

[3] On behalf of the Respondent, a Replying Affidavit was filed by **Mr. Francis Omondi, Advocate**, sworn on **6 September 2017**. Counsel raised a preliminary issue that the application is incompetent, having been drawn and filed by a stranger to the proceedings. He further averred that the application is premature, having been filed before the expiry of the 30 days provided for the filing of appeals. He also pointed out that leave to appeal had not been obtained from the lower court, the proposed appeal being one impugning the exercise of discretion by the lower court.

[4] In response to the averments set out in the Replying Affidavit, a Further Affidavit was filed on behalf of the applicant by **Mr. Erick T. K'okul, Advocate**, in which it was averred that there was a previous firm of Advocates acting for the applicant before the lower court, namely, **Ipapu Jackah & Co. Advocates** who initially filed the Objection application; and that he was still in the process of familiarizing

himself with the matter by the time this application was filed. He further deposed that the appeal is arguable and therefore that it is in the interest of justice that the orders sought be granted. Counsel also mentioned that a Consent Letter has since been filed dated **22 September 2017** between the applicant's erstwhile Advocates and the firm of **Ochieng', Kokul & Velo Advocates** in compliance with the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** and in response to the Respondent's averment in paragraph 3 of the Replying Affidavit. Counsel reiterated that it is in the interest of justice that the application dated **22 August 2017** be allowed as prayed.

[5] Directions having been given that the appeal be argued by way of written submissions, the parties hereto filed and exchanged their respective written submissions, which I have carefully perused and considered. In respect of its prayer for leave to appeal out of time, Counsel for the applicant relied on **Article 159(2)(d)** of the **Constitution** to counter the Respondent's contention that the application is premature; and to support the argument that, as it is the period provided for has lapsed and therefore the prayer is still valid. On stay pending appeal, Counsel for the applicant relied on **Order 46 Rule 6(2)** of the **Civil Procedure Rules** and urged the Court to find that all the conditions set out therein have been made herein. He relied on **G.N. Muema P/A Mt. View Maternity & Nursing Home vs. Miriam Maalim Bishar & Another** [2018] eKLR, wherein it was held that substantial loss does not have to be a lot of money; and that it was sufficient if an applicant for stay demonstrated that it would have to go through hardship, such as instituting legal proceedings to recover the decretal sum if paid to the respondent in the event of the appeal succeeding.

[6] Counsel for the Respondent, on his part, reiterated the contention that in the absence of a properly filed and served Notice of Change of Advocates, it would follow that the firm of **Ochieng', Kokul & Velo Advocates** are not properly on record; and therefore that the application dated **22 August 2017** is incompetent and ought to be struck out. He relied on **Bungoma HCCC No. 71 of 2000: Mbogo vs. Asikoyo & Others** in support of this argument. He further submitted that, since the orders sought to be appealed are discretionary, leave of the lower court ought to have been obtained pursuant to **Section 75(1)** of the **Civil Procedure Act** and **Order 43 Rule 1** of the **Civil Procedure Rules**. Reliance was placed on **Nairobi Civil Appeal No. 187 of 1999: Niazsons (K) Ltd vs. China Road & Bridge Corporation (Kenya)** to underscore the submission.

[7] From the foregoing, and from a careful perusal of the record, it is manifest that Prayers 1, 2, 4 and 5 of the application dated **22 August 2017** are spent; noting that in Prayer 4, the order of stay sought was to last for the duration of the hearing and determination of the application. And in Prayer 5, a Consent has since been filed validating the Change of Advocates from **Ipapu P. Jackah & Co. Advocates** to **Ochieng', Kokul & Velo Advocates**. Thus, the only outstanding prayers are Prayer 3, for leave to file appeal out of time and **Prayer 6**, that costs of the application be in the cause. In my view issues to do with the question whether the leave of the lower court to appeal was obtained are matters that would best be determined in the appeal itself.

[8] Regarding the prayer for leave to appeal out of time, **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."

[9] 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 provision. 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.

[10] As the ruling of the lower court was delivered on **2 August 2017**, the application for leave to appeal out of time was unwarranted in the premises, noting that the instant application was filed within 20 days of the date of the impugned ruling. Nevertheless, it is manifest that time has since passed and that, as matters stand, no appeal can be filed without leave; and yet it cannot be said that as at the time the application was filed there had been inordinate delay as to call for an explanation from the applicant. Hence the justice of the case, and indeed the provisions of **Article 159(2)(d)** of the **Constitution**, dictate that the application be looked at from that prism, which in my view favours the applicant.

[11] On the question of prejudice, having weighed the competing interests and rights of the parties, I take the view that the party that would suffer the most prejudice would be the applicant, should it be denied a chance to pursue his appeal. I say so because, the Respondent already has a Decree in her favour; and the delay in its enjoyment, if any, 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."

[12] In the result, I would be inclined to rule in favour of extension of time, which I hereby do and order that the intended appeal be filed

within 21 days from the date of this ruling; and that costs of this application shall abide the intended appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF DECEMBER, 2019

OLGA SEWE

JUDGE