REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC APPLICATION NO. 7 OF 2020

STANLAUS OTIENO OKUMU...APPLICANT

VERSUS

SUKARI INDUSTRIES LIMITED ....RESPONDENT

RULING

By the Notice of motion dated 23/11/2020 and filed in court on 2/12/2020, the applicant, **Stanlaus Otieno Okumu,** seeks the following orders against the respondent, **Sukari Industries Limited;**

> **1) The applicant be granted leave to appeal out of time against the whole Judgment of Hon. R.K. Langat dated 19/8/2020 in Rongo PMC case No. 138 of 2018.**
>
> **2) That the memorandum of appeal annexed hereto and marked X be deemed as duly filed upon payment of the requisite filing fees.**
>
> **3) Costs of the application be provided for.**

The application is premised on grounds found in the body of the application and an affidavit sworn by Mr. **Ezekiel Oduk**, the applicant's counsel.

It was deponed that the Judgment in respect of the suit PMC No. 138 of 2018 was delivered on 19/8/2020 without notice and in absence of counsel and that the judgment was discovered upon an inquiry made to the registry on 9/1/2021 that the late discovery was due to the Covid 19 pandemic which had caused interruptions in the court operations; that the applicant was aggrieved with the said judgment and instructed counsel to appeal; that though he prepared a memorandum of appeal, the time for filing the appeal had lapsed; that the delay is beyond their control and if the application is allowed, the respondent will not suffer any prejudice. According to the applicant, the judgment raises serious legal issues that need to be considered on appeal.

In opposing the application, David Okoth, the respondent; General Manager, swore a replying affidavit dated 25/2/2021 and filed in court on 11/3/2021. The respondent deponed that the applicant was indolent in that he learned of the dismissal of the suit on 9/11/2020, drew this application on 23/11/2020 and filed it on 2/12/2020 about a month after the said discovery; that the applicant lost inherent in the suit by failing to check on the status of her case regularly; that this court should take judicial notice of the fact that no court of law shut down its operations due to Covid 19 save for scaling down and that Rongo court never locked down for fumigation nor were the staff quarantined; that upon the onset of Covid 19 directions were given by the Chief Justice on how the court operations would proceed and courts were accessible through emails and practice directions as advocates had been asked to avail their emails; that the applicant has not demonstrated by way of correspondence either postal or email addressed to the court or physical visit to the court to enquire about the status of the case. It was also deponed that the appeal has no chance of success because the magistrates court did not have jurisdiction to entertain sugarcane contracts under the Crops Act as held in **Homa-Bay HCC NO. 60 of 2017 Sukari Industries Ltd =Vs= Jeremiah Otieno Wadera** and also in **Court of Appeal CA 256 of 2019 John Oriri Nyandoro =Vs= Transmara Sugar Ltd (2021) e KLR.**

Lastly, it was deponed that the respondent will suffer prejudice due to the inordinate delay in bringing this application and urged the court to dismiss the application.

The court gave directions that the parties file and exchange submissions which they did. The applicant filed their submissions on 22/3/2021 while the respondent filed theirs on 12/4/2021. I have now considered the rival submissions and the affidavits sworn by the parties.

This application is premised on section 79 G and 95 of the Civil Procedure Act which provide for filing of appeals from the subordinate courts and for enlargement of time. Section 79 (G) provides as follows;-

Section 79(G) provides as follows:-

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

Section 95 provides as follows:-

"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time, enlarge such period, even though the period originally fixed or granted may have expired."

In the Court of Appeal in **Gerald Kithu Muchanje =v= Catherine Muthoni Ngare & another (2020) eKLR** set out the principles which courts will consider in applications for leave to extend time as follows;-

Leo Sila Mutiso =vs= Rose Hellen Wangari (supra)

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."(*Emphasis provided).*

The Supreme Court in **County Executive of Kisumu =vs= County Government of Kisumu and 8 others (2017) e KLR** set down the following principles to guide the court in excising its discretion any powers to extend time.

"Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The court delineated the following as:

The under-lying principles that a court should consider in exercise of such discretion:

1. 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;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

See also **Nicholas Kiptoo Arap Korir Salat =vs= IEBC and 7 others** (SC Application 16 of 2014).

In this case, the suit was dismissed on 19/8/2020. The applicant claims to have found out about the dismissal on 9/11/2020 which was about 2 ½ months after the delivery. This application was then filed on 21/12/2020. The lower court record is not before this court and it is not possible for this court to know what transpired. Generally, it seems that the notice of the judgment was not served on the applicant because there was no evidence to that effect. The respondent has not provided any contrary evidence to show that the applicant was notified of the delivery of the judgment. This court is aware of the Covid 19 Pandemic situation in this country and its effect on the court operations.

At the onset of Covid Pandemic in March 2020, the courts actually closed down and thereafter operations were down scaled with some courts closing down for either fumigation or where some staff got infected. Unfortunately, I am not in a position to take Judicial notice of the fact that Rongo court never closed down. Different courts went through their own special circumstances at different times. I do appreciate the fact that practice directions were given whereby counsel were to avail email addresses for purposes of communication. I cannot confirm if the applicant did this or not and counsel has not availed any such evidence. On the whole however, I do appreciate, there was some confusion regarding notices especially in delivery of rulings and judgments that were to be delivered in most of 2020. The bottom line however is that, there is nothing to show that the court served notice on the applicant which is mandated to. I would echo the decision of **Ngoso General Contracts Ltd =vs= Jacob Gichunge CA 248 of 2001 (2005) I KLR 737** where the court said;

"The failure by the Superior Court Judge in an application for extension of time to file an appeal, to consider, as a matter of law, whether the Appellant, who was admittedly absent when the Judgement was delivered, was served with notice of

delivery of the Judgement was a misdirection…The law under Order 20 R 1 is explicit in terms and mandatory in tone that a Judgement which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates and where only the successful party in the Judgement had prior knowledge of the delivery of the Judgement and no apparent reason was advanced for the failure to serve or to attempt to serve the Appellant or his advocate, the Appellant's right of appeal was grossly compromised…..

An order was made by the Magistrate granting a right of appeal within twenty (28) days and directing the party in attendance to inform the other side does not cure the flagrant breach of the mandatory procedural rule which accords with fundamental rules of natural justice and the right to be heard which the Constitution safeguards."

I do agree with the respondent's submissions that the applicant had a duty to follow up with case to find out whether or not the judgment was delivered from the date the court reserved it. The above notwithstanding, the court had a primary duty to give notice to the parties which it seems, was not given.

In my considered view, I would find that when considering the period of delay, the time must be reckoned from 9/11/2020 the date the applicant found out about the delivery of judgment to the filing of this application on 2/12/2020 which is about 22 days. In my view the delay was not unreasonable.

As to whether the draft memorandum of appeal raises triable issues, I cannot at this stage determine that issue because the court has not had an opportunity to see the lower court file or even the judgment alone. However, a perusal of the draft memorandum of appeal shows that the judgment dealt with the issue of jurisdiction which is a serious triable issue.

Whether the respondent will suffer any prejudice;

Though the respondent deposed that he will suffer prejudice, he did not disclose the nature of prejudice. If the appeal is dismissed in the end, the respondent will be compensated in terms of costs.

In the end, and balancing the rights of both parties, I find that the applicant deserves to exercise her right of appeal and I allow the application and make the following orders; -

1. **The application has merit and is hereby allowed;**

2. **The annexed draft memorandum of appeal is deemed to be duly filed and served upon payment of requisite filing fees within 7 days hereof;**

3. **This order be served on the Executive Officer Migori Court who should have the proceedings typed and served on the appellant's counsel within 30 days hereof;**

4. **Upon receipt, the applicant to file and serve Record of Appeal within 14 days;**

5. **Costs to be in the cause;**

6. **Mention before Deputy Registrar on.**

Dated and signed at Migori this 30th day of June, 2021

R. WENDOH

JUDGE

Ruling delivered in the presence of:

Ms. Nyauke court assistant

Counsel absent though they had been notified of the date for delivery by email.