



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 104 OF 2016**

**PONDEROSA LOGISTICS LTD .....APPELLANT**

**VERSUS**

**AYUB WESONGA ..... RESPONDENT**

***(Being an Appeal from the Judgment and decree of the Honourable Rita Amwayi Resident Magistrate delivered on the 13<sup>th</sup> July 2016 in)***

**RULING**

1. In his application dated 27<sup>th</sup> September 2016 the appellant seeks an order of stay of execution of the lower Court Judgment in **Molo CMCC No. 256 of 2015** pending hearing and determination of this application. It further prays for leave to file an appeal out of time. The application is premised on the provisions of **Section 79G of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules**. In its supporting affidavits and grounds, the reason for delay is said to have been due to none availability of the trial court file said to have gone missing soon after delivery of the judgment on the 13<sup>th</sup> January 2016.

2. The applicant states that it is ready to deposit such security as the court may order.

The applicant by its advocates have annexed a letter dated 13<sup>th</sup> September 2016 informing the applicant that the court file could not be traced and were dealing with the matter.

3. In opposing the application the respondent has filed a replying affidavit sworn on the 19<sup>th</sup> October 2016. It is averred that the applicant was at all times aware of the judgment and that the delay, to file the intended appeal on time has not been explained nor was the delay in seeking orders of stay explained. It is further averred that the respondent has written four letters during the 86 days of delay that the applicant tabulating the decretal sum and calling for payment and therefore that the application is an afterthought and made in bad faith.

It is further averred that the applicant has not met conditions for grant of an order of stay under **Order 42 Rule 6(2) of the Civil Procedure Rules**. Details of the Judgment sought to be appealed from is stated in the respondents letter dated 25<sup>th</sup> July 2017 and followed by two other by emails.

4. I have considered the rival arguments by counsel. I do not agree with the applicant that the alleged none availability of the court file which has not been supported by any evidence had anything to do with the delay in filing the intended appeal.

The applicant did not respond to any of the letters written to it by the respondent. This is not only

unprofessional but lack of courtesy to Advocates. Without a copy of the judgment, the court is unable to determine what chances the appeal has. It is not enough to state facts in an affidavit and ask for the court to grant orders sought without any demonstration or evidence tendered.

5. The appellant has not satisfactorily explained the 56 days delay after the statutory period lapsed. Citing the case **APA Insurance Company Limited -vs- Michael Kinyanjui Muturi (2016) e KLR**, the applicant argued that filing of an appeal is a Constitutional right to a party who wishes to appeal. I fully agree with that submissions but there are statutory guidelines in terms of the period that a party is permitted to file the appeal.

I further agree that the correct procedure to approach the court under **Section 79G of the Civil Procedure Act** is to first file the Memorandum of Appeal as is the case here, then seek that the same be deemed filed within time, if the court finds merit and grants leave. I note that the Memorandum of Appeal was filed on the 6<sup>th</sup> October 2016 together with this application, 56 days after the statutory period.

I have considered the Respondents opposition. It is submitted that the delay period was not explained and that it is inordinate, and an afterthought.

6. On the matter of stay of execution, no demonstration was tendered that the respondent would not be able to refund the decretal sum, should the appeal be successful.

The more important condition set under **Order 42 rule 6(2) of Substantial** loss has not been demonstrated either.

It is not enough to state that the appellant will pay the decretal sum or even deposit the same into court, shutting the respondent out of the decretal sum unless the requirements are met.

7. **Order 42 rule 6(1)** provides that an application for stay must first be filed and heard in the trial court, and only then whether granted or not, should an application be filed in the appeal court. The application has not told the court whether such an application was filed or heard in the trial court.

**Rule 6(2)** of the said Order sets the conditions to be met for an order of stay of execution to be granted. It states that:

*(a) the court must be satisfied that substantial loss may result to the applicant unless the order is made and the applicant has been made without reasonable 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.*

8. I have stated above that other than making a statement, the applicant has not shown what substantial loss it may suffer by paying out the decretal sum to the respondent.

In the case **Joseph Ngigi Ibore -vs- Myori James and Another (2016) e KLR**, I denied leave to file appeal out of time to the applicant who failed to explain a delay of 58 days, and 28 days outside the requisite period.

The delay in even bringing this application cannot be said to be reasonable yet it has been proved by the respondent that the decretal sum was communicated to the applicant soon after the delivery of the judgment. See **Order 42 rule 6(2) (a)**.

**Article 159(2) (d)** of the Constitution cannot be invoked to cover unexplained or deliberate omissions by a party.

9. In **Misc. Application N. NAI 98 of 2013 Aviation Cargo Support Ltd -vs- Mark Freight Services Ltd (2014) e KLR** the Court of Appeal expressed itself that where delay is not explained, leave ought not

be granted.

Further in **Christopher Mugo Kimotho -vs- A.G Civil Application No.131 of 2008** the court also declined to grant leave to file appeal out of time because the delay was not explained sufficiently. Delay by the applicant in bringing this application and in lodging the appeal within time is unexcusable. The court will not assist an applicant who is indolent as “equity aids the vigilant not the indolent.” to deny the respondent enjoyment of his fruits of judgment.

10. In **Kenya Shell Ltd -vs- Benjamin Kiruga Kibiru & Others (1982-88) I KAR Plall J.**

Stated:

*“An intended appeal does not automatically operate as stay. The application for stay made before the High Court filed because the first of the conditions under Order 41 Rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss either in the manner of paying damages awarded which could cause difficulty itself or because it would lose its money if payment was made since the respondents would be unable to repay the decretal sum plus costs ---” that Substantial loss is the cornerstone of both jurisdictions for granting stay. That without evidence it is difficult to see why the respondent should be kept out of their money.”*

See also **David Mwenje -vs- Jubilee Ins. Co. Ltd (2005) e KLR** where similar sediments were expressed by Mwera J (as he then was).

11. For the above reason, I find the application dated 27<sup>th</sup> September 2016 devoid of merit. It is dismissed with costs.

**Dated, Signed and Delivered this 19<sup>th</sup> Day of January 2017.**

**JANET MULWA**

**JUDGE**