



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 103 OF 2016

PONDEROSA LOGISTICS LIMITED.....APPELLANT/APPLICANT

VERSUS

GEOFREY LANGAT KIPKURUI.....RESPONDENT

(Being an Appeal from the Judgment and decree of the Honourable Rita Amwayi, Resident Magistrate, delivered on 13th July 2 in CMCC No.258 o015)

RULING

1. The Applicant/Appellant seeks an order of stay of execution of the decree of the trial court following a judgment delivered on the 13th July at **Molo CMCC case No. 258 of 2015** in favour of the plaintiff now Respondent.

In its supporting affidavit to the application, it is stated that the Appellants advocates advised the instructing client Occidental Insurance Company of the delivery of the judgment on the 28th July 2016 15 days after the judgment – and soon instructed the Advocates to lodge an appeal. It is deponed that the court file could not be traced in the court registry to facilitate application for proceedings and certified copy of the judgment. By a letter to the appellants advocates dated 6th September 2016, the Advocates advised the Insurance Company that the file could not be traced. That already outside the statutory period of filing the appeal.

2. Under the provisions of **Section 79G of the Civil Procedure Act**, the applicant seeks leave to file the appeal out of time.

3. The Respondent opposes the application by his Replying Affidavit sworn on the 19th October 2016. The main ground put forth is that the applicants were at all material times fully aware of the delivery of the judgment as numerous letters, annexed to the affidavit confirm forwarding tabulation of the decretal sum and calling for the payment long before the statutory period of 30 days to lodge the appeal lapsed. It is further urged that the prayer for stay of execution pending appeal does not meet the conditions under **Order 42(6) of the Civil Procedure Rules** hence urged for the dismissal of the application.

4. I have noted that the decretal sum as tabulated by the Respondent is in the region of Kshs.588,358/=. No decree seems to have been taken out or drawn. There can be no execution unless a decree is drawn by the executing court. There is therefore no immediate threat of execution as urged by the applicant who says it is ready to offer security if the application is granted.

5. I do not agree with the applicants averments that the court file could not be traced in the court registry as no evidence by of letters or otherwise to the Executive officer of the said court complaining of the

missing file. In any event, it is evident that the applicant aware of the judgment and even led to respond when payments were called for. Coming to court after three months to seek leave to file the appeal out of time and stay execution in my considered view is an afterthought and not made in good faith evidenced by the applicant conduct.

6. **Section 79G of the Civil Procedure Act** states:

“Every appeal from a subordinate court to the High Court shall be file within a period of 30 days from the date of the or appealed against excluding 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:

Provided that an appeal may be admitted of time if the appellant satisfied the court that he had good and sufficient cause for filing the appeal in time.”(emphasis added).

7. The proviso above is to the effect that an appeal must first be filed then leave to admit it out of time. An appellant does not first seek court's leave to admit a nonexistent appeal.

The applicant filed the appeal on the 6th October 2016 but does not seek to have it admitted out of time. In its application it seeks leave to file the same out of time yet it is already filed. For the application to be allowed sufficient cause and reasons ought to be demonstrated for the failure and delay in filing the appeal within time.

Interestingly, no letter of request for proceedings or judgment sent to the trial court. None been exhibited. This is why I say the applicants application is an afterthought. See **Gerald M'Limbinevs Joseph Kangangi Misc Appl. No. 40 of 2007** where **Justice Emukule** faced with similar circumstances observed t to allow the applicants application under **Section 79B and G** the requirement of a certificate of delay and delivery of copy of decree and order without sufficient reasons would be to defeat the said requirement under **Section 79B and G**.

Without any plausible explanation and sufficient cause, I am unable to find merit in that prayer.

8. Order 42 e 6 of the Civil Procedure Rules mandates an applicant to first apply for stay in the trial court and would then move to the appeal court if such order is denied. There is no evidence at all that the applicant moved the trial court for such an order or any other.

9. In its arguments and supporting affidavit, the applicant did not elaborate on what substantial loss be occasioned to it if the order is not granted. It is not enough just to state, proof is mandatory. It not alleged t the respondent would be unable to repay the decretal sum if the appeal is successful. A court will go outside conditions stated in **Order 42 e 6(2) of the Civil Procedure Rules** to satisfy itself that the applicant will not be denied its rights to be heard considering provisions of **Section 1A and 1B of the Act** as it is a tenent of natural justice. Having not demonstrated to the court and persuaded it to exercise its discretion in its favour to order a stay of execution, the court is left with no option but to find that the application is devoid of merit.

In **Joseph Ngigi Ibare vs Myori James And Another (2016) e KLR**, in similar circumstances, I denied leave to the applicant to file appeal out of time as well as an order of stay of execution in similar circumstances.

10. Similarly, I find no merit in the application in its entirely and proceed to dismiss the same with cost to the Respondents.

Dated, signed and delivered in co this 10th Day of November 2016.

JANET MULWA

JUDGE