



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**MISCELLANEOUS CIVIL CASE NO 26 OF 2016**

**(Formerly Migori Miscellaneous No 14 of 2016)**

**SAMUEL O. NYAUKE.....PLAINTIFF**

**Versus**

**AIRTEL NETWORKS (K) LTD.....DEFENDANT**

**RULING**

1. The application dated 11<sup>th</sup> July 2016 seeks leave for the applicant to file his memorandum of appeal out of time and that once such leave is granted then the memorandum of appeal filed be deemed as duly filed and served. The court was also requested to stay the ruling dated **15<sup>th</sup> May 2015 delivered in Civil Case No 5 of 2012**.
2. The application is premised on grounds that the intended appeal is arguable and has overwhelming chances of success. Further that the applicant was neither notified of the date for ruling nor was the ruling delivered in his presence, so he cannot be accused of indolence. The applicant says the prayers have been brought without inordinate delay and execution of the trial court's ruling is already in motion so the applicant is likely to suffer irreparably.
3. The applicant explained that the trial court failed to deliver the ruling on the scheduled date of 8<sup>th</sup> May and gave no directions as to when the ruling would next be delivered. It was not until the **7<sup>th</sup> of January 2016** when the applicant realized that ruling had been delivered on **15<sup>th</sup> May 2015**. He states that there was an element of mischief in all this and now execution process has set off.
4. In opposing the application, **VIOLA AKINYI OCHOLA** deposes in a replying affidavit that the application is an abuse of the court process saying the ruling referred to was not delivered on 8<sup>th</sup> May 2015 because the trial magistrate was away attending to other official duties.
5. The respondent and its counsel nonetheless attended court and were directed to the duty magistrate who informed them that the trial magistrate had advised that ruling had been rescheduled to 15<sup>th</sup> May 2015.
6. The respondents argue that no explanation has been tendered as to why the applicant did not attend court on 8<sup>th</sup> May 2015 or why he did not send someone to hold his brief and take another date. The present application is described as an afterthought and a waste of time and ought to be dismissed with costs. It is their contention that the applicant is an advocate who practices in Homa Bay town and ought to have gone to court and made inquiries as to what became of the ruling to his application. He is accused of failing to exercise due diligence and although the court has power to exercise its discretion in such

instances, counsel is adamant that equity should not aid the indolent.

7. The respondent also argues that the delay is inordinate spanning more than six months and no good reason is given to warrant the court's indulgence. In event it is stated that there is nothing to stay since the decree is in the negative.

8. The matter was disposed of by way of written submission-unfortunately as at the date of writing this ruling the applicant had not filed nor served his submissions. I will therefore consider the application simply on the face thereof alongside the supporting affidavit since there was no prayer for it to be dismissed for want of prosecuting it by way of written submissions. The respondent in its written submissions urged the court to dismiss the application saying no reasonable explanation had been given for the delay in bringing the application to court and the applicant's own conduct did not did not portray him as one deserving of a favourable discretion.

9. The applicant is accused of lack of interest and that even adverse applications including service of a bill of costs did not jolt him. Counsel argues that the present application is without merit

10. There is no dispute that the ruling was not delivered on 8<sup>th</sup> May as had been intended. No records or document from the lower court record were presented to this court to confirm whether the reason for such non delivery was recorded. There is also nothing on record to prove that the respondent and its counsel appeared before the un-named duty magistrate and were advised to come back to court on 15<sup>th</sup> May or any other date.

11. Ideally a notice should have been posted on the court notice board and even at the door of the trial court informing all the counsel and litigants of the court's absence and giving directions regarding the fate of all the matters scheduled for that day. This would help to avoid guess work on part of those attending and deny parties and counsel the opportunity of imputing bad faith and mischief as is now suggested in this matter.

12. I have considered the decided cases cited by the respondent's counsel. Of course a little diligence from counsel would have saved him all the agony of coming to court eight months later to revive his claim yet the buck must stop with the court for failing to exercise that due diligence in the first place. It is for this reason that I am persuaded to exercise discretion in favour of the applicant and grant the applicant leave to file the memorandum of appeal out of time. Further the memorandum of appeal filed in support of this application shall be deemed as the one properly filed and served for purposes of pursuing the appeal.

13. Each party shall bear its own costs for this application.

**Delivered and dated this 30<sup>th</sup> day of January 2017 at Homa Bay**

**H.A.OMONDI**

**JUDGE**