



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NUMBER 41 OF 2018**

**RONALD AMASA ..... 1<sup>ST</sup> APPLICANT**

**WEST KENYA SUGAR CO. LTD ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**WYCLIFFE MBOTE KIPANGA ..... RESPONDENT**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**RULING**

**The Application**

1. The application coming up for determination is the Notice of Motion dated 30<sup>th</sup> April, 2018 and filed in court on 2<sup>nd</sup> May, 2018. The applicants therein seek orders:-

a) Spent

b) That the Honourable Court be pleased to issue an order of stay of execution of the decree and judgment in *Butali SPMCC No. 79 of 2016 (Wycliffe Mbote Kipanga versus West Kenya Sugar Co. Ltd & another)* pending the hearing of this application.

c) That the honourable court be pleased to grant the applicant leave to file appeal out of time, from the decree and judgment in *Butali SPMCC No. 79 of 2016*.

d) That costs of this application be in the cause.

2. The application which is brought under Sections 3A, and 39G of the Civil Procedure Act Cap 21, order 42 Rule 6 of the Civil Procedure Rules (2010), Articles 50 and 159 of the Constitution of Kenya 2010, and all other enabling provisions of the law is premised on twelve grounds which are set out on the face thereof and is also supported by an affidavit sworn by Paul Kibet, the legal officer of APA Insurance Company. The supporting affidavit is dated 30<sup>th</sup> April, 2018 and has a number of documents annexed to it; including a draft memorandum of appeal.

3. Among the grounds raised in support of the application are that the applicants were not privy to some vital information about the suit after investigations were concluded long after delivery of the judgment, that it will take a long time securing the decree from the lower court and that the intended appeal has merit as it raises triable issues. Finally the applicants say they are ready to abide by whatever terms the court may impose for the due performance of the stay order.

**Response to the application**

4. The respondent filed a Replying Affidavit on 14<sup>th</sup> May of 2018 by which he opposes the application. He depones that the judgment of the trial court was delivered on 5<sup>th</sup> March, 2018 and communicated to the applicant's counsel on the same day vide a letter dated 5<sup>th</sup> March, 2018. The deponent also avers that no reason has been offered by the applicant as to why it took the applicant more than one month to file the instant application despite being advised by their advocates on record of the judgment of 5<sup>th</sup> March, 2018 and a reminder to them dated 26<sup>th</sup> March, 2018. The respondent contends that the applicant has been lethargic in dealing with this matter and has also demonstrated a clear lack of seriousness on its part as there is not even one single letter on record addressed to the trial court requesting for typed proceedings. Further, that the applicant has not demonstrated to the court that the intended appeal has high chances of success. Finally, the

respondent depones that this application is brought in bad faith, particularly in light of applicant's counsel letter dated 5<sup>th</sup> April, 2018 asking for indulgence of seven (7) days to enable the applicants' insurer process payment of the decretal sum. The respondent prays that the application be dismissed.

### **Submissions**

5. The applicant filed written submissions but because of late service of those submissions upon the respondent's counsel, the respondent did not get the opportunity to file written submissions. I have carefully read through the applicants submissions together with the authorities. I have also considered the oral submissions by counsel for the respondent who urged the court to be guided by the principle that each case must be considered on its own merit, and to find that the applicant is not deserving of the orders sought.

### **The Law**

6. The instant application falls within the provisions of **Order 42 rule 6 of the Civil Procedure Rules**, and in particular **Rule 6(2)** thereof which requires an applicant seeking orders of stay of execution to satisfy the court;

**a) that substantial loss may result to the applicant unless the order is made; and**

**b) that the application has been made without reasonable delay; and**

**c) that 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.**

7. The above are the conditions to be satisfied by the applicant in this case, and all of them must be complied with and not just one. The question that arises for determination is whether the applicant herein has complied with all the three conditions.

### **Analysis and Determination**

8. There is no doubt in this case that whether or not to grant the orders sought is a matter of discretion by this court, and the said discretion is unfettered. For this proposition see **Samuel Mwangi Nganga – versus – Damaris Wanjiku Kamau and another [2016] eKLR**. The courts have also held, in applications for leave to file appeal out of time, that it is the duty of the applicant to place sufficient material before the court which would explain the delay, and once such material is before the court, the court has to consider not only the interests of the applicant but also those of the respondent who has a legitimate expectation to enjoy the fruits of his/her judgment. Generally see **M/s Portreitz Maternity versus James Karanja Kabia Civil Appeal No. 63 of 1997**.

9. Now concerning the prayer for leave to file appeal out of time, I find that no sufficient material has been placed before this court to warrant the exercise of this court's discretion in favour of the applicant. What I find is that the application is an afterthought. The applicant's counsel wrote to the respondent's counsel asking for seven (7) days indulgence to allow the applicant's insurers process payment of the decretal sum. Upon receipt of those letters, the respondent had a legitimate expectation that the decretal sum would be paid. The letters are clean and unequivocal. In going back on this undertaking and seeking leave to appeal out of time, the applicant has come to court with unclean hands. For the above reasons, the prayer for leave to appeal out of time is unmerited and is accordingly dismissed.

10. On whether or not the order for stay of execution should issue, the same remains an academic question since the prayer for leave to file appeal out of time has been dismissed. All the same I will say the following: that the applicant has not satisfied all the three conditions for the grant of the order sought. In particular the applicant has not demonstrated what substantial loss it will suffer if the order is not granted. The applicant submits that because the respondent is a casual worker he lacks demonstrable capacity to reimburse the decretal sum should the appeal succeed after release of the amount to him. The applicant has not placed hard facts before this court to demonstrate the respondent's inability to refund the amount. The law provides that he who alleges must prove. The applicant has merely alleged without proving the allegation.

11. Secondly, it is my considered view that there was inordinate delay in filing the application, especially because of the fact that the judgment was communicated to the applicant within days of its delivery and thereafter on 12<sup>th</sup> March, 2018, the applicant asked for seven days within which to pay. If the applicant was serious, the application should have been filed by 20<sup>th</sup> March, 2018. In these circumstances, time was of the essence, and by taking more than one month to file the application, there was inordinate delay.

### **Conclusion**

12. For the above reasons, I have reached the conclusion that the applicant's Notice of Motion dated 30<sup>th</sup> April, 2018 and filed in court on 2<sup>nd</sup> May, 2018 lacks merit and the same is accordingly dismissed in its entirety with costs to the respondent.

It is so ordered.

**Ruling delivered, dated and signed in open court at Kakamega this 22<sup>nd</sup> day of June, 2018**

**RUTH N. SITATI**

**JUDGE**

**In the Presence of**

N/A for Appellant

Mr. Obilo for Chanzu present for Respondent

Polycarp Mukabwa - Court Assistant