



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. APPLICATION NO. 85 OF 2018.

MULTICHOICE KENYA LTD.....APPELLANT/APPLICANT

VERSUS

FRANCIS OMONDI.....RESPONDENT

RULING

1. The applicant herein filed the application dated 23rd August, 2018 seeking for orders that:-

a. Pending the hearing and determination of this appeal, an order a stay of execution of the judgment and decree in **Eldoret CMCC NO. 859 of 2016, Francis Omondi vs. Multichoice Kenya Limited** do issue.

b. That the time within which to file a memorandum of appeal against the decision in **Eldoret CMCC NO. 859 of 2018 delivered on 18th May, 2018** be enlarged.

2. The application was based on the grounds that the judgment was delivered in **Eldoret CMCC NO. 859 of 2018** in favor of the Respondent in the sum of Kshs. 600,000 in general damages, interest thereon and costs of the suit and the applicant was granted 30 days stay of execution. The applicant is apprehensive that unless stay is granted the respondent will proceed with execution as warrants of attachment and a proclamation notice had issued had earlier.

3. The Applicant's effort to obtain a typed copy of the judgment has been futile and was compelled to file an application for stay of execution dated 18th June, 2018 to enable the applicant obtain a copy of the judgment.

4. The said application was dismissed on the grounds that there was no appeal pending, so the applicant is apprehensive that if the orders sought herein are not granted, the respondent will move to execute the judgment against the applicant.

5. Lastly, that the applicant has not been granted an opportunity to consider the merits of the judgment and the prayers sought are not granted, the applicant shall be time barred from filing its intended appeal.

6. The application was supported by an affidavit sworn by one **Eric Odipo** that it was necessary to acquire a typed copy of the judgment since the same was not read in full and therefore need to have one in order to consider the merits of the same.

7. That despite numerous visits to the registry the applicant was unable to obtain a copy of the judgment and thus forced to file application dated 18/6/2018 seeking for stay of execution which application was dismissed.

8. As a result of the above, the applicant has been forced to prepare a memorandum of appeal based on the self - evident errors of the law apparent on the award of general damages and believes that he has good grounds of appeal as per the draft memorandum of appeal.

9. In opposing the said application, the Respondent stated that there was nothing urgent in the application since there was already a decree of Kshs. 600,000 in general damages, the applicant did not controvert the Respondents evidence and that judgment was delivered in the presence of the applicant who neither preferred an appeal nor a review of the said judgment. The 30 days stay of execution have lapsed and the decree and certificate of costs are now ripe for execution.

10. The time for filing an appeal in this matter lapsed on 15/6/2018 and this court does not have jurisdiction to grant stay of execution where there is no appeal.

11. That the Respondent is a man of means, an advocate of the High Court of Kenya having practiced for 19 years and as such in the unlikely event that an appeal is subsequently filed, and judgment allowed, he is capable of refunding the sum awarded in the judgment.

12. Further, that this application has been made 70 days out of time and therefore this court is the only one with jurisdiction to extent but, the principles for extension of time have totally not been made and therefore the application ought to be dismissed.

Issues for determination

13. Obviously application that invokes the discretionary powers of the court which must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

Order 42 Rule 6 (1) & (2) provides as follows:-

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 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 of stay shall be made under sub rule (1) unless-

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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

14. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

15. However, it is necessary to consider the considerations for granting applications for stay pending hearing and determination of an appeal. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal (Madan, Miller and Porter JJA)* while considering an application of this nature had this to say:-

i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

16. It is clear from the wording of Order 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely;

(a) Substantial loss may result to the applicant unless the order is made;

(b) The application has been made without undue delay;

(c) Such security as to costs has been given by the applicant.

17. **SUBSTANTIAL LOSS:** The substantial loss alluded to by the applicant at paragraph 14 of the further affidavit sworn by ANTHONY NJOGU is that:

“The applicant is a multi-national company that offers services to a number of countries across Africa with Kenya being a key market. If the judgment is allowed to stand the applicant is likely to be inundated with suits that cannot be proved to have been based on any breach, contractual or otherwise, perpetuated by the applicant and the applicant will be required to settle unquantifiable unproved sums”.

