



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**MISCELLANEOUS APPLICATION NO. 443 OF 2017**

**PINNACLE CAPITAL LIMITED .....APPELLANT/APPLICANT**

**VERSUS**

**EDWARD MWANIKI GATUKU .....1<sup>ST</sup> RESPONDENT**

**HELLEN NYAMBURA .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Ruling relates to a Notice of Motion Application dated 30<sup>th</sup> October, 2017 brought under the provisions of Section 79 G and 95 of the Civil Procedure Act, Order 42 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of law. It is supported by the grounds thereon and an Affidavit of the same date sworn by Allan Kinyanjui, the Advocate who has conduct of this matter.

2. The Applicant is seeking for orders that;

- a. The Honourable Court be pleased to stay execution of the Judgment/decree of the Chief Magistrate's Court (Hon. I. Orege) delivered on 18<sup>th</sup> August 2017 in Milimani CMCC No. 6624 of 2012, pending the hearing and determination of the intended Appeal;
- b. Leave be granted to appeal out of time against the whole judgment and decree of the Chief Magistrate's Court (Hon. I. Orege) delivered on 18<sup>th</sup> August 2017 in Milimani CMCC No. 6624 of 2012;
- c. Costs of this Application be awarded to the Appellant/Applicant.

3. The background facts of the matter are that, the Plaintiff (herein "the Applicant") sued the Defendants (herein "the Respondents") vide a Plaint dated 7<sup>th</sup> November 2012, in the case of; Chief Magistrates Court Case No. 6624 of 2012: *Pinnacle Capital Limited vs Edward Mwaniki Gatuku & Hellen Nyambura Mwaniki* seeking for a sum of Kshs. 5,300,000 allegedly borrowed from the Applicant and not refunded. The said sum was sought for together with interest at Court rates and costs of the suit. The case was heard by the Learned Magistrate Hon. K.I. Orege (SRM), who delivered the Judgment therein on 18<sup>th</sup> August 2017, whereby the suit was dismissed with costs.

4. The Applicant avers that, being dissatisfied with the decision rendered instructed its Advocate on record to lodge an Appeal against it. Subsequently, the Advocate filed a Notice of Appeal on 11<sup>th</sup> September 2017, unfortunately, the same was erroneously filed before the Subordinate Court. The mistake, is that the "filing of Notice of Appeal is a practice synonymous with Appeals that lie to the Court of Appeal and the Supreme Court". That the Counsel for the Applicant only learnt of the mistake while "trying to lodge a Memo of Appeal" in the High Court.

5. He argues that the mistake is excusable and the intended Appeal is meritorious, raises serious points of law with overwhelming chances of success. However, the Applicant is apprehensive that as it is yet to be supplied with the proceedings of the subordinate Court and yet the Respondents have commenced execution as evidenced by their letter dated 13<sup>th</sup> October, 2017, served upon the Applicants on 17<sup>th</sup> October 2017. Therefore, unless stay of execution is granted, the Applicant will suffer irreparable loss.

6. Finally, the Applicant averred that, it is ready and willing to abide by the reasonable conditions as may be directed by the Court on security for costs and it will be in the interest of justice that, the Application be allowed as prayed.

7. However, the Application was opposed vide a Replying Affidavit dated 21<sup>st</sup> November 2017, sworn by Hellen Nyambura Mwaniki, the 2<sup>nd</sup> Respondent herein. She deposed that when the judgment was delivered as aforesaid, the Applicant was represented in Court, but he did not file an Appeal against it and was only woken up by a demand for payment of costs, vide the letter referred to herein dated 13<sup>th</sup> October 2017, which forwarded the Decree and Certificate of Costs.

8. The Respondent argued that there is no sufficient reason why the Appeal was not filed within the stipulated time and the reason advanced by the Applicant for the delay is a “self indictment” of professional negligence on the part of the Advocate, and not an inadvertent mistake as alleged.

9. It was further argued that the Decree passed by the trial Court is for dismissal of the Applicant’s suit and therefore, it is not capable of execution and not amenable to stay of execution. Therefore, it is difficult to appreciate how an Appeal against a dismissal of a suit claiming a liquidated sum of money can be rendered nugatory by refusal to grant a stay of execution. That neither has the Applicant demonstrated how it will suffer substantial loss if the stay order is denied.

