



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISCELLANEOUS CIVIL APPLICATION NO. 3 OF 2020

BETWEEN

IMA HAULIERS LIMITED..... APPLICANT

AND

JAMES OMONDI AMONDE.....RESPONDENT

RULING

1. **Ima Hauliers Limited**, the applicant herein moved the court by way of Notice of Motion dated 18th January 2020 under Order 46 Rule 6 and Order 50 rule 6 of the Civil Procedure Rules and Sections 3A & 79 (G) of the Civil Procedure Act. The following orders are being sought:

a) That the execution of the decree in Busia Chief Magistrate's Court civil case number 241 of 2018; Ima Hauliers Limited vs. James Omondi Amonde (Suing as the legal administrator of the estate of Dorice Akinyi – Deceased) be and is hereby stayed pending the hearing and determination of this application *inter-partes*.(Spent)

b) That the applicant be and is hereby granted leave to file an appeal out of time against the judgment and decree of Busia Chief Magistrate's Court civil suit NO.2431 of 2018; Ima Hauliers Limited vs. James Omondi Amonde (Suing as the legal administrator of the estate of the estate of Dorice Akinyi – Deceased) be and is hereby stayed pending the lodgment hearing and determination of the appeal to be filed in the High Court of Kenya at Busia.

c) That the execution of the decree in Busia Chief Magistrate's Court civil suit NO.241 of 2018; Ima Hauliers Limited vs. James Omondi Amonde (Suing as the legal administrator of the estate of Dorice Akinyi – Deceased) be and is hereby stayed pending the lodgment hearing and determination of the appeal to be filed in the High Court of Kenya at Busia.

d) That costs of this application be provided for.

2. The application is premised on the following grounds:

a) That judgment in Busia Chief Magistrate's Court civil suit NO.241 of 2018; Ima Hauliers Limited vs. James Omondi Amonde (Suing as the legal administrator of the estate of the estate of Dorice Akinyi – Deceased) was delivered on the 29.10.2019 without notice to the applicant/the applicant's advocates.

b) That the applicant intends to lodge an appeal out of time, against the judgment of the trial magistrate delivered on 29.10.2019.

c) That the applicant's advocates learnt of the judgment on 29/11/2019 when their representative attended court to find out the position.

d) That subsequently, upon being informed of the judgement on 02.12.2019 the applicant's insurers pointed out that they would have internal deliberation on whether to appeal or not and only gave instructions to appeal on 16.01.2020.

e) That the delay in filing the appeal is excusable and has been explained.

f) That the appeal intended to be lodged has high chances of success on quantum.

g) That the delay occasioned in presenting this application is not inordinate.

h) That the respondent/decree holder herein is a person of straw as per his evidence in court and as such if the decretal amount is paid to him the intended appeal will be rendered nugatory as it will be well-nigh impossible to recover the decretal amount from the plaintiff/respondent/decree holder if the intended appeal succeed.

i) That the applicant is willing to furnish such security as the Honourable Court may order for the due performance of the decree.

j) That it would be in the interest of justice for the orders prayed to be granted.

3. The application was opposed by the respondent on the following grounds:

a) That the application is misconceived, bad in law and an abuse of the Court process.

b) That the application albeit riddled with contradictions; it is meant to extremely prejudice the respondent in an otherwise concluded litigation.

c) That the application does not raise any triable issues and is premised on the wrong provisions of the law.

d) That despite the application not meet the requirements upon which it is alleged to be brought; The applicant is guilty of laches.

e) That the said affidavit is fatally defective and contrary to the provisions of Order 19 Rule 3 of The Civil Procedure Rules.

4. I have perused the original file in CMCC. NO.241 of 2018 and the following were noted:

a) That on 15th October 2019 Mr. Balongo held Mr. Njoga's brief. Mr. Njoga was the advocate for the defendant, the applicant herein. Mr. Balongo informed the court that the defendant had filed submissions and requested for a judgment date. The learned trial magistrate scheduled the judgment for 29th October 2019.

b) The judgment was delivered on 29th October 2019.

5. The applicant is therefore not truthful to claim that the judgment was delivered without notice. The delay to file an appeal is not justified and has not been adequately explained.

6. Mathew Okiring who swore the supporting affidavit described himself as a legal officer with Occidental Insurance Company. The company was not a party in the Busia CMCC. case No. 241 of 2018. He therefore lacks *locus standi* to give instruction for appeal therein.

7. This application therefore lacks merit and the same is dismissed with costs.

DELIVERED and SIGNED at BUSIA this 27th day of February, 2020

KIARIE WAWERU KIARIE

JUDGE