



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 40 OF 2013

GYKA FUEL MART LTD. APPLICANT

VERSUS

BWANA MSHIRI SUNGURA RESPONDENT

RULING

The Notice of Motion application dated 2nd April, 2013 is expressed to be brought under section 3A, 79G and section 95 of the Civil Procedure Act order 42 Rule 6(1) of the Civil Procedure Rules and seeks leave to lodge appeal out of time.

Secondly an order staying the execution of the decree subject matter of the intended appeal pending the determination of the said appeal.

The grounds are that the applicant delay in lodging the appeal was purely inadvertent and is excusable.

That the delay was not inordinate. Further that the intended appeal has merit and has high chances of success.

In the Replying affidavit of one Nabwana Mushiriri Sungura the Respondent herein depones that there was no in advertence or error as there was no misfiling that caused counsel not to file appeal in time.

It is further deponed that there was misrepresentation, non disclosure of material facts and that the order obtained was though deliberate misleading of the court and that the leave to appeal out of time granted ex parte and the temporary stay were obtained through material non-disclosure, concealment of material facts and misrepresentation and as such ought to be vacated.

As to whether there was a misrepresentation or non-disclosure of facts counsel for the applicant submits that the Advocate swore affidavits dated 2nd April, 2013 and 24th April, 2013 explaining the events that led to the delay in filing of the appeal. That failure to file the appeal in time was not deliberate but rather a lapse in their office.

As to whether the application meets the threshold for granting of stay of execution he relies on the court of appeal authority **Civil Application No. 271 of 2008 Barclays Bank of Kenya – Vs- Evans Ondusa Onzere** where it was held that,

“ The intended appeal must be arguable and not frivolous.

Secondly, that unless stay is granted, the appeal or intended appeal, if it succeeds will be rendered nugatory”.

Counsel contends that the appeal is arguable from the serious grounds raised.

As to whether the appeal would be rendered nugatory if it succeeds, it is submitted that the Respondent would not be able to refund the Decretal amount if the appeal succeeds. That the Respondent was not the Applicants employee and indeed he was a total stranger and his financial position is not clear.

Counsel for the Respondent submits that an order for leave to file appeal out of time can only be granted if the said appeal is already filed.

That the applicants application has no merit as the affidavit in support thereof is made without full, frank and material disclosure of facts and further that the act of failure to disclose material facts militates against getting equity from a court of equity and that in the main the appeal is without merit and has no chances of success.

Counsel has cited the case of **Andrew Ouko – Vs- KCB HCC No. 55 of 2000** where Azangala Judge set aside order granted at ex parte stage for material non- disclosure.

Also cited is the case **Ruth K. Wachira t/a Amingirl Beauty Parlour – vs- The Chairman Business Rent Tribunal (2006) eKLR.**

Counsel has also submitted on the legality of seeking an appeal to be filed out of time when the same has not been filed. He relies on the case of **Gerald M' Limbire – Vs- Joseph Kangangi (2009) eKLR.**

As to whether the appeal has overwhelming chances of success it is contended that the plaintiff was working with the Defendant and that the award of damages was fair and just.

A perusal of the proceedings shows that the applicant was granted leave to file appeal out of time on 3rd April, 2013, however, the draft memorandum of appeal was not deemed to have been filed. The contention by the Respondent is that the order was obtained through misrepresentation and non-disclosure.

I have perused the affidavits sworn by S.K. Onjoro Counsel for the applicant and I am satisfied that an error as to a date should not be treated as misrepresentation and non disclosure. I do find that failure to file the appeal in time was inadvertent and excusable.

As to whether the appeal is arguable I do find the grounds raised in the memorandum of appeal serious and needing consideration.

If the stay is not granted and the appeal succeeds will it be rendered nugatory? It has not been shown that the Respondent has the capacity or the necessary wherewithal to refund the Decretal sum if same is paid to him.

I find the application has no merit and leave to file appeal out of time is granted as prayed. Same to be filed and served within 14 days from the date of this ruling.

A stay of execution of the decree subject matter of this appeal is granted subject to the depositing of the whole of the Decretal amount in the joint names of Counsel for the Appellant and the Respondent within 30 days from today.

Costs in the cause.

Ruling delivered dated and signed this **31st** day of **October, 2013.**

M. MUYA

JUDGE

31ST OCTOBER, 2013

In the presence of:-

Mr. Wafula holding brief Ojode for applicants

Maanyia holding brief Ameli Inyangu for Respondent.