10. The parties agreed to dispose of the Application by filing submissions. I have considered the same alongside the grounds and Affidavit in support of the Application and the Replying Affidavit in opposition thereto. The Applicant raised the following issues for determination;

- a. Whether an inadvertent mistake by Counsel should be visited/meted upon an innocent litigant;
- b. Whether execution of the subordinate court’s decree issued on 3<sup>rd</sup> of October 2017 should be stayed.

11. On the 1<sup>st</sup> issue, it was submitted that, errors and blunders will continue to happen from time to time; however, mistakes of an Advocate should not be visited upon a litigant where justice can be met by way of compensation by costs. Reference was made to the cases of inter alia of; **Phillip Keipto Chemwolo & Another vs Augustin Kubende (1986) eKLR** and **Lucy Bosire vs Kehancha Div. Land Dispute Tribunal & 2 Others (2013) eKLR**.

12. The Applicant further submitted that, by dint of the provisions of Article 159 (2)(d) of the Constitution of Kenya, and Sections 1A and 1B of the Civil Procedure Act, the Applicant should not be driven away from the seat of justice and that the Court has a duty to render justice without undue regard to procedural technicalities.

13. The Applicant went on to argue, that, in any event, the Respondents have not outlined any prejudice that they will suffer if the prayer for filing the Appeal out of time is allowed by the Court. That the delay herein is of two (2) months and fifteen (15) days, which has been genuinely explained and is not prejudicial.

14. Reference was made to the case of; **Edith Gichugu Koine vs Stephen Njagi & Thoithi (2014) eKLR**, to argue that a delay of 2 months and 8 days was held not to be inordinate in view of the constitutional and statutory provisions of overriding objectives. The Applicant invited the Court to invoke its inherent and discretionary power judiciously under Section 3 and 95 of the Civil Procedure Act and grant the orders sought. The Court’s attention was also drawn to the principle of proportionality which balances between the competing values and determines where the scales of justice lie. Further reference was made to the case of; **Lucy Bosire vs Kehancha (supra)** to argue that, the Court in exercising its discretion should always opt for the lower, rather than the higher risk of injustice; (**See Suleiman vs Amboseli Resort Limited (2004) 2 KLR 589**).

15. The Applicant also relied on the provisions of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010; and submitted that, the Court has the discretionary power to grant the orders sought and that the Applicant is not trying to deny the Respondent the fruits of their Judgment; but simply prays that, the decree be stayed until the intended Appeal is expeditiously dispensed with, and if the Appeal is dismissed, the Respondents “will have their way”. The Applicant reiterated that it is more than willing to provide and abide by the Court’s orders as to the security for costs.

16. However, in response submissions dated 11<sup>th</sup> December 2017, the Respondents submitted that, in order to succeed in the prayer for enlargement of time to file an Appeal out of time, the Applicant has to satisfy the Court, that, there is a good and sufficient cause for not filing the Appeal in time as provided for under Section 79 of the Civil Procedure Act. The allegations that the Notice of Appeal was filed in the subordinate court, are not supported, in that, there is no evidence of the said Notice of Appeal annexed to the Supporting Affidavit marked “PCL 2” was ever received at the Chief Magistrate’s Registry. There is no Court’s receipt stamp and no evidence of payment of required filing fees, nor a receipt in support of the same exhibited.

17. Reliance was placed on the case of; **Council, Jomo Kenyatta University of Agriculture and Technology vs Joseph Mutuura Mbeera & 3 Others (2015) eKLR**, to argue that, the rules of procedure are not ornamental as they serve a pivotal role in the administration of justice. That inaction on the part of the Advocate has been held “not to be an excusable mistake on which the Court can exercise its discretion.”

18. The Respondent further relied on the case of; **Baber Alibhai Mawji vs Sultan Hasham Lalji and Others (1995) eKLR** to argue that, ignorance cannot be equated to a genuine mistake or error on the part of a legal officer, and that misunderstanding is excusable while failure to read the Rules is not. That in the instant case, the Applicant’s lawyer simply did not look up for Section 97G of the Civil Procedure Act.

