

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 576 OF 2016

KABUNDU HOLDINGS LIMITED.....APPLICANT

VERSUS

RICHARD M. GITHUL.....RESPONDENT

RULING

1. There is before court a Notice of Motion dated 14/9/2016 seeking orders that the leave be granted to the Applicant to file an appeal against the decree and judgment delivered on 18/12/2014 and that the Memorandum of Appeal dated 14/9/2016 exhibited in the Affidavit in support be deemed duly filed.

2. The reasons given is that the Applicant was never informed of the judgment date and only come to learn about it through an application dated 29/7/2016. Those facts and reasons are reiterated in the supporting Affidavit of PATRICK MUKIRI KABUNDU with an added fact that Hon. L. Achode had on 5/12/2003 made a decision in the trial after which the file disappeared only to be reconstructed at the instance of the Respondents' advocate, some 7 years later.

3. After the file was reconstructed parties filed other papers including submissions and a judgment was reserved for the 31/10/2014 but was never delivered because on 11/12/2014 the court sent a judgment notice to the defendant(now applicant) indicating it would be delivered on the 18/12/2014. However the Applicant says it did not learn about the judgment till he was served with the Application dated 29/7/2016.

4. That application was opposed by the Respondent who filed grounds of opposition blaming the application for being an afterthought, having not revealed any good reasons for the delay, that the appeal raises no arguable issue and that the sole intendment is not to comply with the court orders.

5. Parties filled written submissions on 21/4/2017 by the applicant and on 15/5/2017 by the Respondent. In the submissions, the Applicant is adamant that the ruling sought to be appealed against was delivered on the 18/12/2014 but contrary to the Application and the Affidavit in support, the Applicant now contends that there was no notice or evidence of service upon it. In addition it was contended that the judgment delivered by Hon. Wasike was bad in law for being in contradiction with the ruling of Hon. Achode dated 5/12/2003.

6. The Respondent on its side says nothing much rather than that the application is bad for having been brought after undue and inordinate delay with the sole purpose to delay the conclusion and determination of the dispute between the parties.

7. There are two issue in this matter for the court to determine. The first is whether there is need for leave to file an appeal from a judgment finally determining a dispute between the parties. I understand the law to be that a judgment that determines the dispute between the parties finally on the merits attracts an appeal as of right. To that extent there is no justification for the Applicant to seek leave and there is not jurisdiction on the court to grant a right that is by law vested in the Applicant. To that extent I would dismiss the Application for being misconceived and does not lie.

8. However, noting that the Applicant acting in person, I may give him the benefit of the doubts that what he actually intended to pray for is enlargement of time to file an appeal. That is a discretion given to court to be exercised widely and in unfettered manner so as to meet the interests of substantial justice so that a deserving litigant is not shut from the seat of justice. However, where there is a default by a party, the

duty is on such a party to explain the default in a manner the court finds plausible. In giving explanation the party is expected to be honest and candid and to be convincing on his reason for not having acted in time.

9. In this matter, the Applicant itself says it was served with a notice dated 11/12/2017 but does not explain why it did not attend at the delivery of the Judgment took no steps for more than 1 ½ years to take steps till he was served with the application dated 29/7/2016. When there is no explanation there is no discretion to be exercised because a court of law exercises its discretion based on facts and reason.

10. The second consideration is the nature of the Appeal sought to be pursued – Does it present any arguable points? The only reason the Applicant faults the decision by the trial court is that it contradicts a finding by a ruling delivered some 11 years before. I do find that the ruling by Hon. Achode dated 5/12/2003 was on an interlocutory application and it says that the application was dismissed. It was not on the merits of the case so as to invite the doctrine of res judicata. Without delving into the merits of the intended appeal. I am unable to find that it presents an arguable appeal and therefore even on this second consideration the Application cannot succeed but must fail.

11. For those reasons, the application dated 14/9/2016 is found to lack merits and is therefore dismissed with costs.

Dated and delivered at Mombasa this 21st day of February 2018.

P.J.O. OTIENO

JUDGE