



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL CASE NO. 15 OF 2018

TATA AFRICA HOLDINGS (KENYA) LIMITED.....PLAINTIFF

VERSUS

FARM AFRICA MILLY'S LIMITED.....DEFENDANT

RULING

1. Pursuant to the provisions of section 7 of the Appellate Jurisdiction Act (Cap 9) Laws of Kenya, sections 1A, 1B, 3, 3A and section 63 (e) of the Civil Procedure Act (Cap 21) Laws of Kenya and Orders 9 (9) 42 (6) and 51 (1) of the 2010 Civil Procedure Rules, the Plaintiff has applied for the following major orders.

1) spent

2) spent

3) an order be granted to stay the execution of the judgement delivered on 7/5/2020 and the resultant decree pending the hearing and determination of this application.

4) an order be granted to stay execution of the judgement delivered on 7/5/2020 and the resultant decree pending the hearing and determination of the intended appeal to the Court of Appeal or for such other duration as the court may deem fit.

5) an order be granted for filing a notice of appeal be extended by seven days, or such other period as the court deems fit, with the effect that the notice of appeal dated 22/6/2020 is deemed as being properly on record.

6) an order be granted to make provision for costs of this application to be costs in the intended appeal.

2. The application is supported by 17 grounds that are set out on the face of the notice of motion, whose major grounds are as follows.

3. The Defendant is a special purpose vehicle between Farm Africa (Ace) Corporate Ventures Ltd and Milly Fruits Processors Ltd. Its shareholding and directorship is therefore derived from the two companies. The Defendant learnt that judgement was delivered electronically on 7th May 2020 wholly allowing the Plaintiff's suit and dismissing the Defendant's counter-claim.

4. The Plaintiff extracted a decree dated 5th June 2020 and filed a bill of costs dated 18th May 2020. The Defendant is aggrieved by the said judgement and decree and has filed a Notice of Appeal dated 22nd June 2020.

5. The Defendant's intended appeal is not frivolous and has substantial chances of success.

6. Unless stay of execution is granted, the Plaintiff will execute and the defendant will suffer substantial and irreparable loss for the following reasons. The Defendant will be compelled to pay the judgemental sum of Shs 40,133,319.00 based on a judgement obtained through fraud involving the plaintiff and two of the defendant's directors. The particulars of fraud are set out in the Defendant's application to set aside the judgement. It will be inordinately onerous for the defendant to pay the colossal judgemental sum given the economic difficulties brought about by the Covid-19 pandemic.

7. If the court orders, the Defendant is willing to give security for the due performance of the decree should the appeal fail. In any event, the Defendant has both moveable and immovable assets, which the Plaintiff will execute against and for this reason the court is invited to find it unnecessary to order security.

8. The delay in bringing the application is neither intentional, inordinate, nor unreasonable as the Defendant is a special purpose vehicle formed by Farm Africa (Ace) Ventures Ltd and Milly Fruits Processors Ltd and the day to day was and has always been undertaken by directors from Farm Africa Ltd.

9. The Defendant has through one of its director namely Mohamed Raza Sajjad Rashid deposed to a 19 paragraphs supporting affidavit. The defendant has replicated the grounds that are set out in its notice of motion, which I find unnecessary to set out herein.

The submissions of the Defendant.

10. Messrs Muriu Mungai & Co LLP, Counsel for the Plaintiff, have in their submissions identified two issues for determination. First, whether extension of time to file a Notice of Appeal should be granted. Second, whether stay of execution pending appeal should issue. Counsel cited *Elkana Kipruto Tallam v Moi University [2020] e-KLR*, in which the court in part stated:

"A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised."

11. Based on the affidavit evidence, counsel submit that the delay of 35 days is not inordinate. And for that reason extension of time to file a Notice of Appeal should be granted.

12. In respect of stay of execution, counsel has cited Order 42 Rule 6 (2) of the 2010 Civil Procedure Rules, which sets out the conditions to be met before an order of stay of execution is granted. These conditions are 1) substantial loss will occur unless an order of stay is granted; 2) the application has been made without inordinate delay; and 3) the applicant has made an offer for security for the due performance of the decree.

13. Counsel has submitted based on *Orient Sacco Society Ltd v Joseph Wambuku Kamau [2018] e-KLR*, in which the court in part stated that where the decretal sum is substantial it would be onerous to order the entire sum deposited by the Applicants as the operations of the Applicant may well stall or be hampered. Counsel has therefore submitted that ordering the entire judgemental sum of Shs 40,133,319.00 to be deposited may be economically crippling. This is more so due to the Covid-19 inspired economic downturn. This in itself constitutes substantial loss.

14. Furthermore, counsel also submitted that the Defendant has offered to furnish security for the due performance of the decree.

15. Based on the foregoing reasons, counsel has submitted that the Defendant has made out a case for the grant of the orders sought.

The case for the Plaintiff

16. The Plaintiff through its accountant (Edwin Too) filed a 14 paragraphs replying affidavit in opposition to the application. He has deposed that the defendant should have filed its Notice of Appeal within 14 days after delivery of judgement on 7th May 2020. The delay in filing the appeal is an afterthought and the application has been brought inordinately late in the day. Based on information from its advocate, which the deponent believes, the court's jurisdiction to extend time for the filing of the appeal can only be exercised on fixed and settled rules. The defendant has not laid any basis to the satisfaction of the court for the grant of an order to

extend time for the filing of the appeal.

17. Furthermore, the deponent has deposed that the decree passed in the plaintiff's favour was as a result of an outstanding debt that accrued in 2006. The application is a ploy to deny the decree holder the fruits of their judgement. The deponent has also deposed that the defendant is an international company with its presence in Kenya; which deals in selling tractors and motor vehicles in the world and has a sound financial base to refund any moneys in the event that the decretal sum shall be required to be refunded.