19. The Respondent reiterated that there is nothing in this matter to be executed in the substantive decree, the suit having been dismissed, save for the award of Kshs. 180,480 and based on the conditions set out under order 42 Rule 6 of the Civil Procedure Rules and the legal principles in **Machira v/a Machira & Company Advocates vs East African Standard (2002) eKLR**, the Applicant has failed to prove the substantial loss that it will suffer. A mere regurgitation of the statutory provision “will not do”. Even then, since 18<sup>th</sup> August 2017, when the judgment was delivered, the Applicant did not seek for stay of execution in the Trial Court and only filed this Application upon demand for payment of assessed costs.

20. I have considered the Application in total alongside the submissions filed and I find that the judgment was delivered in the Trial Court on 18<sup>th</sup> August 2017 and the Application herein filed on 30<sup>th</sup> October 2017. That is a period of about 2½ months. The Applicant explains that the delay was due to filing of the notice of Appeal which erroneously in the Subordinate Court. I have looked at the said Notice of Appeal and I note that, it does not bear a Court stamp to evidence the alleged filing thereof; nor a receipt to prove filing fees was ever paid.

21. However, I note that it is dated 11<sup>th</sup> September 2017 and was served on the firm of Musyoka & Muigai Advocates on 13<sup>th</sup> September 2017, as evidenced by that Law firm's stamp thereon. The Respondents have not denied that they were served. The service on the Respondents was within one month from the date of Judgment. Therefore the Respondent had notice of the Applicant's intention to appeal against the Judgment as at 13<sup>th</sup> September 2017. In the given circumstances, I find that, the delay of 2½ months in the interest of justice is not inordinate. However, the failure by the Applicant to respond to the absence of the Court stamp and receipt indicates that they are less than candid in the explanation offered and the Applicant's explanation falls short of being satisfactory and convincing.

22. In regard to the issue of substantial loss, the law is now settled through several cases that have dealt with this issue. In the case of; **Equity Bank Ltd vs Taiga Adams Company Limited (2006) eKLR**, the Court held that:

“...the only way of showing or establishing substantial loss is by showing that if the decretal sum is to be paid to the Respondent- that is execution carried out- in the event the appeal succeeds the Respondent would not be in a position to pay- reimburse as she/he is a person of no means.”

23. Further reliance was placed on the case of; **ABN Amro Bank N.V. vs Le Monde Foods Limited – Civil Application No. Nairobi 15 of 2002** where the Court stated:

“...all an applicant in the position of the bank can reasonably be expected to do is to swear, upon reasonable grounds, that, the Respondent will not be in a position to refund the decretal sum if it were paid over to him and if the pending appeal was to succeed...the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has such land, cash in the bank so on.”

24. In the instant case, the Applicants have not clearly stated the substantial loss it will suffer if the execution is not stayed. It merely submits that execution is eminent, and that it is ready and willing to provide security. There is no indication on how the intended Appeal will be rendered nugatory if the sum sought is paid and evidence that, the Respondents will not be in a position to refund the money if the Appeal succeeds. Indeed, the provisions of order 42 Rule 6 of the Civil Procedure Rules is clear on the prerequisites for stay of execution and the issue of substantial loss is the cornerstone thereof.

25. Taking into account the amount involved herein and the fact that there is no prejudice that will be suffered if the amount sought is paid, and the fact that the Applicant is ready and willing to provide security for costs, I find that it will be in the interest of justice to order stay of execution on condition that, the Applicant do deposit the total sum claimed herein in an interest earning account, in the names of both counsels of the Parties within Fifteen (15) days of this order. Failure of which execution to proceed forthwith.

26. Finally, I have entirely considered the arguments on extension of time by the Respondent and concur with the same. However, in view of the Order of stay of execution issued herein, I grant the Applicant leave to file the intended Appeal out of time. Therefore the period for filing the said Appeal is enlarged by a further period of Twenty One (21) days from the date of this order. The costs of the Application are granted to the Respondents.

27. Ordered accordingly.

**Dated, delivered and signed in an Open Court, this 3<sup>rd</sup> day of May 2018**

**G.L. NZIOKA**

**JUDGE**

**In the presence of:**

Mr. Mugogo for Mr. Kinyanjui for the Appellant/Applicant

No Appearance for the Respondents

Lang'at .....Court Assistant