



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL APPLICATION NO 30F 2016**

**HEAVY VEHICLE & PLANT SUPPLIERS LTD.....APPLICANT**

**VERSUS**

**ELDORET PACKERS LIMITED.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant's Notice of Motion application dated and filed on 12<sup>th</sup> June 2016 was brought pursuant to the provisions of Section 1A, 1B, 3A, 63(e), 79G and 79 of the Civil Procedure Act, Order 50 Rule 6 Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 27 of the Limitation of Actions Act, Article 159 (1) (d) of the Constitution of Kenya and all other enabling provisions of the Law. Prayer Nos (1) and (4) were spent. It sought the following remaining orders:-

1. Spent.
2. **THAT the Honourable court do grant the Applicant leave to file an Appeal out of time.**
3. **THAT the draft Memorandum of Appeal herein be deemed as properly filed.**
4. Spent.
5. **THAT stay of execution do issue pending the hearing and determination of the intended Appeal.**
6. **THAT the costs of the suit be provided for.**

2. The Applicant's Written Submissions were dated and filed on 29<sup>th</sup> February 2016 while those of the Respondent were dated 14<sup>th</sup> March 2016 and filed on 16<sup>th</sup> March 2018.

3. When the matter came up on 3<sup>rd</sup> October 2018, the parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPLICANT'S CASE**

4. The Applicant's application was supported by the Affidavit of its advocate, George Onsombi that was sworn on 12<sup>th</sup> January 2016.
5. It contended that the Ruling in **CMCC No 11482 of 2005** was to be delivered on 30<sup>th</sup> December 2015. However, when its advocates went to take the said Ruling, they found that the said Ruling was delivered on 1<sup>st</sup> December 2015.
6. It also averred that its advocates mis-diarised the date for delivery of the said Ruling hence their non-attendance on 1<sup>st</sup> December 2015 when the same was delivered and which it wanted to appeal.
7. It stated that its advocates had been unable to peruse the court file as the same was missing hence the delay in filing an Appeal by 1<sup>st</sup> December 2016. It pointed out that it had already been served with warrants of attachment and proclamation and it was apprehensive that

execution would proceed if the orders sought were not granted.

8. It therefore urged this court to allow its application as prayed.

### **THE RESPONDENT'S CASE**

9. In response to the said application, the Respondent filed Grounds of Opposition dated 21<sup>st</sup> January 2016 on 27<sup>th</sup> January 2016.

10. The gist of the Respondent's grounds of opposition was that the Applicant had not demonstrated that he had satisfied the ingredients in Order 42 Rule 6(2) of the Civil Procedure Rules and that because no appeal had been lodged herein, the present application seeking a stay of execution pending appeal was premature as no appeal had been filed herein.

### **LEGAL ANALYSIS**

11. The Applicant submitted that although Section 75 A of the Civil Procedure Code provides for the period of thirty (30) days for an aggrieved party to lodge an appeal, Order 50 Rule 6 of Civil Procedure Rules empowered the court to enlarge the time to do a particular act.

12. It argued that if its appeal was not heard then it would render its appeal nugatory. It pointed out that it was willing to deposit security and/or abide by the directions of this court. It stated that the fact that the Respondent had attached its goods was sufficient demonstration that it would suffer irreparable loss.

13. On its part, the Respondent was emphatic that the Applicant always filed applications for stay of execution whenever its goods were proclaimed. It pointed out that the Applicant filed applications seeking stays of execution in 2011, 2012, 2013 and that the application to be appealed from was filed after a Notice to Show Cause dated 21<sup>st</sup> August 2015 was to be heard. It was emphatic that litigation had to come to an end.

14. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:-

**“No order for stay of execution shall be made under subrule (1) unless-**

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

15. This means that an applicant has to demonstrate:-

**a. That he will suffer substantive loss if the order of stay was not granted;**

**b. That he had filed his application for a stay of execution timeously; and**

**c. That he was willing to provide security.**

16. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **“and”**. It connotes that all three (3) conditions must be met simultaneously.

17. This court noted that the present application was filed without unreasonable delay. It was filed about a month after the Ruling the Applicant wishes to appeal from was delivered. The Applicant was also ready and willing to provide security.

18. This court has previously held in similar cases one of which was **Magnate Ventures vs Simon Mutua Muatha & Another [2018] e KLR** that substantial loss did not have to be a colossal amount. It was sufficient if the successful appellant would have to institute proceedings to recover the decretal sum.

19. In this respect, the Applicant had fulfilled all the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules.

20. Having said so, each case must be decided on its own merits. The conduct of a party is an important factor in the court considering whether or not it should exercise its discretion in favour of a party seeking a stay of execution pending appeal.

21. This court perused the court file which the Respondent asked to be placed in the file herein and noted that contrary to the Applicant's advocates assertions, the Ruling in contention was delivered on 30<sup>th</sup> November 2015 and not 1<sup>st</sup> December 2015 as they had contended.

22. The question that arose in the mind of this court was, if the Applicant became aware of the subject Ruling on 30<sup>th</sup> December 2015, why did it not file its application seeking a stay of execution on 31<sup>st</sup> December 2015 which was a Thursday or 4<sup>th</sup> January 2016 or 5<sup>th</sup> January 2016 or 6<sup>th</sup> January 2016 or 7<sup>th</sup> January 2016 and only filed the same after its goods were proclaimed.

23. This court was of the opinion that the Applicant had not acted in good faith more so as it was also not truthful of when the Ruling herein was delivered. It stated that the Ruling was delivered on 1<sup>st</sup> December 2015 yet the court proceedings of the lower court were clear that the Ruling was delivered on 30<sup>th</sup> November 2015 as the Learned Trial Magistrate had directed.

24. If indeed, the Applicant's advocates had not perused the court file by the time they were filing the present application, it was not clear to this court how they knew which grounds of appeal to rely upon in drafting Memorandum of Appeal. It was also not clear how they knew that the Ruling was delivered on 1<sup>st</sup> December 2015 and that the Respondent's advocates were not present when the same was delivered. Indeed, a Mr Agwenyi held brief for Pramod for the Respondent when the said Ruling was delivered.

25. As this court formed the opinion that the Applicant's advocates had not been wholly truthful, their conduct disentitled the Appellant from being granted an order for stay of execution pending appeal.

26. Be that as it may, the Appellant should however, not be denied an opportunity to seek redress from the court merely because its counsel had not been candid. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50 of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.

27. Notably, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge time for a party to do an act. It stipulates as follows:-

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:**

**Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.**

28. Accordingly, having considered the parties' respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that while the Appellant's conduct disentitled it from being granted an order for stay of execution pending appeal, it could not be denied an opportunity to appeal against the Ruling that aggrieved it.

#### **DISPOSITION**

29. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 3<sup>rd</sup> October 2018 was allowed only in terms of Prayer Nos (2) and (3) therein. The Appellant is therefore at liberty to file and serve its Memorandum of Appeal within fourteen (14) days from today and therefore take all necessary steps towards the prosecution of its appeal.

30. In view of the fact that the Appellant's application was partly successful, each party will bear its own costs.

31. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 13<sup>th</sup> day of December 2018**

**J. KAMAU**

**JUDGE**