



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL. NO. 189 OF 2011

TURBO HIGHWAY LIMITED.....1ST APPLICANT

BENARD ODHIAMBO 2ND APPLICANT

VERSUS

ALEX K. KIMUTAI RESPONDENT

RULING

1. The application by way of Notice of Motion filed in court on 19th February, 2014 by the Appellants/Applicants seek three main orders namely:-
 - i. That this Honourable court be pleased to extend time within which the Applicant should deposit the sum of KShs.49,000/- being costs in Eldoret Chief Magistrate Civil Case No. 868 of 2006 as ordered by this court on 15th November,2011.
 - ii. That the orders of stay granted pursuant to the court'sruling on 15th November, 2011 be reinstated and extended to remain in force pending the hearing and determination of the appeal.
 - iii. That the proclamation, the warrant of attachment of the Appellant/Applicant properties be lifted forthwith and be set aside.
2. The application is supported by the supporting and supplementary affidavits sworn *by AmitAggarwala* director of the 1stApplicant on 19th February, 2014 and 7th March, 2014 respectively.

The application is premised on ten grounds stated on its face which can be condensed into the following five grounds;

- i. That this court granted the Appellant/Applicant leave to file an appeal out of time and granted conditional stay pending appeal on 15th November, 2011 vide Eldoret High Court Misc. App. No. 128 of 2011.
- ii. The conditions were that the 1stApplicant was to release Kshs.89,000 to the Respondent and the balance of the decretal amount plus costs was to be deposited in court within 7 days of the order.
- iii. That the Applicant complied with the order save for depositing of costs in court since the same had not been assessed and were subsequently assessed at Kshs.49,000/- after the time limited by the court had expired.
- iv. That the Applicant stands to suffer substantial loss should execution proceed and the appeal is likely to be rendered nugatory.

v. That the warrants of attachment and sale are erroneous.

3. Though there are two appellants in this appeal, the instant application appears to have been made on behalf of the 1st Applicant who I will hereinafter refer to as the Applicant.

In the supporting affidavit sworn on behalf of the Applicant, the deponent, its director, re-iterated the grounds stated on the body of the application but added that after the costs were assessed on 2nd February, 2012, their advocates communicated to the Applicant the

need to deposit the amount of assessed costs; that the Applicant inadvertently forgot to draw a cheque for the amount and only remembered about it when the deponent was served with a proclamation on 13th February, 2014 in execution of the decree; that the delay was not deliberate and the court should exercise its discretion in the interests of justice by granting the orders sought; that if the orders sought are declined, the Applicant will be prejudiced since its appeal will be rendered nugatory while no prejudice will be occasioned to the Respondent if orders sought are granted.

4. The application is opposed through grounds of opposition dated 25th February, 2014 and a replying affidavit sworn by the Respondent on 25th February, 2014. The gist of the Respondent's opposition is that the application lacks merit and should be dismissed as the Applicants have failed to satisfactorily explain the delay in complying with the court orders; that the delay of 870 days is excessive and prejudicial to the Respondent's case; that the Applicants not keen to prosecute the appeal since by the time the application was filed, no record of appeal had been filed and served despite

leave to file the same having been granted.

5. The application was prosecuted by way of written submissions; those of the Applicant were filed on 1st August, 2014 while those of the Respondent were filed on 29th May, 2014. In their submissions, the parties buttressed their respective positions as stated in their affidavits.

6. Having carefully reflected on the application, the affidavits sworn in support and in opposition thereto, the written submissions filed on behalf of the parties and the authorities cited, I take the following view of the matter.

It is not disputed that whether or not to enlarge time for compliance with court orders rests with the courts unfettered discretion. This discretion is bestowed on the court by **Order 50 Rule 6** of the **Civil Procedure Rules**. This Rule states as follows;

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such

enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

I hasten to add that such discretion must be exercised judicially with the aim of furthering the cause of justice depending on the circumstances of each case.

