



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

MISCELLENEOUS CIVIL APPLICATION NO. E087 OF 2021

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

AGAINST AN ORDER OF A SUBORDINATE COURT TO THE HIGH COURT

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPLICANT

-VERSUS-

DICKSON AORO OWOUR..... RESPONDENT

RULING

1. On 3/12/2020, the trial court in **Rongo SRMCC No. 42 of 2018** delivered judgements in favour of the respondent (plaintiff) for the sum of **Kshs. 607,500/=, in Rongo SRMCC No. 42 of 2018 - Dickson Aoro Owuor for a sum of Kshs. 1, 102, 840/= and in Rongo SRMCC No. 48 of 2018 -Dickson Aoro Owuor for a sum of Kshs. 1,518,750/=** together with costs and interest of the respective suits against the applicant (defendant). In respect to this ruling, **Miscellaneous Application No. E087 of 2021** shall be the lead file.

2. Being dissatisfied with the judgement and decree passed by the trial court, the applicant filed an application dated 8/3/2021 before the trial court to set aside its judgement and decree which was heard on merits and dismissed by a ruling delivered on 8/6/2021.

3. Still being dissatisfied with the ruling of the trial court of 8/6/2021, the applicant has now approached this court vide an application dated 31/8/2021 seeking the following orders: -

a. Spent;

b. Spent;

c. The court be pleased to extend the time to the applicant within which to prefer an appeal against the ruling and order of the subordinate court dated and delivered on 8/6/2021 in Rongo SRMCC No. 47 of 2018, in terms of the annexed draft Memorandum of Appeal;

d. The court be pleased to order a stay of execution of the judgement and decree of the subordinate court dated and delivered on 3/12/2020 in Rongo SRMCC No. 47 of 2018 pending the hearing and eventual disposal and determination of the intended appeal, on such leave being granted and on such appeal being file on terms as the court shall direct;

e. Costs of this application be in the intended appeal.

4. The grounds upon which the application is premised are found in the body of application and the supporting affidavit of **Maurice Omondi Ng'ayo**, the Legal Officer of the applicant. The applicant is aggrieved by the entire judgement and decree issued in the trial court on 3/12/2020; that on 8/3/2021, the applicant approached the trial court to set aside its judgement and decree which application was dismissed by a ruling dated and delivered on 8/6/2021; that there was a delay in issuing instructions to Counsel to file an appeal against the said ruling since the top management of the applicant were out of the office and they only managed to issue instructions on 23/8/2021; that the applicant intends to challenge the judgement and decretal sum of Kshs. 607,500/= which award cannot be challenged by way of an appeal unless time is extended; that the applicant was not also able to issue instructions on time since their Counsel informed them that the file was missing; that if the orders are not granted, the applicant stands to suffer substantial loss; the applicant is ready and willing to provide security on terms as shall be ordered by the court as condition for stay.

5. The application was opposed. The respondent filed a replying affidavit sworn by **Ezekiel Oduk** learned Counsel for the respondent, dated 5/10/2021. Mr. Oduk deponed that the reasons advanced for failure to file the appeal on time are not truthful as stated in paragraphs 2,6,10,11 of the supplementary affidavit of Maurice Omondi Ng'ayo are contradictory; that the deponent's authority to depone in paragraph 2 from the alleged non-existent board of management has not been disclosed and further, no authorization alluded to in paragraph 11 of the affidavit has been disclosed; that the magistrate supplied typed copies of the ruling upon reading the same in court and not as alleged in paragraph 12; that in response to the missing files, there is no evidence of a written complaint alleging missing files; that the misplaced attack on the merits of the judgement and award is not sufficient cause shown to warrant the court granting leave to appeal out of time and must be ignored; that the applicant has failed to offer good reasons or sufficient cause to enable this court to grant leave to file appeal out of time as the excuse given are untrue and lacking veracity; that the application is incompetent and ought to be dismissed.

6. On 27/9/2021, the court directed that the application be canvassed by way of written submissions. The applicant was to file and serve written submissions within 14 days after service of the replying affidavit by the respondent and a mention was slated for 9/11/2021 to confirm compliance. On the said date, the applicant indicated they were desirous to file a further affidavit and submissions which leave was granted and they were to comply within 14 days and mention was slated for 6/12/2021. On 6/12/2021, despite not being served with submissions by the applicant, the respondent duly complied and a ruling date was reserved for 24/3/2022. As at the time of writing this ruling, the applicant's submissions were not on record. Therefore, this court shall only consider the application and respondent's submissions.

7. The respondent's submissions are dated 5/11/2021. The respondent submitted that the learned trial Magistrate was correct in making a finding that the firm of Okong'o Wandago cannot ask to come on record on behalf of the appellant whereas the firm of M/S Owiti, Otieno & Ragot Advocates was still on record. The respondent relied on the provisions of Order 9 Rules 5 and 9 and submitted that there is no order made in favour of the firm of Okong'o Wandago to come on record on behalf of the applicant in place of the firm of Owiti, Otieno & Ragot Advocates. The respondent relied on the findings in the case of **Camillus Okwiri (Suing as the Administrator of the Estate of Gladys Makokha) vs Matunda Bus Services Ltd (2021) eKLR**.