The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of **James**

Wangalwa & Another vs Agnes Naliaka Cheseto where it was held *inter alia* that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs. Chesoni,the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

18. It has to be demonstrated that the applicant would suffer substantial loss. It has to be shown that the Respondent is a person of straw and that he may not repay the said sum in the event of the appeal succeeding. In *Equity Bank Ltd vs Taiga Adams Company Ltd*, the court stated as follows:-

“In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

The respondent is described as an advocate practising in Eldoret with 19 years standing...it is not suggested that he is a man of straw who would not be able to refund the sum were the appeal to succeed. The sum awarded is not for subscribers from the entire African continent and I am unable to fathom how an award to one individual would become a yard stick for other claims-unless of course the applicant is saying that they have a less than honourable practice which leaves its clientele with a sour taste in the mouth. In my opinion the reason given is purely speculative it is a sum in favour of the respondent as an individual, the figure being only Kshs 600,000/- and substantial loss has not been demonstrated to this court’s satisfaction.

19. In *Elena D.Korir vs Kenyatta University Justice Nzioki wa Makau* had this to say:-

“...The applicant must furnish security, the application must be made without unreasonable delay.”

20. **SECURITY:** Apart from proof of substantial loss the applicant is enjoined to provide security. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer for security must come from the applicant as a price for stay. See *Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others*.

21. In the above cited case of *Equity Bank Ltd vs Taiga Adams Company Ltd* it was held that:-

“.....of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought.....let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in *Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others*.

22. The importance of complying with the said requirement was emphasized in *Machira T/A Machira & Co Advocates vs. East African Standard* where it was held that:-

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

The applicant’s counsel has stated that there is a willingness to deposit security for costs which should be held in a joint interest earning account. Although the applicant has made this offer, I share the sentiments expressed in the Machira case (supra) that it is not for every fleeting offer of security that the court should fall for and immediately grant stay. This is because in addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo vs Straman EA Ltd (2013)* as follows:-

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.

23. In considering whether a money decree or a liquidated claim would render the success of the appeal nugatory, the court of appeal in the case of *Kenya Hotel Properties Ltd vs. Willesden Properties Ltd* had this to say:-

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant./ However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all.”

In my considered view, this being a money decree, even if the sum was paid out and the appeal succeeds, that amount can easily be recovered from the respondent, and the appeal would not be rendered nugatory.

Extension of time to file an appeal.

25. The principles guiding the court on an application for extension of time premised **upon Rule 4**. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered.

26. It is therefore upon an applicant under this rule to, explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favor. In exercising the discretion the court ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and any interested parties if the application is granted, and whether the matter raises issues of public importance.

27. In the case of ***Fakir Mohammed V Joseph Mugambi & 2 Others, Civil Appln No. Nai 332/04 (unreported)*** this Court rendered itself thus:-

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

28. The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In ***Mwangi V. Kenya Airways Ltd, [2003] KLR 48***, the Court having set out matters which a single Judge should take into account when exercising the discretion under Rule 4, went on to hold:-

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

29. In considering whether the explanation given by the applicant for the delay in lodging his appeal is reasonable and excusable. It is upon the applicant to place sufficient material before the Court which would explain the delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case

30. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. In the case of ***Wasike V Swala [1984] KLR 591*** where the court stated that:

“As Rule 4 now provides that the Court may extend the time or such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors;

a) That there is merit in his appeal.

b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and

c) That the delay has not been inordinate.

31. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favor. There has to be valid and clear reasons upon which discretion can be favourably exercised. Aganyanya, JA in ***Monica Malel & Another V. R, Eldoret Civil Application No. Nai 246 of 2008*** stated:-

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

33. The case of ***Mwangi V Kenya Airways Ltd*** laid down three conditions to be fulfilled with regard to delay which are:

a. The length of the delay.

b. The degree of prejudice to the respondent if the application is granted.

c. The fourth condition is relevant but not prerequisite i.e. the possibly, the chances of the appeal succeeding if the application is granted.

The delay in filing has been long, almost three months, but an explanation has been given which shifts the ball into the court's playing field. Indeed a host of correspondences has been annexed to demonstrate the efforts by the applicants to get a typed copy of the judgment delivered by the trial court in vain. I take judicial notice of the challenges this court has experienced in typing and accept the explanation given. I direct that the Deputy Registrar do ensure that the applicant is served with a certified typed copy of the judgment delivered by Hon C.Obulutsa on 18th May 2018 in Eldoret CMCC No. 859 of 2016 within 7 days hereof. The applicant is granted 14 days leave to file its appeal out of time.

Summary of orders

1) The prayer for stay of execution pending appeal is dismissed as lacking merit

2) The Deputy Registrar do ensure that the applicant is served with a certified typed copy of the judgment delivered by Hon C.Obulutsa on 18th May 2018 in Eldoret CMCC No. 859 of 2016 within 7 days hereof

3) The applicant is granted 14 days leave to file its appeal out of time.

The applicant shall bear the costs of this application.

Delivered and dated this 13th day of November 2018 at Eldoret

H. A. OMONDI

JUDGE