



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY.

MISCELLANEOUS CIVIL CASE NO 37 OF 2016

SUKARI INDUSTRIES LIMITED.....APPLICANT

VERSUS

MONICA ADHIAMBO (suing as the legal representative

of the estate of MICHEAL ONGONGO –Deceased)...RESPONDENT

RULING

1. By a notice of motion dated 7th November 2015 brought under the provisions of Order 42 Rule 6 and Order 50 Rule 6 of the Civil Procedure Rules 2010, the applicant prays that the court issues orders of stay of execution of the decree in **NDHIWA SRMCC No 30 of 2015** pending filing, hearing and determination of the intended appeal and leave be granted to lodge the appeal out of time.
2. The application is premised on grounds that the applicant was informed about the outcome of the case via email sent by its insurers but the same was not received due to some technical glitch, and by the time the information was made known on the time for lodging an appeal had lapsed.
3. The applicant states that the reason for delay in filing the appeal has been explained and is excusable especially bearing in mind that the appeal has high chances of success, and the delay is not inordinate.
4. It is further stated that the respondent is a person of straw and if the decretal sum is paid out to her then the appeal will be rendered nugatory as it will be well nigh impossible to recover the decretal sum from her in the event that the appeal success.
5. The applicant is willing to furnish such security for sue performance as the court may order.
6. In the affidavit sworn by **MITCHELL J.B. MENEZES** (the applicant's counsel), he deposes that subsequent to the delivery of the judgment he wrote to the applicant's legal officer advising of the judgment and instructions were sent by email for him to pursue an appeal but he did not receive the email. He has annexed the memorandum of appeal to demonstrate that the applicant has an arguable appeal with high chances of success
7. The application was canvassed by way of written submissions where the applicant's counsel argued that it was only upon receiving a phone call from the applicant's insurers on 03/11/2016 inquiring whether he had filed an appeal that he realized the instructions sent by email to do so had not reached him. He was not able to get the certified copies of proceedings, judgment and the duly signed and sealed decree in time to lodge the appeal
8. Counsel urged this court to exercise its discretion in the applicant's favour saying it would be unfair to

shut out the applicant from pursuing the appeal yet the appeal stands good chances of success. He referred to the case of **RUBINGA V KATO (1990-1994) EA 530**.

9. Counsel also submitted that orders for stay of execution are merited because the respondent's financial status is not clear.

10. The respondent's counsel urges the court to grant the application on condition that the applicant releases at least half the decretal sum plus costs to, and the other half be deposited in an interest earning account in the joint names of the parties. It is also contended that the applicant has not demonstrated the substantial loss it will suffer. It is also submitted that there is nothing to confirm that the respondent would not refund the sum awarded in the event that the appeal succeeds.

11. The applicant has not annexed a copy of the letter purportedly sent to the applicant's insurer informing them about the delivery of the judgment nor has he annexed an extract from the applicant showing the failed email. In fact the applicant does not claim that the email was deleted by the sender. The only inference I can draw is that the counsel failed to file the appeal within the designated time.

12. There is however no serious objection to the application as long as certain conditions are placed. The respondent carefully omits to say how she earns her daily bread or even the source of income- which then lends credence to the applicant's fears that if the decretal sum is paid out and the appeal succeeds, the money may never be recovered.

13. It is on account of this behavior that I find merit in the application and direct that the applicant is granted leave to file the appeal within 14 days hereof on condition that the entire decretal sum is deposited in an income generating account in the joint names of the parties at a financial institution to be agreed upon within 14 days from today

14. It would make no sense to allow execution to proceed in the light of a pending appeal and I therefore grant stay of execution for 90 days pending hearing and determination of the appeal. The costs of this application shall be borne by the applicant.

15. The orders herein apply *mutatis mutandis* to **Homa Bay Misc. Civil Case No 38 of 2016 SUKARI INDUSTRIES LTD versus FREDRICK OLUOCH** and **Homa Bay Misc. Civil Case No 13 of 2016 SUKARI INDUSTRIES LTD versus MAXWELL OMONDI OTIENO**

Delivered and dated this 28th day of February, 2017 at Homa Bay

H.A.OMONDI

JUDGE