



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CIVIL APPLICATION NO. 151 A OF 2018

KOFINAF ESTATE LIMITED.....APPLICANT

VERSUS

SUSAN WANJIRU MAINA.....RESPONDENT

RULING

1. This is an application by way of Notice of Motion filed by Kofinaf Estate Limited 1st October, 2018 and expressed to be brought under Section 1A, 1B, 3B and 79G of the Civil Procedure Act, 2010, Order 51, seeking an order to file an appeal out of time against the orders of the learned Senior Principal Magistrate made on 20th August, 2018 in **GATUNDU SPMCC NO. 10 of 2014 SUSAN WACHIRA v KOFINAF COMPANY LIMITED**, dismissing its application.

2. The application is based on the ground that the Applicant is dissatisfied with the order dismissing its applications and intends to appeal against the said entire order.

3. The application is supported by the affidavit of **TREZA NJERI MWAURA** the advocate with the conduct of this matter on behalf of the Applicant. She deposed that judgment in the lower court was delivered on 13th December, 2017 and that the order which they intend to appeal against was made on 20th August, 2018 and therefore time within which to lodge an appeal has lapsed. She deposed that the Applicant was never served with the notice of entry of judgment and only learnt of the judgment when it was served with the warrants of attachment. That the Applicant filed an application seeking orders to stay execution, which application was dismissed for non-attendance; that counsel had a motor vehicle break down, hence the non-attendance She contended that the Applicant will be greatly prejudiced if this application is not allowed as the appeal a high probability of success and that no prejudice will be suffered by the Respondent.

4. **MAGDALENE NYOKABI WAIGANJO**, counsel for the Respondent filed a replying affidavit on 6th March, 2019, in opposition to the application. She deposed that the Applicant failed to file its defence in the lower court and judgment was entered against them, and that their subsequent application for stay of execution, *inter alia* was dismissed for non-attendance on the part of the Applicant. It was stated that the Applicant ought to have timeously lodged an appeal against the decision of the trial court. The delay was said to be unreasonable and without a plausible explanation. The court was urged to allow the Respondent to enjoy the fruits of her judgment.

5. The court directed that the application be disposed of by way of written submissions. The Applicant through its advocate submitted that courts have unfettered discretion to extend time to file an appeal out of time as stated in **Kenga Cheupe v China Jiangxi International Kenya Limited (2019) eKLR**. Counsel submitted that the reason for delay in filing the appeal was due to the urgent need to address the impending threat of execution. It was submitted that the appeal has high chances of success and that the Respondent has not demonstrated that she will suffer any prejudice. It was contended that justice can still be done between the parties as stated in **National Bank of Kenya Ltd & another v Solomon Ndibui Ngechu (2019) eKLR**.

6. The Respondent's counsel submitted that the Applicant is guilty of laches as it failed to enter appearance and defend the suit and only filed an application for stay of execution seven months after judgment. Counsel submitted that the instant application is an abuse of the court process and a blatant disregard of procedure laid down in the law. Lastly, it was contended that the delay in filing the appeal is inordinate and no explanation has been given and that, in any event, it lacks merit. As such the court was urged to dismiss the instant application.

7. The court has considered the matters canvassed in respect of the motion filed on 1st October 2018. In order to put the motion in perspective, I find it necessary to restate the relevant history. The Applicant herein first approached the court by way of a notice of motion seeking to stay execution of the judgment of the lower court pending hearing of the application that was slated for hearing on 20TH August 2018 before the lower court.

8. This court in exercise of its discretion did grant stay, and ordered that the decretal sum be deposited into court, pending *inter partes* hearing of the second prayer therein to stay execution pending hearing determination of the lower court suit. Seemingly this prayer was abandoned and rightly so, as it was predicated on the outcome of the application to set aside the *ex parte* judgment pending in the lower court. Had the said motion failed or succeeded the prayer would still have been rendered otiose. As it turned out later, the Applicant did not

attend the hearing of its application to set aside the lower court's *ex parte* judgment. The said application was dismissed on 20th August 2018 for non-attendance.

9. Rather than apply to set aside the said order, the Applicants approached this court again *via* the application filed on 6/9/18. By the said application, the Applicant principally sought an order to compel the lower court to reinstate the dismissed application and to extend stay of execution in the meanwhile. **Kimaru J** granted the latter prayer and directed that the order was to last until 3/10/18 by which date, the Applicant was required to file an application to enlarge time to file an appeal.

10. The said application was filed on 1st October 2018 and is the subject of this ruling. The sole prayer is for leave to file an appeal out of time in respect of the dismissal order by the lower court, made on 20th August 2018. The affidavits and submissions filed leave no room for doubt that the Applicant's motion before the lower court was dismissed on 20th August 2018 for non-attendance by the Applicant, and not on merit. That being the case, the proper course of action for the Applicants ought to have been to file a motion before the lower court for reinstatement of dismissed motion. Under Order 51 rule 15 of the Civil Procedure Rules a court that makes an *ex parte* order may be moved to set aside such order. In this case, the proper court before which such application as filed on 5th September 2018 ought to have been made is the trial court. Only upon the dismissal of such application should the aggrieved Applicant approach this court on appeal.

11. I note that the draft memorandum of appeal annexed to the supporting affidavit as annexure "**TWM – 8**" purports to not only challenge the *ex parte* dismissal order, but also other previous orders made by the trial court, which are not the subject of the prayer for leave contained in the instant motion. Suffice to say that, the motion for leave to appeal out of time is misconceived, there being no substantive ruling made in respect of the dismissed application, a fact that was apparently concealed in the affidavit sworn in support of the motion, giving the impression that a considered ruling may have been given by the court on 20th August 2018.

12. In the circumstances, this court is of the view that the applications filed on the 1st October 2018, and on 5th September 2018 are both misconceived and bad in law. The same are struck out with costs. As the application filed on 1st August 2018 is also spent, there can be no further justification for retaining the sums deposited into court by the Applicant as condition for stay, pending the hearing of the application in the lower court. The court therefore directs that the said monies be released to the Applicant's advocates.

DELIVERED AND SIGNED AT KIAMBU THIS 20TH DAY OF DECEMBER 2019

C. MEOLI

JUDGE

In the presence of:

No appearance for Applicant

Non-appearance for the Respondent

Court Assistant Nancy