



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLN. NO. 207 OF 2014**

**SHAJANAND HOLDINGS CO. LTD.....APPLICANT**

**-VERSUS-**

**RUTH JUMA MWENESI.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant herein, SHAJANAND HOLDINGS CO. LIMITED moved this Court under the Vacation Rules sometimes in August 2014 for leave to be heard during vacation. The Court granted the leave and heard the Notice of Motion dated 11/08/2014 which sought the following Orders:-

- i. *That this application be certified as urgent and the same be heard ex-parte in the first instance in respect to prayer 2 below.*
- ii. *That the honorable court be pleased to grant a stay of execution of the decree in Kakamega CMCC No. 189 of 2007 pending the hearing and determination of this application inter-parties.*
- iii. *That the proposed Appellant be granted leave to appeal out of time against the whole decision of the court in Kakamega CMCC No' 189 of 2007 delivered on the 7/5/2014.*
- iv. *That the honourable court be pleased to grant a stay of execution of the decree in Kakamega CMCC No. 189 of 2007 pending the hearing and determination of the appeal being Kakamega HCCA No. ,....of 2014.*
- v. *That the memorandum of Appeal annexed hereto be deemed as duly filed and served.*
- vi. *That the costs of this application be provided for.*

2. The Court further granted a stay of execution of the decree in Kakamega CMCC No. 189 of 2007 pending inter parties hearing of the application during the vacation.

3. The said application was eventually heard by way of written submissions after parties had filed their respective affidavits and submissions.

4. This Court has intently looked into the parties' positions alongside the various of authorities referred into and would wish to deal with the twin issues of leave to appeal and stay of execution as follows:-

**On the leave to appeal out of time:**

5. It is the Applicant's case that whereas it participated in the Kakamega CMCC No. 189 of 2007 as a Defendant (hereinafter referred to as "*the suit*") some events took place without its knowledge thereby leading to the application under consideration. The Applicant took issue with the conduct of some proceedings in the suit which were allegedly taken without its participation, acts which it feels too

offended by.

It is contended that on 06/06/2014, the Applicant's Counsels were served with a Bill of Costs pursuant to a judgment which had been delivered on 07/05/2014. The Applicant remained unaware of the proceedings leading to the said judgment. The Applicant moved to peruse the Court file in the suit and found out several steps which had taken place without its involvement. They include the following:-

- i. ***The suit had been fixed for and proceeded for the defence hearing on 11/12/2013 without notice to the defendant;***
- ii. ***The defence case was thereafter closed and the suit was further mentioned to confirm the filing of submissions without the advantage of the Applicant's input;***
- iii. ***Judgment in the suit was delivered on 07/05/2014 without notice to and in the absence of parties in the suit.***

6. On being served with the Respondents herein Bill of Costs aforesaid, the Applicant moved to file an application under certificate of urgency to set-aside the judgment. This was allegedly on 20/06/2014. However the Court file could not be traced at the Registry until 17/07/2014 when the suit came up for the assessment of the Respondent's Bill of Costs. The application seeking to set-aside the judgment was declined audience as the Court was of the opinion that it was not urgent and proceeded to deal with and eventually assessed the Bill of Costs accordingly. The Applicant communicated with the instructing clients who also had a problem of tracing their file leading to the Applicant's Counsel making copies of the Court file and forwarding the same to the said clients. Instructions to lodge an appeal were received on 06/08/2014 in which time the time to lodge an appeal had already lapsed, hence the current application and prayer.

7. The Respondent herein who was the Plaintiff in the suit did not put much resistance to this prayer but rather dealt with the limb of the stay of execution. To this Court therefore the above facts remain mainly uncontroverted and can be reasonably believed. Whereas it is a cardinal principle in law that a party has to be given an opportunity to present its case, it has to be known that that right is not absolute but conditional on several factors including the conduct of the party alleging breach.

8. I have perused the record before me and have not seen any evidence in support of the allegation that the Court file went missing until when the Respondent's Bill of costs came up for hearing. There is no correspondence to the Court to request for the file or to protest on the alleged disappearance of the Court file. To this end, this Court rejects that argument as having been made in bad-faith and an afterthought.

