



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. APPLICATION NO. 130 OF 2016

DENIS ONSASO NYAUNDIPLAINTIFF/RESPONDENT

VERSUS

BETT COMPANY (K) LTDDEFENDANT/APPLICANT

RULING OF THE COURT

1. The Notice of Motion application before the court is dated **9th June, 2016** praying for the following orders;

- a. That this application be certified urgent the same be heard *ex-parte* in the first instance.
- b. That the court be pleased to grant the defendant leave to file this appeal out of time.
- c. That this court be pleased to set aside the judgment of the learned Magistrate Hon. E.K. Too (Mr.) Senior Resident Magistrate dated 21st April, 2016 in Mavoko PMCC No. 237/2015 pending the hearing and determination of the present appeal.
- d. That this court be pleased to expressly order stay of execution of judgment and decree against the applicant herein pending the hearing and determination of the present appeal.
- e. The pending *inter-partes* hearing of this application, an interim relief be granted in terms of prayers 3 and 4 hereinabove.
- f. That the costs of this application be awarded to the defendants.

2. The application is premised on the grounds set out therein and is supported by affidavit of **Sheila Alusiola** sworn on 9th June, 2016. The applicant's case is that on 21st April, 2016, the learned Magistrate Hon. E.K. Too (Mr.) Principal Magistrate, entered judgment in favour of the Plaintiff/Respondent. Until now the applicant has not managed to obtain a typed copy of the said judgment against which the applicant intends to appeal. It is the applicant's contention that the learned magistrate misdirected herself in both points of law and fact in the judgment and the Intended Appeal by the applicant has overwhelming chances of success. Should the Plaintiff/Respondent proceed with execution, the applicant stands to suffer great financial loss and damages and the subject of the present appeal may be rendered nugatory. It is the applicant's case that this application has been brought without undue delay, and that it is only fair therefore and in the interest of justice that this court do grant the injunctive relief's to preserve the subject of this litigation pending the intended appeal.

3. The application is opposed vide a replying affidavit of **Denis Onsaso Nyaundi** sworn on **21st June, 2016**. The respondent's case is that the defendant is not being truthful to the court. The defendant has not given any evidence to prove that it requested for the typed judgment and proceedings. The typed judgment is readily available in the lower court file (Mavoko PMCC No. 127 of 2015). The respondent's case is that the appeal has no chances of success. The draft Memorandum of Appeal is only aimed at delaying and/or scuttling the fruits of his judgment. It would be unfair to set aside judgment in favour of a party who went to sleep only to be woken up by execution proceedings. The respondent states that he knows for a fact that the appellant's advocate was duly informed of the judgment date by the respondent's advocate on record via notice dated 11th April, 2016. The said Notice states that:

“Take Notice that the above matter is fixed for a judgment on 21st day of April, 2016 at 9.00a.m or soon thereafter when your presence or that of your representative shall be required.

Take further notice that if you do not attend court by yourself or someone duly authorized by law judgment will be taken your absence notwithstanding.”

4. The said judgment was delivered on 21st April, 2016 and on 6th May, 2016 the respondent's advocate on record wrote a letter to the defendant's advocate informing them of the judgment. The said letter was received by the defendant's advocate on 6th May, 2016 but the defendant did not file an appeal against the said judgment. On 21st April, 2016 the respondent's advocate on record wrote a reminder letter dated 18th May, 2016 to the defendant's advocate and the said letter was received by the defendant's advocate on 20th May, 2016 but again the defendant did not file an appeal against the said judgment. The respondent believes that the application is merely an afterthought aimed at prolonging the court process contrary to the overriding objectives of the **Civil Procedure Act**. The overriding objective of the **Civil Procedure Act** is to ensure that justice is done to all parties within the shortest possible time.

5. Parties filed submissions which I have considered. The only issue for consideration is whether the applicant has satisfied the court that he has good and sufficient cause for not filing an appeal in time. The law applicable in this case is **Section 79G of the Civil Procedure Act**.

Section 79G of the Civil Procedure Act provides that;

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for not filing the appeal in time.”

6. From the above provisions it is clear that an appeal from a subordinate court to the High Court should be filed within 30 days from the date of the decree or order appealed against, and may be admitted out of time only where there is good and sufficient cause for not filing the appeal in time.

7. Looking at the defendant's application in its totality, the defendant has not given a single reason why it failed to file an appeal out of time. In opinion of this court, the defendant's application does not meet the necessary requirements for granting leave to file an appeal out of time provided for under **Section 79G of the Civil Procedure Act**.

8. From the foregoing paragraphs of this ruling it is clear that the application lacks merit and is herewith dismissed with costs to the respondent

DATED AND DELIVERED AT MACHAKOS THIS 29TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

Mr. Odhiambo for applicant

Mr. Langalanga holding brief for Jeruto for respondent

Court Assistant – Mr. Munyao