



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**MISC APPLICATION NO. 639 OF 2014**

**LEO INVESTMENTS LIMITED.....APPLICANT**

**V E R S U S**

**1. MAU WEST LIMITED**

**2. MOHAWK LIMITED.....RESPONDENTS**

The Applicant herein seeks by Notice of Motion dated 26<sup>th</sup> September, 2014 leave to appeal out of time against the judgment delivered at the Chief Magistrate's Milimani Commercial Court on 25<sup>th</sup> July, 2014 in Milimani CMCC No. 2157 of 2009. The Applicant also seeks stay of execution of the judgement of the lower court pending disposal of the intended appeal. The application is brought under Sections 3A, 79G and 95 of the Civil Procedure Act (the Act) and Order 42 Rule 6(1) of the Civil Procedure Rules (the Rules). The 1<sup>st</sup> Respondent has opposed the application.

I have read the supporting and replying affidavits. I have also given due consideration to the submissions of the learned counsels appearing and the authorities cited.

Under section 79G aforesaid, an appeal from a subordinate court to the High Court must be filed within a period of thirty (30) days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. But the Court has power under the proviso to that section to admit an appeal out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.

In the present case, I am satisfied that the lower court's judgement was delivered without notice to the Applicant or its advocate. Judgement was not delivered on 29<sup>th</sup> May 2014 as at first reserved and was subsequently delivered without notice to the Applicant or its advocate.

It is also satisfactory that the Applicant became aware of the said judgment when the draft decree and certificate of costs was sent by Advocate for the 1<sup>st</sup> Respondent on 5<sup>th</sup> September 2014. The present application was filed on 26<sup>th</sup> September 2014 about 15 days from the date the Applicant became aware of the Judgment.

I am satisfied that there is sufficient reason to extend the time to lodge appeal as sought, and I hereby grant that extension. The Applicant should not be prevented from exercising its undoubted right of appeal, especially here where it was blameless and sought leave to extend time within which to file its appeal as soon as was reasonably practical. The Applicant may file its appeal within 24 days of delivery

of this ruling.

Regarding stay of execution of decree pending disposal of the intended appeal, as there is no appeal now pending, the same cannot be granted under Order 42, rule 6 of the Rules; but it can be granted under the inherent powers of the court. The Applicant has invoked that inherent jurisdiction under section 3A of the Act. Having granted the Applicant leave to appeal, it must be facilitated to exercise its undoubted right of appeal without any undue clogs. However, the court must balance this against the interests of the 1<sup>st</sup> Respondent who has a judgement in its favour that it ought to enjoy.

Stay of execution of a money decree will normally not be granted unless the appeal will be rendered nugatory if the appellant ultimately succeeds. An appeal will not normally be rendered nugatory by payment of a money decree; but where the appellant may not be able to recover the decretal sum from the respondent if he succeeds in the appeal, or where he cannot recover the money without undue difficulty, then the appeal may be rendered nugatory.

The Applicant has pleaded in its supporting affidavit that if it were to succeed in its intended appeal, it may not be able to recover from the 1<sup>st</sup> Respondent as it is not aware of any substantial work that it is currently undertaking and is thus apprehensive that it may not be able to refund the decretal sum if and when required to do so.

In its reply the 1<sup>st</sup> Respondent states that it is involved in various projects and works hence is able and willing to refund the decretal sum should the intended appeal succeed. The 1<sup>st</sup> Respondent has not gone into details of what these projects and works are as they are within its peculiar knowledge. It would have sufficed for the 1<sup>st</sup> Respondent to file an affidavit of means particularizing its financial capability. The court is therefore satisfied on a balance that the Applicant will have a difficult time recovering from the Respondent the decretal sum in the event of it succeeding in the intended appeal.

I will therefore grant stay of execution of the judgement of the lower court pending disposal of the intended appeal in the interests of justice upon the following terms –

1. The Applicant shall deposit the whole decretal amount within 30 days of today in a joint interest earning account in the names of the Advocates for the parties, in a bank to be agreed by both of them before the appeal can be heard.
2. In default of such deposit, stay of execution now granted shall stand vacated, and the 1<sup>st</sup> Respondent shall be at liberty to execute.
3. The costs of this application shall be in the intended appeal; if no appeal is ultimately filed, the costs shall go to the 1<sup>st</sup> Respondent.

Those shall be orders of the court.

**Dated and delivered at Nairobi this 10<sup>th</sup> Day of March, 2016.**

**A.MBOGHOLI MSAGHA**

**JUDGE**