9. The Applicant having been made aware of the judgment in the suit on 06/06/2014 proceeded to file its application to set aside the judgment. This Court was not availed of the evidence thereto to ascertain exactly when the said application was filed though it should have been before or on the day the Bill of costs came up for assessment. The instructions to lodge an appeal were received on 06/08/2014, a period of 2 months from the time the Applicant's Counsel became aware of the judgment. This delay is again alluded to the unavailability of the client's file. The current application was filed on 12/08/2014, 6 days from the receipt of the instructions to lodge an appeal.

10. The conduct of the Applicant from the time it learnt that the judgment had been delivered ought to have been satisfactorily explained. There is laches on its part. On the other hand, it is not denied that the Applicant was not accorded an opportunity to participate in the proceedings in the suit. It never tendered its defence and subsequent submissions. The effect thereof is that the Applicant was shut from the suit which it had participated as a party. I have carefully looked into the events in this matter and have not found any justification why the Applicant was shut out.

On weighing the Applicant's conduct from the time it learnt of the judgment on one hand and the period it took to come to Court and the Applicant's non-participation in the suit on the other hand, this Court finds that it is fair and in the best interest of justice that the Applicant be granted leave to appeal. It is so granted.

## **On the stay of execution pending appeal:**

11. The conditions to be considered in dealing with an application seeking a stay of execution pending appeal in the High Court are clearly provided for under Order 40 Rule 6 of the Civil Procedure Rules 2010 being:

1. Applicant to demonstrate substantial loss that may result if stay is not granted;
2. There should be no delay in the making of the application; and,
3. The Applicant must provide security for the due performance of such decree or order which the court may ultimately grant.

12. In this matter, the Applicant did not state in the Affidavit what loss, if any, it may suffer if the stay orders are not granted but instead averred in its Affidavit that it stands to so substantially suffer in the absence of the orders. Unfortunately the loss to be suffered was not stated or described. In applications of this nature, the Applicant is supposed to clearly set out the factual basis on oath of the substantial loss to be suffered in the absence of the orders. It is far below the required legal threshold for an Applicant to only allege loss without specifically demonstrating it.

13. The Court is supposed to form an opinion based on the facts laid before it as to whether or not the Applicant stands to suffer any substantial loss. A party failing to so satisfy the Court runs the risk of not having favorable orders in its favour. It appears that the Applicant herein laid a lot of credence to the limb of leave to appeal instead.

14. This is a money decree. The concern in money decrees is usually that if the money is paid out and is eventually spent then there is likely to be challenges on the recovery of the said sums in the event the appeal succeeds in favour of the Applicant. On the other hand, a party who has a judgment of a Court ought not to be unreasonably impeded from enjoying the fruits thereof. However as stated herein above the Applicant has not alluded to this concern.

15. Another important issue of consideration by the Court is that of security for the performance of the decree. The Applicant has again not offered any security neither has it expressed its willingness to abide by such orders in the event this Court so orders. Simply put, the Applicant is again quiet on this issue.

16. As the issue of delay has been dealt with on the limb of the leave to appeal and I wish not to revisit the same.

17. This Court would have not found any difficulty in dismissing the prayer for stay of extension pending appeal but by taking into account the events which led to this application and as clearly dealt with hereinabove including the constitutional need to dispense with substantial justice and in the interest of the overriding principle in the Civil Procedure Act, I am inclined to grant but a conditional stay of execution herein instead. The need to instead dispense with substantial justice was so strongly echoed by the Court of Appeal in the much celebrated case of **Macharia Mwangi Maina & 87 others versus Davidson Mwangi Kagiri, Civil Appeals Nos. 6, 26 & 27 of 2011 at Nyeri (2014) eKLR.**

## **CONCLUSION**

18. The upshot is that this Court makes the following final Orders: -

- a. ***The Applicant herein be and is hereby granted leave to file and serve a Memorandum of Appeal within 7 days of the delivery of this ruling.***
- b. ***There be a stay of execution of the decree in Kakamega CMCC No. 189 of 2007 on condition that the entire decretal sum arising out of the judgment in the said Kakamega CMCC No. 189 of 2007 shall be deposited in an interest-earning joint account in the names of the parties Advocates in the next 45 days of the date of hereof and in default execution of the decree to issue.***

*c. Costs of this application bore by the Applicant.*

**DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 5<sup>th</sup> DAY OF February 2015.**

**A. C. MRIMA**

**JUDGE**