



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO 1 OF 2014**

**KISUMU STEEL COMPANY LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**ARVING ENGINEERING LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. By a notice of motion dated 13th November, 2017 and filed on 14th November, 2017 brought under Section 95 of the Civil Procedure Act, Order 50 rule 4 and 6 and Order 51 rule 1 of Civil Procedure Rules, and all enabling provisions of the law; the defendant/applicant prays for orders that

1. Application be certified urgent
2. There be a stay of execution of the judgment delivered on 31st May, 2017 and any subsequent decree thereon pending the hearing and determination of this application *inter partes*
3. The Honorable Court be pleased to enlarge time within which to comply with the orders of the Court issued on 20.9.17 for 60 days
4. That costs of this application be in the intended appeal

2. The application is based on the grounds on the face of the application among them that the defendant's production, sales and revenue have been affected by the hard economic times.

3. The application is also supported by an affidavit sworn on 15.11.17 by Arvind Tiwari who describes himself as a director of the defendant in which he reiterates the grounds on the face of the application. Attached to the affidavit is a copy of defendant's statement of account for account number 011136463470600 marked AT4 with a balance of Kshs. 48,254.71 as at 30.9.17.

4. The application is opposed on the grounds set out in a replying affidavit sworn on 24.11.17 by M.J.B. Menezes, advocate for the plaintiff who avers that the concerns raised on behalf of the applicant were within the knowledge of the deponent but were when the court ordered the applicant to deposit the decretal sum in an interest earning account in the names of advocates within 21 days.

5. I have considered the notice of motion in the light of affidavits and annexures on record. Prayers 1 and 2 have been spent.

**Analysis and determination**

6. The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salatvs IEBC & 7 Others, SC Appl. 16/2014** laid down the following as the underlying principles that a court should consider in the exercise of discretion to extend time:-

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. **The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court**
3. **As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case basis;**
4. **Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**
5. **Whether there will be any prejudice to be suffered by the respondents if the extension is granted.**

**6. The application should have been brought without undue delay; and**

**7. In certain cases, like election petitions, public interest should be a consideration for extending time.**

7. Applying the above principles, the question therefore is whether the applicant has shown good and sufficient cause for not complying with the order issued on 20.9.17. To begin with, this application was filed on 14th November, 2017 which is more than the 21 days within which the applicant was ordered to comply with the orders issued on 20.9.17. The applicant has not explained the reason for the delay to the satisfaction of the court or at all.

8. The power to extend time is a discretionary one and the party seeking such discretionary orders must satisfy the court by placing some material before the court upon which such discretion may be exercised. In this case, as I have stated in my analysis above, there is absolutely no reason why the applicant did not move the court with speed and court can only infer that the applicant was not vigilant.

The foregoing notwithstanding, there is no evidence that the respondent will suffer prejudice that cannot be compensated with an order for costs if the application herein is allowed. By extending time, in my view, this court will be exercising its discretion judiciously to ensure that the applicant is not driven from the judgment seat even if there was some indolence leading to delay of close to two months.

### **Orders**

From the analysis above, this court makes the following orders:

**i. The Honorable Court be and is hereby pleased to enlarge time within which to comply with the orders of the Court issued on 20.9.17 for 30 days from today's date**

**ii. The applicant is condemned to pay Kshs. 10,000/- thrown away costs to the respondent within 7 days from today's date**

**Delivered and signed in open court on the 8th day February 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix and Caroline

Appellant - N/A

Respondent - Mr Ariho/Mr Menezes