



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Application 34 of 2012

DAVID RWETI MASAI:::PLAINTIFF/RESPONDENT

VERSUS

NANDI TEA ESTATE LIMITED:::DEFENDANT/APPLICANT

RULING

The applicant, **Nandi Tea Estate Limited**, seeks two main orders of the court namely, that it be granted leave to file an appeal out of time and that there be a stay of execution pending the hearing and determination of its intended appeal. The applicant was the defendant and the respondent, **David Tweti Masai**, was the plaintiff in the lower court. The application is expressed to be brought under Order 50 Rule 6, Order 51 rule 1, Order 22 Rule 22 of the Civil Procedure Rules, Section 3A of the civil procedure Act and all enabling provisions of the law.

The application is predicated upon the main grounds that the applicant desires to appeal against the decision of the lower court delivered on 29th March, 2012 but could not do so in time because notice of delivery of judgment was not served upon it and that if the decretal amount is paid over to the respondent it will not be recoverable in the event its appeal succeeds as the respondent is a person of modest means. In that event so the applicant contends, its intended appeal shall be rendered nugatory.

The application is supported by an affidavit sworn by one, **Abdikadir Hussein**, the applicant's General Manager. In the affidavit it is deponed, *inter alia*, that judgment in the lower court was delivered in the absence of the applicant's counsel without notice and the applicant came to know of the judgment when it was served with a proclamation; that it then immediately moved the court for leave to appeal out of time and for stay of execution; that the respondent is a man of straw and if the decretal amount is paid out to him, he will not be in a position to refund the same should the appeal succeed, which event shall occasion the applicant substantial loss and that its appeal has high chances of success.

The application is opposed and the respondent has filed a replying affidavit in which he avers, *inter alia*, that the applicant has not been diligent in seeking stay and has not shown justifiable cause why there should be a stay of execution.

When the application came up before me for hearing on 17th July, 2012, counsel agreed to file written submissions which were in place by 9th October, 2012. The submissions reiterated the parties' stand-points taken in their respective affidavits. I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The discretion of the court under Orders 50 Rule 6 of the Civil Procedure Rules and section 79G of the Civil Procedure Act is wide. Under the latter, the applicant must satisfy the court that it had good and sufficient cause for not filing the appeal in time and under the former the concern of the court is the justice of the case. The applicant has sworn that judgment was delivered in the absence of its counsel who were not served with a

notice of delivery of the same. The respondent's answer is that, a notice was displayed at the court for every body to read and the applicant and his counsel should have read the same. That response, in my view, is an admission that the applicant and its advocates were indeed not notified of the date of delivery of judgment. Publication of the date on the court notice board was not sufficient notice to the applicant. No reason was given for the failure to serve the applicants counsel with notice of the date of delivery of judgment at his known address. I accept the applicant's explanation for the delay. The applicant has therefore in my view shown sufficient reason for not filing the appeal in time. I have perused the draft grounds of appeal and I am of the view that the intended appeal cannot be described as frivolous.

With regard to the prayer for stay of execution, the test as laid down in order 42 Rule 6 of the Civil Procedure Rules is

- i) Whether the applicant may suffer substantial loss unless the stay is granted;**
- ii) Whether the application has been made without unreasonable delay.**
- iii) Whether there is security for the due performance of the decree.**

With regard to delay, I have already accepted the applicant's explanation for the delay in lodging this application. I do not consider that the applicant is guilty of inordinate delay. With regard to the establishment of substantial loss, the applicant has deponed that the respondent is a man of straw from whom it will not be possible to obtain back the decretal amount if the same is paid to him and the intended appeal eventually succeeds. That averment has not specifically been denied by the respondent.

In the premises, on the material availed to the court, I am satisfied that the applicant has demonstrated that it may suffer substantial loss unless a stay of execution is granted.

With respect to security the applicant has offered to deposit the entire decretal amount in a joint interest bearing account of the parties' advocates. That offer, in my judgment, constitutes sufficient security for the due performance of the decree herein in the event the intended appeal fails. The cases relied upon by the respondent dealt with different facts and are clearly distinguishable from the facts herein.

In the end I make the following orders:-

- (i) The applicant is granted leave to appeal out of time. It should file and serve the appeal within seven (7) days of the date hereof.**
- (ii) The applicant shall deposit the decretal amount into an interest bearing joint account to be opened in a reputable financial institution in the names of the parties' advocates within fourteen (14) days from the date hereof.**
- (iii) There shall be stay of execution pending compliance with (i) (ii) above.**
- (iv) In default the applicant's Notice of Motion dated 10th May, 2012 shall stand dismissed with costs.**
- (v) If (1) and (2) are complied with, there shall be stay of execution of the decree of the lower court until determination of the intended appeal with costs in the appeal.**
- (vi) Each party has liberty to apply.**

Order accordingly.

**DATED AND DELIVERED AT ELDORET
THIS 6TH DAY OF NOVEMBER, 2012.**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Nyolei H/b for Nyaundi for Applicant and

Mr. Nyamweya for Respondent.

**F. AZANGALALA
JUDGE**

6TH NOVEMBER, 2012