



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENY AT NAIROBI**  
**CIVIL SUIT NUMBER 16 OF 2009**

**KEREN BAURON. .... APPLICANT/PLAINTIFF**

**VERSUS**

**SONY HOLDINGS LIMITED. .... 1<sup>ST</sup> DEFENDANT**

**NAKUMATT HOLDINGS. .... 2<sup>ND</sup> DEFENDANT**

**KNIGHT FRANK KENYA LIMITED. .... 3<sup>RD</sup> DEFENDANT**

**RULING**

The application before the court is a Notice of Motion dated 31<sup>st</sup> July, 2013 seeking leave to appeal out of time.

The lower court Ruling was delivered on 26<sup>th</sup> June, 2013 by Deputy Registrar Mr. A K Ndungu in the absence of the Applicant who was the Plaintiff in this matter. The Applicant argued that although he knew the date when the Ruling was fixed for delivery, he failed to attend court on the reason that the matter did not appear in the Cause List of the day, notwithstanding the fact that the date had been fixed in court in the presence of both parties.

It is also clear from the record and the Applicant concedes the same, that although he allegedly knew that the ruling was delivered on 26<sup>th</sup> June 2013 and that he intended to appeal against it within 7 days he did not do so. He did not either file this application for extension of time until 31<sup>st</sup> July, 2013 which was

about 38 days out of the time to appeal and 14 days after allegedly knowing the result of the Ruling.

The Applicant's counsel conceded also that it was his mistake or negligence that led to the failure to file the intended appeal in time. He conceded as well that he failed to file this application more timeously after he learnt of the result of the Ruling. He finally undertook to obey any conditions that the court may attach to any favourable discretion that the court may grant.

The Respondents opposed this application. They argued that the applicant did not deserve any favourable discretion from the court since he neither obeyed the Deputy Registrar's orders nor acted quickly or diligently after he learnt of the result of the Ruling of the Deputy Registrar.

I have carefully considered the application after studying the arguments from both sides and the law applicable.

There is no doubt that the Applicant had filed this application to extend time to appeal 38 days after the Ruling he intended to appeal against had been delivered. The date for the delivery of the Ruling was known to him because he or his lawyer was present in court when it was fixed as an order of court. Failure to attend court to take the ruling on the grounds that it did not appear in the Cause List of the day, it had been scheduled, was not in my view proper or reasonable. The Applicant did not even explain how he learnt that the ruling was not to be delivered on the day it had been scheduled, notwithstanding its absence from the Cause List. He did not check from the Registrar to confirm. He simply, (and in my view unreasonably) assumed that if the matter did not appear in the Cause List, it would not appear before the court which had fixed it in the presence of both parties.

Secondly, why did the applicant not find out from the Registry when the Registry would next fix the Ruling, for delivery if he thought it would not be delivered on 26<sup>th</sup> June, 2013? Had he done some inquiry, he would have as expected, learnt that the Ruling had been delivered as originally scheduled.

The facts from the Advocate however, if believed, indicate that he learnt of the delivery of the ruling three weeks after delivery. The court of course, does not believe that this is what really happened since a reasonable person would not have just sat there without being pressed by common sense or curiosity, to know what actually happened in court on the relevant Ruling date. Be that what it may, the applicant's advocate conceded that although he was instructed to file this application on or about the 17<sup>th</sup> July, 2013, he failed to do so until a further two weeks passed by; that is to say he filed it on 31<sup>st</sup> July, 2013. He has not adequately explained to the court why he made this further delay of two weeks.

The result of all this lethargic conduct on the part of the Appellant is that the delay episodes were unjustified and unnecessary in an application of this nature where a favourable exercise of discretion would be dependent on diligent and equitable conduct on the part of the applicant. The Applicant herein should accordingly expect little sympathy.

I have however, considered the fact that the applicant has a large claim against the Respondents. The lower court had considered it fit to order security of costs of the total Sum of Ksh.2,400,000/- which if payable, would secure the applicant/plaintiff a chance to proceed with his claim. That the Applicant now wishes to appeal to reduce the level of the security, is his right although, considering the circumstances of the suit, the ordering of payment of such security may appear to be justified.

Be that as it may, this court is of the view that the Applicant has the right to pursue his claim but he must also, in the meantime, show regard to the court's orders. The result is that the court will grant and hereby grants leave to appeal out of the prescribed time on the following terms: -

## **ORDERS**

1. **The Applicant shall file his appeal within 7 days.**
2. **The Applicant shall together his Memorandum of Appeal deposit in this court the sum of Ksh.2.4 million being security for costs for the lower court suit as ordered by that court.**
3. **In default of such deposit the leave to appeal within 7 days aforestated shall automatically lapse and the Defendant/Respondents shall be at liberty to move the lower court under order 26 Rule 5 (i) as earlier ordered by the lower court.**
4. **Costs of this application shall be borne by the applicant the same to be agreed upon or be taxed.**

Dated and delivered at Nairobi this 29<sup>th</sup> day of October, 2013.

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**D A ONYANCHA**

**JUDGE**