



**REPUBLIC OF KENYA**

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

**CIVIL MISC APPL. NO. 367 OF 2016**

**JULIUS MUKOMA OJOWI.....APPLICANT**

**- V E R S U S -**

**HIGHCHEM PHARMACEUTICALS LTD.....1<sup>ST</sup> RESPONDENT**

**SHRIJI CHEMISTS LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT DEBTOR**

**RULING**

1. Julius Mukoma Ojowi, the applicant herein, took out the motion dated 18.7.2016 in which he sought for the following orders:

***1. THAT this application be certified urgent and heard ex-parte in the first instance.***

***2. THAT this honourable court be pleaded to suspend implementation of the order of court in the Chief Magistrate's Court Milimani Commercial Courts Civil Suit no. 971 of 2011 committing the applicant to civil imprisonment for 6 months till the hearing and determination of the proposed appeal against the ruling of the said court that made the applicant personally liable before the debts of an incorporated company in which he was a non-executive a nominal and a salaried director.***

***3. THAT in the alternative the court be pleased to suspend the continued civil imprisonment of the applicant pending the hearing and disposal of the proposed appeal against the order of the subordinate court making the applicant personally liable for the debt of the corporate body.***

***4. THAT in further alternative this honourable court be pleased to issue a mandatory injunction for and/or order the release of the applicant from 6 months' civil imprisonment pending the hearing and determination of the proposed appeal against the order of the CMCC No. 971 of 2011 making the applicant personally liable for the payment of a debt of a body corporate of which he was a nominal director and worker.***

***5. THAT the costs hereof be provided for.***

2. The motion is supported by the affidavit sworn by the applicant. When served with the motion Highchem Pharmaceuticals Ltd and Shriji Chemists Ltd the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed the replying affidavit of Betty Kageni to oppose the motion. The motion was disposed of by oral submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have further considered the oral submissions presented by learned counsels for the applicant. When the motion came up for inter partes hearing, the respondents' advocate failed to turn up. Though the respondents and their counsel were absent from court, this court is enjoined by law to consider what was filed by the respondents in answer to the motion. It is stated that on 23<sup>rd</sup> May 2014, Hon. S. Atambo, learned Principal Magistrate delivered a ruling vide C.M.C.C. no. 971 of 2011 declaring Julius Mukoma Ojowi, the applicant herein personally liable for the debts of Shriji Chemists Ltd, the judgement debtor (2<sup>nd</sup> respondent herein). The applicant has expressed his intention to appeal against the aforesaid ruling. He stated that he then applied to be supplied with typed proceedings but none was supplied despite several reminders until 4<sup>th</sup> July 2016. Upon receipt of certified copies of proceedings and ruling, the applicant avers that he prepared a certificate of delay for the court to sign but the court has failed to do so. The applicant has averred in his affidavit that the court on 30.7.2016 re-issued a notice to show cause why execution of the decree should not issue by way of his committal to civil jail. The applicant further claimed that the trial court denied to consider his application for stay and instead proceeded to examine him over his source of income. At the end of the exercise, the applicant was committed to civil jail for six (6) months while the stay application was fixed for inter partes hearing on 3.8.2016. It is argued by the applicant that his committal to prison for 6 months for the debts of a corporate body while his application for stay was pending before the same court and while he was waiting to be issued with the certificate of delay to enable him appeal to be grossly unfair and in breach of his fundamental rights and administrative action. For the above reasons the applicant sought for the intervention of this court.

4. The respondents filed the replying affidavit of Betty Kageni to oppose the application. The respondents are of the view that the applicant is guilty of inexcusable and inordinate delay of 2 years in bringing in the application for stay since that did not require typed proceedings. The respondents further stated that the applicant's motion did not meet the conditions required in an application for stay.

5. The background of this matter appear to be short and straightforward. Highchem Pharmaceuticals Ltd (1<sup>st</sup> respondent) filed an action against Shriji Chemist Ltd 2<sup>nd</sup> respondent (judgement debtor) to recover a civil debt. The 1<sup>st</sup> respondent obtained a default judgment against the 2<sup>nd</sup> respondent/ judgment debtor. The respondent then filed an application to have the applicant, who is a director of the judgment debtor summoned to be examined as to whether the company had any means of satisfying the decretal sum failure to which the applicant was to satisfy the decree personally. The applicant's examination was undertaken and on 23.5.2014 the trial magistrate found the applicant personally liable for the debts of the judgment debtor, a limited liability company. The applicant is desirous to appeal against the decision but the time to do so has lapsed. It is argued that the trial court has failed to present a certificate of delay to the applicant so that he could file his appeal. The respondents do not dispute the averment that there was a delay in supplying typed proceedings and the ruling. The respondents have argued that the absence of typed proceedings could not have hindered the applicant from filing the motion. With respect, I agree with the respondent's submission. It would appear the applicant inadvertently misapprehended the point and thought it was a requirement for typed proceedings to be supplied first before the filing of the appeal. The applicant has clearly stated that he will be seeking to have the order making him liable for the liabilities of a corporate body impugned on appeal. This, in my view, is a strong arguable point in the circumstances of this case. For the broad interest of justice, in the circumstances of this case I will excuse the delay in filing the application for stay and proceed to consider its merits.

6. It is not in dispute that the applicant is yet to file the appeal. It is the applicant's submission that he has not done so because he is waiting for the trial court to issue him with a certificate of delay. A critical look at the provisions of Section 79A of the Civil Procedure Act, will reveal that if the trial court issued the certificate of delay, then time to appeal begins to run from the date of issuance of the certificate of delay. This court is also concerned that the trial court has taken too long to issue the certificate of delay yet it is apparent that there was delay in supplying the applicant with the typed proceedings and ruling.

7. In the unique circumstances of this case, I find the motion dated 18.7.2016 to be meritorious. I grant prayer 3 of the motion to last for 3 months with costs abiding the outcome of the intended appeal. In

order to avoid the matter procrastinating further the applicant is directed to have the intended appeal filed and expeditiously prosecuted before the lapse of three months from the date of this ruling.

Dated, Signed and Delivered in open court this 10<sup>th</sup> day of March, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant