



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 119 OF 2013

HACO INDUSTRIES LIMITED.....APPELLANT

- V E R S U S -

MICHAEL MWASALU..... 1ST RESPONDENT

HON. ATTORNEY GENERAL..... 2ND RESPONDENT

RULING

1) Michael Mwasalu, the 1st respondent herein (and a former employee of the appellant herein) was arrested, detained and charged for theft by servant vide Criminal Case no. 19557 of 2001. The same charge was found by the honourable trial magistrate to be baseless and subsequently dismissed. This prompted Michael Mwasalu to move to court against the appellant herein and the Attorney General vide Civil suit no. 2485 of 2008 where he sought for general and special damages for malicious prosecution and false imprisonment. Judgement was entered in favour of the 1st respondent by the lower court as against the appellant in the sum of Ksh.4.5 million plus costs and interests on the 18th December, 2012 by Honourable C. Obulutsa learned Senior Principal Magistrate.

2) Being dissatisfied with the said decision, the appellant filed this appeal. The appellant also obtained a conditional order for stay of execution of the decree, pending appeal whereby it was ordered to pay the 1st respondent a quarter of the decretal amount with the other quarter being deposited in an interest earning account

3) The 1st respondent and applicant herein has taken out the motion dated 26th April, 2016, in which it sought for the following orders:

1. This honourable court be pleased to strike out the Memorandum and Record of Appeal filed on 1st March, 2013 and 8th May, 2013 respectively.

2. The decretal sum, quarter of which (Kshs.1,125,000/-) deposited in a joint interest-earning account together with interest; and the other half (Ksh.2,250,000/-) being the unpaid balance on the decretal amount, be released and paid to the 1st respondent's/applicants' advocates; and

3. The costs of this application be borne by the appellant.

4) The motion is supported by the affidavit of Michael Mwasalu. The appellant filed a replying affidavit of Peter Kangethe to oppose the motion. When the motion came up for interpartes hearing, it was given direction for written submissions to dispose of the application.

5) I have considered the grounds stated on the face of the motion and the facts deposed in the affidavits filed in support and against the application. The 1st respondent/applicant was the only party which had filed its submissions. I have also considered those submissions.

6) The applicant avers that the appellant filed the memorandum of appeal out of time and without leave of the court. The 1st respondent specifically avers that it was filed over 3 months from the date of judgment. It is stated that judgement was delivered on the 18th December 2012 while the memorandum of appeal was filed on 1st March, 2013. It is clear that the appeal was filed out of time without leave of court. Therefore, the same is found to be incompetent.

7) The appellant on the other hand, believes that this application by the 1st respondent was filed after a long delay and after he had filed his memorandum and record of appeal and therefore it should be struck out.

8) The 1st respondent is also seeking for the balance of the decretal Sum i.e ksh.1,125,000/= deposited in a joint interest account together with interest and the half (ksh.2,250,000/=) being the unpaid balance on the decretal sum, be released and paid to the 1st respondents' advocate.

9) The appellant responded to this request by merely stating that since it has filed an application for leave to file an appeal out of time the order should not be granted.

10) Having struck out the appeal, there is therefore no basis to have the deposit retained. The argument that the appellant has filed an application for leave to file an appeal out of time cannot be entertained. It is important to note that the appellant filed the aforesaid application upon being served with the 1st respondent's motion. I am convinced that the 1st respondent is entitled to the second prayer too.

11) In the end, the motion is allowed as prayed.

Dated, Signed and Delivered in open court this 28th day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent