



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 215 OF 2019

SHANZU BEACH RESTORT LIMITED.....APPELLANT/APPLICANT

-VERSUS-

CROWN MARBLE & QUARTZ LTD.....RESPONDENT

RULING

1) The Appellant/Applicant by an application dated 5/11/2019 has sought for stay of execution against the Judgment and decree of the lower in Mombasa CMCC 1850 of 2017.

2) This court, upon hearing the application ordered that the Appellant provides a bank guarantee of Kshs.4,193,168.78 as a condition for stay pending the appeal. In addition, this court set a 45 days time line in which the said bank guarantee was to be deposited with the court. However, the Appellant failed to provide the bank guarantee within the timelines set by this court.

3) The Appellant has now come to this court vide a notice of motion dated 17th April, 2020 and filed under Section 1A, 1B & 3A of the Civil Procedure Act, Order 50 Rule 6, and 51, both of the Civil Procedure Rules and Article 159 of the Constitution of Kenya 2010 seeking for the following orders;

a) Spent;

b) That the Honourable Court be pleased to extend the time for the Applicant to place a Bank guarantee of Kshs.4,193,168.75;

c) That the costs of this application be provided for.

4) The above application is premised on 8 grounds on its face and further supported by an affidavit of one Dr. John Njoroge, the Appellant's Director. The Appellant/Applicant's gravamen is that on 3/3/2020, this court granted a conditional stay pending appeal for the Appellant to provide a conditional bank guarantee of Kshs.4,193,168.75 within 45 days, failure to which the application would stand dismissed. That following the outbreak of the Covid-19 pandemic, the Appellant's hotel business was severely affected hence hampering the Appellant's financial capacity to comply with the court's order. It is argued that the Appellant's inability to comply with court's orders was caused by circumstances beyond its control and this court should therefore exercise its discretion to extend the time for giving the security. The Appellant avers that if the prayer is not granted, the appeal will be rendered nugatory and thus, it is only in the interest of justice for this court to allow the instant application.

5) The application is opposed by the Respondent's replying affidavit sworn on 5/5/2020 by Daniel Ndirangu Mburu, the Respondent's Accountant. He deponed that the debt from the Appellant has been due and owing since 30/11/2013 and no compelling reason has been advanced by the Appellant to warrant the exercise of the court's discretion in extending time as sought by the Appellant/Applicant. The Applicant asserts that the application has been made in bad faith to prejudice the Respondent. It is averred that the Applicant has not shown any effort to obtain the bank guarantee and neither has it shown that it is willing to comply with the court's orders, hence the application should be dismissed.

6) Parties consented to dispose of the application by way of written submissions. That notwithstanding, only the Respondent filed its written submissions whilst the Applicant failed to comply with the timelines set by this court.

7) The Respondent's submissions substantially reiterate the grounds on the face of its replying affidavit. Nonetheless, the Respondent asserts that the applicant ought to have shown sufficient reason for extension of time which ought to be balanced against the Respondent's right to enjoy the fruits of the judgment delivered in its favour. Reliance is placed on an excerpt from the case of *Judson Nyaboga Ogwora-vs-Madison Maroko Nyamwea [2018] eKLR*, wherein the court set a procedure to be observed in circumstance where extension to comply with court's order is sought.

8) It is submitted that even at the subsistence of Covid-19, bank guarantees are still being obtained and that cannot be a valid ground for extension of time. Further, the Applicant has exhibited indolence in seeking extension of the court orders after they had already expired hence no orders are there for the court to extend. This view was adopted by the court in the case of ***Timon Otieno Mboga-vs-Kenya Forest Service Kisumu ELR NO. 2 of 2014.***

Analysis and Determination

9) Having set out the respective parties' positions as above, It is my most considered view that the sole issue for determination is whether the application for extension of orders issued on 3/3/2020 is merited for the court to exercise its discretion in favour of the Appellant/Applicant.