7. It is common ground that in this case, the Applicant failed to fully comply with the court order of 15th November, 2011 as it was unable to deposit costs awarded by the trial court to the Respondent within the time ordered by the court. The Applicant has explained that it was unable to deposit any amount by way of costs since costs had not been assessed and the same were

assessed after the time limited by the court had expired; that after being notified about the amount payable as costs, the Applicant forgot to draw a cheque for the amount hence its failure to comply soon after the costs were assessed; that its director remembered the matter after it was served with a proclamation in execution of the decree issued in the lower

court and promptly filed the instant application.

8. Though I wholly agree with the Respondent that there has been a long delay in depositing the amount assessed as costs, I also take note of the fact that the Applicant had substantially complied with the court order by releasing Kshs 89,000 to the Respondent and depositing Kshs.52, 000 into court as directed by the court.

I also find the reason given in explanation for the Applicant's failure to beat the court's deadline for depositing of the costs awarded to the Respondent plausible because as the amount of costs was not agreed between the parties, logic demanded that the amount of costs be ascertained through the normal legal process before any deposit in court could be made. It is not contested that said process was completed well after the time limited by the court had expired.

9. Regarding the delay after costs were computed and ascertained, the Applicant candidly deposed in the supporting affidavit that its director forgot to draw the cheque for the amount to facilitate its deposit in court until it was reminded by service of proclamation on its property in execution of the decree of the lower court.

This is what triggered the filing of the instant application about six days later.

Though taken on its own this is not a very convincing reason that ordinarily would not warrant the exercise of the court's discretion in favour of an applicant in an application such as the one before the court, in this case, I find that the Applicant's conduct of depositing into court a cheque for the amount of assessed costs drawn on 24th February, 2014 though without leave of the court fortified its claim that failure to take steps to comply with the court order as soon as the costs were ascertained was not deliberate; that it was caused by inadvertence owing to forgetfulness on the part of its management.

This court is alive to the fact that the Applicant is a company which runs its affairs through human beings. I am prepared to give the Applicant the benefit of doubt since it is human to forget and secondly, the Applicant took corrective action soon after it discovered its mistake.

10. In exercising its discretion under **Order 50 Rule 6**, the court must always be alive to its primary responsibility of administering substantive justice. In this case, the Applicant has already filed an

appeal against the judgment and decree of the lower court on liability and if the court were to decline to grant the orders sought, execution would definitely proceed and the Applicant's appeal will be rendered nugatory.

Secondly, if execution proceeded on the basis of the warrants of attachment and sale annexed to the application, it is evident that the Applicant will suffer substantial loss since the decretal amount sought to be executed is much more than what is owed to the Respondent.

The warrants on their face show that they are based on the decretal sum awarded to the Respondent in the lower court without taking into account the money that was subsequently released to the Respondent and deposited in court through the court order of 15th November, 2011.

11. On the other hand, if the application is not allowed, the Respondent will not suffer any prejudice that cannot be compensated by way of costs. But I have also noted with concern that since the Applicants filed their memorandum of appeal on 22nd November, 2011, to date they have not filed the Record of Appeal.

This delay has not been explained at all by the Applicant despite the Respondent having brought it to its attention in his Replying affidavit.

I am therefore in agreement with the Respondent that the Applicant does not appear keen on prosecuting its appeal.

12. In order to strike a balance between administering substantive justice by allowing the Applicant an opportunity to prosecute its appeal so that the dispute between the parties may finally be determined on its merits on appeal and the need to give effect to the overriding objective of the **Civil Procedure Act** and **Rules** which is to facilitate the just, expeditious, proportionate and affordable resolution of disputes, I am inclined to allow the application as prayed but with a further condition.

I accordingly allow the application in terms of Prayer 3, 4 and 5 of the Notice of Motion dated 19th February 2014 so that the deposit of Kshs.49,000/- into court on 10th March, 2014 is deemed to have been made within time. The orders of stay of execution granted by this court on 15th November, 2011 and issued on 2nd December, 2011 are hereby reinstated on condition that the Applicant files and serves the

Record of Appeal within 21 days from today and in default the stay orders will automatically lapse.

The Respondent is awarded the costs of this application.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF MARCH 2015.

In the presence of:-

Mr. Songok J.K for Mr. Chebii for the Respondent

MsOdwa for the Appellant/Applicant