8. The respondent further urged this court to find that the applicant is not deserving of an order of stay of execution of the decree dated 3/12/2020 because for a stay to be granted, there has to be an existing appeal. Further, there is nothing to be stayed from the order of 8/6/2021 as it is a negative order incapable of being executed; that the propriety of the ruling of 8/6/2021 is not the real cause for filing the application in this court but this application is intended to delay the execution of the decree issued on 3/12/2020. On the issue of leave to file appeal out of time, the respondent submitted that the reasons given do not show sufficient cause as there is no authorization from the Board to show that this appeal should be instituted since there was lack of a board of management.

9. On the allegations of lack of proceedings in the lower court, the respondent submitted that the Counsel in this appeal was not present in the lower court proceedings and they cannot therefore allege that there were missing files; that the memorandum and grounds of appeal are at a complete variance with the reasons and grounds raised in the notice of motion filed in the lower court now sought to be appealed against; that the period of inaction between 8/6/2021 and 13/9/2021 when this application was made has not been sufficiently explained.

10. The main issues to be determined are:-

a. Whether the firm of Okong'o Wandago & Co. Advocate is properly on record;

b. Whether the instant application has been filed without unreasonable delay.

11. On the first issue, I do agree with the respondent submission that there is no authority on record authorizing the firm of Okong'o Wandago & Co. Advocate to come on record in the place of Owiti, Otieno & Ragot Advocates. Counsel relied on the provisions of Order 9 Rule 5 of the Civil Procedure Rules and argued that even for the purposes of review and appeal, the firm which remains on record is the firm of Owiti, Otieno & Ragot Advocates.

12. I have had the benefit of reading the entire ruling by the trial Magistrate dated 8/6/2021, which was in relation to the applicant's application dated 8/3/2021. The applicant asked the trial court to set aside the ex-parte proceedings, the entire judgement and decree of 3/12/2020 to enable it to defend its case and also sought leave for the firm of Okong'o Wandago & Co. Advocate to come on record in place of Owiti, Otieno & Ragot Advocates. The learned trial Magistrate found no merit in the applicant's application and dismissed it. It is clear that the firm of Okong'o Wandago were not allowed to come on record. They have not sought to come on record in this application.

13. On the issue of setting aside the trial court's proceedings, judgement and the firm of Okong'o Wandago & Co. Advocate coming on record in the place of Owiti, Otieno & Ragot Advocates, the trial Magistrate held as follows:-

“In this case, I concur with the Plaintiff's Counsel that the judgement being sought to be set aside was not ex parte as alluded by the applicant. The plaintiff's case was heard and closed on 1/10/2020 the defendant having failed to attend court. The court was satisfied that the defendant's counsel was duly served as per the affidavit on record but chose not to attend Court. the defence case was also closed on the same day. What is on record is that the defendant did not tender any evidence and its case was closed on 1/10/2020...It is clear that the firm Of Owiti, Otieno Ragot are still on record for the defendant and there is no notice of withdrawal of services of the said firm neither is there an order to cease from acting on record leave alone an application to cease from acting.”

14. Order 9 Rule 5 of the Civil Procedure Rules provides:-

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be

considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

15. The trial Magistrate observed that at the time of filing the application dated 8/3/2020, judgement had already been delivered and the firm which was still on record, was the firm of Owiti, Otieno Ragot & Co. Advocates. Having dismissed the application, it means that the firm of Okong’o Wandago were not allowed to come on record. They have not made any application to be placed on record herein.

16. Order 9 Rule 9 of the Civil Procedure Rules provides that where there is a change of advocates after judgement has been passed, such change shall be effected by an order of court or upon filing of consent by the outgoing and the incoming advocates. **Order 9 Rule 10** of the Rules further provides that an application for change of advocates can be combined with other prayers provided that the issue of change of advocate has been determined first.

17. In the application before this court, there is no prayer seeking leave that the firm of Okong’o Wandago & Co. Advocate do come on record in the place of Owiti, Otieno & Ragot Advocates as one of the prayers. There is a clear procedure in law on how change of advocates should be effected post judgement. A company’s resolution to replace its previous advocates cannot override the clearly laid down procedures on change of advocates. It would have been prudent that the firm Okong’o Wandago & Co. Advocates resolve the issue of representation first before embarking on seeking leave to extend time to file an appeal against the ruling of 8/6/2021. As matters stand, the firm of Owiti, Otieno Ragot is the one which is still on record.

Even if the firm of Okong’o Wandago were properly on record I find that the applicant did not move this court timeously. The ruling was delivered on 8/6/2021 and this application was filed on 13/9/2021. No explanation has been offered for the three (3) months delay.

18. From the foregone, the application dated 31/4/2021 is a non - starter, fatally incompetent and bad in law. The same is dismissed with costs to the respondent. The same order shall apply to **Misc. E088 and E089 of 2021.**

DATED, DELIVERED AND SIGNED AT MIGORI THIS 24TH DAY OF MARCH, 2022

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

Mr. Odero for the Applicant Absent

Mr. Oduk for the Respondent

Ms. Nyauke Court Assistant