**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

Coram: D. K. Kemei – J

**MISCELLANEOUS CIVIL APPL. NO. 288 OF 2019**

**ALFA HAULAGE LIMITED.......................................................APPLICANT**

***VERSUS***

**CHRISTOPHER KYEVA NZIOKA..........................................RESPONDENT**

**R U L I N G**

1. The Applicant herein filed an application dated 26/06/2019 seeking several reliefs *inter alia*: *that the Applicant be granted leave to lodge an appeal out of time against the judgement in* ***Mavoko PMCC No. 1 of 2015*** *delivered on 10/08/2016; that upon grant of such leave the Memorandum and Record of Appeal be deemed as duly filed; that an order of stay of execution be granted pending the determination of the intended appeal.*

2. The application is supported by an affidavit sworn by a director of the Applicant on even date. The Applicant's case is that its former Advocates made some bonafide mistake when they failed to file a notice of appeal against the judgement of the trial court and instead pursued a review application and an appeal on a ruling thereon both of which were dismissed for lack of merit. It was further averred that the Applicant's is now desirous of pursuing an appeal against the judgement of the trial court. It was also averred that the inadvertent delay is highly regretted and that the mistake by counsel should not be visited upon the Applicant. It was finally averred by the Applicant that it is willing to furnish such reasonable security as may be imposed and that the Respondent is not likely to suffer any prejudice if the request is granted.

3. The application was opposed by the Respondent who filed a preliminary objection and a replying affidavit dated 12/09/2019. It is the Respondent's case that the Applicant's review application before the trial court as well as an appeal on the ruling thereon having been dismissed and in the absence of an appeal against the trial court's judgement then the present application is an abuse of the court process. It was further the Respondents case that the issues sought to be agitated in the intended appeal had already been determined by a court of competent jurisdiction vide the application for review and the subsequent appeal; Finally it was the Respondent's view that litigation must come to an end since the Applicant is out to subject the Respondent to repetitive litigation over the same matter.

4. Parties agreed to canvass the application by way of written submissions. However it is only the Respondent's counsel's submissions that are on record. Learned counsel raised three (3) issues for determination; *whether the Applicant's counsel is properly on record; whether conditions for enlargement of time to appeal have been met* and *whether stay of execution can be granted*. On the first issue, counsel submitted that the present advocates for the Applicant have not sought the court's leave to come on record in place of the Applicant's former Advocates Njeri Lukorito & Mungai and Rahma Jillo Advocates as provided under Order 9 Rule 9 of the Civil Procedure Rules and therefore the present application should be dismissed. On the issue of enlargement of time to appeal it was submitted that the Applicant having opted to apply for review and an appeal thereon then it is now barred from attempting an appeal on a matter that was properly dealt with. On the issue of stay of execution it was submitted that there has been unreasonable delay on the part of the Applicant and no sufficient cause therefor has been presented.

5. I have considered the application and the rival affidavit as well as the submissions presented herein. I find the following issues necessary for determination namely:-

***(i) Whether the Applicant's advocates are properly on record.***

***(ii) Whether the Applicant has demonstrated sufficient reasons justifying the extension of time to lodge appeal.***

***(iii) Whether stay of execution should be granted.***

6. As regards the first issue, it is noted that the Applicant's Advocates filed a notice of appointment of Advocate dated 26/06/2019 contemporaneously with the application. The Applicant vide its supporting affidavit confirmed that it had been represented by the firms of

Njeri Lukorito and Mungai and Rahma Jillo Advocates. The court matter had proceeded to judgement in the trial court and therefore any change of advocates ought to be conducted in strict compliance with order 9 rule 9 of the Civil Procedure Rules which provides as follows:-

> ***"When there is a change of Advocate; or when a party decides to act in person having previously engaged an Advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court:-***
>
> ***(a) upon an application with notice to all parties; or***
>
> ***(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be."***

Apart from the Notice of Appointment of Advocate by the present Advocates for the applicant there is no other document such as a consent duly signed by the said Advocates and the Applicant's former Advocates. In the absence of such a consent then the Applicant's Advocate ought to have sought leave from the court. The provisions of Order 9 rule 9 of the Civil Procedure Rules is couched in mandatory terms by use of the word "**shall"**. No reasons has been given by the Applicant's counsel as to why the above provision was not complied with. I wish to associate myself with the sentiments of Odunga – J in the case of **Lalji Bhimji Shangani Builders & Contractors –vs- City Council of Nairobi** when he held as follows:-

> "***A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the such objective for assistance and where no explanation had been offered for failure to observe the rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate."***

The Applicant's application having been lodged by counsel who has not sought leave to come on record for the Applicant, then I find the said Advocates are not properly on record. The application is thus incompetent before this court.

