



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS CIVIL APPLICATION NO.239A OF 2019

ASHAR AUTO SPARE & HARDWARE.....PLAINTIFF/APPLICANT

-VERSUS-

ROY PARCEL LTD.....DEFENDANT/RESPONDENT

RULING

1. This is a ruling on application dated 5th April 2019. It seeks leave to appeal out of time. The application is supported by affidavit of **Mongare Gekonga Advocate** counsel for the applicant herein.
2. Grounds on the face of the application are that the applicant filed suit No. CMCC No.346 of 2013, which was fully heard, and judgment delivered on 13th December 2018; that the applicant is desirous of filing appeal as regard interest on costs; that the application is made in good faith and expeditiously.
3. He averred that after hearing the matter was slated for judgment on 6th December 2018 but was not delivered as scheduled and on 7th December 2018, they closed offices for December holidays and resumed in January 2019. He attached a copy of notice. He added that on resuming, he got a letter from the firm of **Murimi Ndumia** indicating that judgment was delivered on 13th December 2018.
4. He averred that after learning of delivery of judgment he wrote a letter for payment with their computation of costs and interest to the defendants and gave them grace period to pay. He attached a copy of the letter.
5. They received a cheque with forwarding letter from the defendants, which indicated that interest was awarded from the date of delivery of judgment, and not date of filing suit. He attached the said letter.
6. That the client upon learning on the order on interest and being aggrieved by the same instructed counsel to file appeal. He averred that the applicant has arguable appeal with high chances of success.
7. In response, the respondent filed replying affidavit sworn by Paul Murimi Kiongo Advocate sworn on 6th June 2019. He averred that the terms of judgment were relayed to the court on 13th December 2018 hence the applicant Advocate's letter dated 13th December 2018 advising Advocates for the respondent of the judgment; that the applicant's contention that they were not aware of the judgment until January 2019 contracts their earlier assertion in paragraph 4 of the supplementary affidavit that they were aware of the judgment.
8. He averred that the applicant received the entire decretal sum on 26th February 2019 without raising an issue and the respondent will be highly prejudiced if the applicant is allowed to turn around through an application filed on 9th April 2019; one and half months after receiving the decretal sum.

ANALYSIS AND DETERMINATION

9. I have perused the annexures to affidavit filed and confirm that judgment in CMCC No.346 of 2013 was delivered on 13th December 2018 and that counsel for the plaintiff was absent.
10. Annexed internal notice by counsel for the applicant indicate that their offices were closed from 7th December 2018 to 7th January 2019. I however note that the letter to the defendant's Advocates is dated 13th December 2018.
11. Counsel for the applicant submitted that the date in the letter to defendants Advocate is incorrect, as they had closed offices. He submitted that they received the letter from defendant's Advocates on 27th February 2019.

12. I note from the defendant's letter to the applicant's Advocates that there is no mention of the letter dated 13th December 2018. If by that time the applicant's Advocate had sent the letter to defendant's Advocate, I believe they would have referred to it in the letter dated 27th February 2018.

13. In view of the above I find that the applicant has given sufficient explanation for delay in filing appeal.

14. From the foregoing, I find that the delay is excusable and that the applicant deserve opportunity to be heard on appeal.

15. FINAL ORDERS

1. Application dated 5th April 2019 is allowed.
2. Each party to bear own costs of this application.

Ruling dated, signed and delivered at Nakuru this 30th day of January, 2020

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

Kiberenge Counsel for applicant

Mr. Otieno holding brief for Murimi Counsel for respondent