



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**MISC.APPLICATION NO. 33 OF 2019**

**CHARLE AGENCIES LTD.....APPLICANT**

**VERSES**

**EXAKTA AGENCIES LTD.....RESPONDENT**

**RULING**

1. The Notice of Motion dated **6<sup>th</sup> May, 2019** by the Applicant prays for orders that this court be pleased to enlarge the time for the filing of the intended appeal against the respondent and that there be stay of execution in Kitale CMCCC No. 269 of 2014 pending the outcome of this application and the main appeal.
2. The said application is supported by the affidavit of **David Cullen** the Director of the Applicant's company. In it he has said that judgment in the lower court was delivered on 12<sup>th</sup> April, 2019 and being dissatisfied he instructed his counsel on record to file an appeal. The counsel did not file the same within the requisite time despite writing to the court to supply him with the proceedings.
3. He contended that the amount in issue is Kshs.895, 165 plus costs and interest. He said that the Applicant has a good appeal given chance and that should it not be allowed it stands to suffer loss and damage. He further prays that the Respondent stands to suffer no loss as the Applicant is ready to provide a bank guarantee in any event.
4. He says that it was a trite law that the mistake of counsel should not be visited on the client. That the mistake of not filing the appeal on time was excusable and he attached a draft Memorandum of Appeal.
5. The Respondent vide the grounds of opposition dated 13<sup>th</sup> May, 2019 has argued that the said application is a total abuse of the court process as the same has been filed by a different law firm contrary to the provisions of Order 9 rule 9 of the Civil procedure Rules namely that they ought to have sought the leave of the court.
6. The Respondent has further stated that there was another application of similar nature pending at the trial court which was yet to be determined and that there was no appeal pending in court yet.
7. The parties were then required to file written submissions which they did and I do not see the reasons to reproduce them here.
8. The issues that ought to be determined are two. The first is whether the firm of **Wachira Wekhomba AIM & Associates** are properly on record. Should they have sought the leave of the court before filing the current application seeing that they did not act for it in the main case?
9. Secondly is whether the application meets the threshold laid down under the provisions of Order 50 of the Civil Procedure Rules.
10. On the first ground , a reading of Order 9 rule 9 of the Civil Procedure Rules presupposes that one ought to seek the leave of the court in a continuing suit and in that specific court. In the case at hand what is before this court is an appeal process and not a continuing or a concluded suit within the same or similar court.
11. Strictly speaking, an appeal is a new suit and a party can choose to employ the services of another fresh counsel as with the case at hand or simply continue with the same counsel. In the instant case the firm of Samba & Co, acted for the Applicant at the trial court and not the current firm. The new firm could seek the leave of the court at the lower court if it intends to act for the Applicant there but not on an appeal stage.
12. Has this application been brought inordinately late? From the date of the delivery of the decision of the trial court and the date of this application and by extension the expiry of the mandatory 30 days, the same is less than 60 days. The same in my view is not inordinate as envisaged by the rules.

13. There is a letter attached to the affidavit which requested for the proceedings dated 12<sup>th</sup> March, 2019 and received by the court on the 14<sup>th</sup> March, 2019. The said letter was written within the reasonable time. In the premises I do not find much delay.

14. Does the Applicant deserve the orders of stay pending appeal which it has sought? I do not think so for the reason that the appeal is yet to be filed and more importantly there is no threat of execution exhibited to this court. It was not in fact disputed by the Applicant that there was another application pending before the trial court which was yet to be determined.

15. For the foregoing reasons, the applicant is hereby granted 14 days from the date herein to file and serve the Memorandum of Appeal. The costs of this application shall go to the Respondent.

16. Orders accordingly.

**Dated, signed and delivered in open court at Kitale this 26<sup>th</sup> day of June, 2019.**

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**H. K. CHEMITEI**

**JUDGE**

**26/6/19**

**In the presence of:-**

**Wabomba for Applicant**

**Nyakundi for Respondent**

**Court Assistant – Kirong**

**Ruling read in open court.**