10) Sections 3A, and 95 both of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules are the operative parts in answering the question of whether the prayer to extend interim orders is merited. The sections grant the courts unfettered discretion to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court.

11) In the case of **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR.** the court stated thus:-

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:-Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

12) In the present case, the court granted a conditional stay of execution. On 3.2.2020 the Appellant/Applicant was directed to provide a bank guarantee of Kshs.4,193,168.75 within 45 days thereof. The applicant asserts that it has been unable to comply with those orders owing to the outbreak of covid-19 which has severely affected its business. On the other hand, the points taken up by the Respondent is that the Applicant has not shown any effort to obtain the bank guarantee and neither has it shown any and indication that the Applicant is willing to comply with those orders at any point. The Applicant further argues that the instant application was made after the lapse of the 45 days from which the Applicant was to provide the bank guarantee. As such, the conditional stay lapsed after the 45 days and this court cannot extend dead orders. In other words, the Respondent argues that there are no live orders for this court to extend.

13) In that regard, I have considered the ***Timon Otieno Mboga-vs-Kenya Forest Service Kisumu*** case relied on by the Respondent wherein the court was of the view that a conditional stay lapses automatically upon failure to comply with the condition upon which it was predicated. In that case, the applicant had failed to provide security within the timelines directed. In any event, and however persuasive the decision is, I take note that it is a decision of a court of concurrent Jurisdiction and not binding upon this court which I would respectively wish to deviate from on a slight extend.

14) In the case of ***Essar Telkom Kenya Limited v Joseph Odongo Okumu [2016] eKLR*** the plaintiff was directed to furnish security for costs in the sum of Kshs.2,000,000 within 21 days from the date of judgement but failed to do so. The court allowed the Plaintiff to furnish the security a year later on being satisfied that the plaintiff had a valid reason and had even deposited the security out of time. The same view was adopted in the case of ***Compliant International Security Ltd & another v Nicodemus Mulwa Muli [2019] eKLR.*** In this case the court expressed itself as follows in an application seeking extension of time way after the set timelines.

“...If the applicants are not given an opportunity to deposit the decretal sums as ordered by the trial court then the appeal will be rendered nugatory and will only be there for academic purposes. There will be no prejudice suffered by the respondent if time is extended in order for the deposit to be made as had been directed by the trial court.

15) On the foregoing, it is my considered view that extension of time is an equitable remedy granted to deserving party at the discretion of the court. Party. Whether the court should exercise that discretion is to be considered a on case to case basis. However, the party seeking the extension of time bears the onus to prove to the satisfaction of the court the existence of extenuating circumstances which delayed compliance of the court orders. The applicant must show sufficient reason for the exercise of court's discretion in its favour. I will now consider whether the explanation tendered by the Applicant, that Covid-19 has hampered its ability to obtain a bank guarantee, is a sufficient reason for seeking extension of time.

16) This court is alive to the impact caused on the economy owing to the Covid-19 pandemic. The Court is also cognisant that the hotel industry has not been spared from the siege. However, the applicant has not shown any effort made to obtain the bank guarantee. That, notwithstanding the Appellant/Applicant does not state when it is able or willing to comply with the conditions of stay by providing the bank guarantee. The court cannot grant unlimited extension of time for the Applicant to comply. It is an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the Court is obligated to promote the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to have been done.

17) However, to the prevailing circumstances and the deteriorated state of economy it is in the interest of justice that the Applicant be granted limited chance to comply with the directions in the ruling delivered on 3/3/2020. The Respondent will not suffer any prejudice if there is a limit to a time extended.

18) In the end, I hereby allow the application and grant the plaintiff an extension of 30 days from the date of this ruling within which it will provide a Bank guarantee of Kshs.4,193,168.78/= failure to which, execution to issue.

19) The Respondent is awarded the costs of the application since the instant application is as a result of the Appellant's failure to comply.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JULY 2020.

D. O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O CHEPKWONY