7. As regards the second issue, I note that the Applicant's application is premised on Section 79G and 95 of the Civil Procedure Act which provides for the filing of appeals from the subordinate courts and for enlargement of time respectively. Section 79G provides as follows:-

> ***Every appeal from a subordinate court to the High court shall be filed within a period of thirty (30) 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 of the said Act 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 to time, enlarge such period, though the period originally fixed or granted may have expired."***

The Applicant herein has given a chronology of the events from the time the trial court delivered its judgement on 10/08/2016. The Applicant averred that upon the delivery of the said judgement its then Advocates filed an application for review and setting aside of the same. The trial court dismissed the same vide its ruling dated 6/12/2017. The Applicant then lodged an appeal against the said ruling and this court dismissed the said appeal on 30/05/2019. The Applicant seems to suggest that the time had been spent in prosecuting the review and the appeal and now wants to get back to the stage of the lower court judgement and pursue an appeal against the same. The Applicant is beseeching the court to excuse the mistakes of its former Advocate and give them a chance to lodge appeal out of time. The Applicant is approaching this court after a period of about three (3) years from the date the judgement of the trial court was delivered. That appears to me to be quite unreasonable in view of the fact that the Applicant had been aware of the matter all along. The Applicant's explanation that the delay was due to the fact that it was prosecuting a review process is not sufficient. It seems the Applicant had opted to go the review way and abandoned an appeal and therefore the subject matter of the review is already spent and an appeal on the initial judgement is not now tenable.

The Applicant's review application presented to the trial was under the provisions of Section 80 of the Civil Procedure Act and Rule 45 of the Civil Procedure Rules. The trial court rejected the review application as it found that the Applicant had not satisfied the conditions imposed by the above two provisions.

Section 80 of the Civil procedure Act provides:-

"Any person who considers himself aggrieved:-

> ***(a) By a decree or order for which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***(b) By a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."***

Order 45(2) of the civil Procedure Rules provides:-

***"A party who is not appealing from a decree or order may apply for a review of judgement notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when being respondent, he can present to the appellate court the case on which he applies for the review"***

From the above provisions, it is clear that a party cannot apply for review and appeal from the same decree or order. In the present circumstances of the Applicant, the fact that its review application having been rejected by the trial court and this court on appeal it cannot now seek to lodge appeal against the same order he had sought review against. Suffice to add here that this court had already dismissed an appeal against the trial court's refusal to grant the application for review. The Applicant has alluded to this court's judgement dated 30/05/2019 as giving it a leeway to mount an appeal. Indeed this court had pointed out the fact that the Applicant would not be condemned unheard but will be given an opportunity to explain itself. If it has now taken up the gauntlet then I expected it to offer a sufficient explanation for failing to lodge the appeal within the stipulated period. As noted above the period of three (3) years is unreasonable delay. Again the explanation that the delay was due to the prosecution of the review application and an appeal against the trial court's ruling thereon is not plausible. In any event the Applicant having opted to seek review instead of an appeal against the trial court's judgement cannot now turn around and seek to appeal against the same order it had sought to review. The Applicants conduct is akin to one playing lottery with the court processes and which should not be entertained. Consequently, I find that the Applicant has not presented sufficient reasons to warrant an order of extension of time to lodge appeal out of time. The Respondent stands to suffer prejudice as the Applicant could not expect the Respondent to just wait for it to finalize the review and then come back for the appeal. That is unconscionable as it cannot have its cake and eat it.

8. As regards the third issue Order 42 Rule 6(2) of the Civil Procedure Rules provides conditions to be satisfied by anyone seeking for stay pending appeal as follows:-

"No order for stay of execution shall be made under sub rule (1) unless –

> ***(a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and***
>
> ***(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."***

The Applicant has brought the application three years after the judgement of the trial court was made. As noted above no good explanation has been furnished by the Applicant as to why it took them that long to make this move. The claim that it was busy prosecuting an application for review and appeal thereon is not convincing at all since it is obvious that they knew about the requirements for lodging an appeal yet they decided not to. On the aspect of substantial loose the Applicant has not availed any evidence to that effect. On the issue of security the Applicant undertook to furnish the same upon terms to be imposed. The Applicant having opted not to pursue an appeal and choose to lodge review, I find the appeal's chances of success minimal on the grounds that the issues had already been ventilated through the review application and appeal thereon. There is also no evidence that such a request for stay of execution has been placed before the trial court for consideration. In the premises, I find that the request for stay is not merited.

9. The upshot of the aforegoing is that the Applicant's application dated 26/06/2019 lacks merit. The same is dismissed with costs to the Respondent.

**Orders accordingly.**

**Dated and delivered at Machakos this 29th day of May, 2020.**

**D. K. Kemei**

**Judge**