18. Based on advice from his counsel, which he believes, the deponent has deposed that the Applicant has not demonstrated by way of evidence that any substantial loss that it will suffer in the event that the decretal sum is paid to the decree holder; since the decree holder has a solid financial base to refund the same.

19. Additionally, the deponent has deposed that this being a money decree, the success of the appeal would not be rendered nugatory so long as the respondent is not facing any financial difficulties to refund the decree sum with interest.

20. The deponent has also deposed that the applicant has failed to offer security for the due performance of the decree as may ultimately be found to be binding on the applicant in the event of the appeal failing. In the event this court finds the application to be merited, then it would be fair that the decretal sum be deposited in court and/or in a joint interest earning account in the names of both counsel on record pending the determination of the appeal.

The submissions of the Respondent/Defendant.

21. The Respondent has submitted that section 7 of the Appellate Jurisdiction Act (Cap 9) Laws of Kenya donates to this court a discretionary power to enlarge time as and when necessary to enable a party to file a notice of appeal out of time. Counsel has also cited *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others, Supreme Court Application No. 16 of 2014*, in which a similar application was made with that court holding that extension of time is not a right of the party, but is an equitable remedy that is only available to a deserving party at the discretion of the court.

22. The court further held that the party that seeks extension of time has the burden of laying a basis to the satisfaction of the court and the delay should be explained to the satisfaction of the court. The applicant has also to demonstrate that the application has been brought without unreasonable delay and the decision to grant the application is to be made on a case to case basis.

23. Counsel has also submitted that one Sivar Kumar Pinnamaraju in his verifying affidavit attached to the plaint, averred that he was the manager of the defendant and was duly authorized to swear the affidavit; and that he did not describe the relationship of the two directors of the other companies that were not part of the evidence during the trial of this suit. Counsel has submitted that the Applicant cannot purport to convince the court that the witnesses who appeared before this court did not know what they were doing.

24. Counsel has also submitted that the Applicant has not demonstrated that it deserves the orders sought. And the Applicant has not demonstrated that it has chances of success in the intended appeal and the instant appeal is a delaying tactic to keep away the decree holder from enjoying the fruits of its judgement.

25. It also the submission of counsel that allowing the application will prejudice the Respondent, who took a loan to purchase and supply to the applicant the machines in the hope of being paid back. The Respondent has suffered great financial hardship in repaying the loan, while the Applicant continues to benefit from using the machines at the agony of the Respondent.

26. Based on Order 42 Rule 6 of the 2010 Civil Procedure Rules, counsel has submitted that the applicant has failed to demonstrate it will suffer substantial loss. Counsel also cited *Butt v Rent Restriction Tribunal [1982] KLR 417*, in which that court held that a court has discretion to grant or refuse an order of stay of execution.

27. Furthermore, counsel has submitted based on *Kenya Hotel Properties Ltd v. Willesden Properties Ltd, Civil Application No. UAI 322 OF 2006 (UR)*, in which the stated that if the decree is a money decree the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the Respondent is not a man of straw but is a person who on the success of the appeal, would be able to pay the decretal amount.

28. Counsel has submitted in the alternative that if the court is inclined to grant an order of stay of execution, then the court should order the Applicant to pay the sum it admitted as owing to the Respondent together with interest from 2014. And finally, counsel submitted that the decretal sum should be deposited in a joint interest earning account in the names of both counsel.

Issues for Determination

29. I have considered the affidavits of the parties, the submissions of their counsel and the authorities cited. As a result, I find the following to be the issues for determination.

- 1) Whether the Applicant has made out a case for the grant of an order of extension of time within which to file a Notice of Appeal.
- 2) Whether the Applicant will suffer substantial loss unless an order of stay of execution is granted.
- 3) Whether the application was brought without unreasonable delay.
- 4) Who bears the costs of this application"

Issue 1

29. I find that on the affidavits of the parties and the applicable law, that the Applicant has out a case for the grant of an order of extension of time within which to file a Notice of Appeal. The jurisdiction of the court to do so is founded on section 7 of the Appellate Jurisdiction which empowers this court "*to extend the time for giving the intention to appeal from the judgement of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.*"

Issue 2

30. I take judicial notice of the existence of the covid-19 pandemic with its adverse effects on businesses generally. I am persuaded on the authority of *Orient Sacco Society Ltd v Joseph Wambuku Kamau, supra*, that since the decretal sum is substantial, it would be onerous to order the entire sum to be deposited by the applicants as the operations of the Applicant may well stall or be hampered given the adverse effects of the Covid-19 pandemic. In the circumstances, I find that the Applicant will suffer substantial loss unless an order of stay of execution is granted.

Issue 3

31. I further find on the affidavit evidence that the delay of about 35 days is not unreasonable in the circumstances of this application.

Issue 4

32. The costs of this application will be costs in cause.

33. In the premises, I hereby grant the applicant 14 days within which to file a Notice of Appeal.

34. Furthermore, the Applicant is hereby ordered to pay to the respondent the sum of money that it admitted as owing to the plaintiff as a condition of granting an order of stay of execution, within 30 days failing which this order will lapse.

35. The Applicant is also ordered to execute a bank guarantee or bond in sum of Shillings thirty million (Shs 30,000,000/-) and deposit it in court within 30 days failing which this order will lapse.

36. Costs of this application will be costs in cause.

Ruling signed, dated and delivered via e-mail at Kitale this 4th day of December, 2020 in the absence of the parties.

J. M. BWONWONG'A.

J U D G E

4/12/2020



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