



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

MISC. CIVIL APPLICATION NO. 27 OF 2020

JIANGXI KHONGMEI ENGINEERING LTD.....APPLICANT

VERSUS

ELIUD WAFULA MAELO.....RESPONDENT

RULING

Before the court is a Notice of Motion Application dated 18th June, 2020 brought under the provisions of Order 50 Rule 4, Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules, Sections 3, 3A and 95 of the Civil Procedure Act seeks the following reliefs;-

1. Spent

2. That honourable court be pleased to order temporary stay of execution of the judgement and decree in Bungoma CMCC No. 276 of 2018 delivered on 16th October, 2019 pending the hearing and determination of this application

3. That the Honourable Court be pleased to grant leave to lodge appeal from the Ruling in Bungoma CMCC No. 276 of 2018 delivered on 30th April, 2020 out of time.

4. That there be stay of execution of the decree in Bungoma CMCC No. 276 of 2018 pending the hearing and determination of the intended appeal.

5. That the attached Motor Vehicle Registration Number KCM 858H be released on a running attachment pending the hearing and determination of this application

6. That costs of this Application be provided for.

The application is grounded on the grounds in the face of the application and the supporting affidavit of Li Xiang.

The applicant depones that the applicant initially instructed the firm of Kidiavai & Co. Advocates to represent them in the subordinate court. That the firm of advocates failed to attend court and an ex-parte Judgement was entered against them. That the firm later preferred an application seeking to set aside the judgment and a stay of execution which ruling was delivered via email to the said advocates on 30th April, 2020.

The applicant depones that the delay in filing the appeal within time was neither deliberate nor intentional but because their advocates did not update them of the ruling. That if a stay is not granted; the auctioneers shall sell, auction, dispose of Motor Vehicle registration Number KCM 858H and the intended appeal shall be rendered nugatory.

The application is opposed through the respondent's replying affidavit dated 25th June, 2020 who depones that the applicant's counsel did not attend court on 2/7/2019 despite knowledge.

Vide Consent Order dated 29/6/2020, parties agreed to stay execution and the only issue pending determination therefore is whether the applicant has made out a case for extension of time to file an appeal.

Generally, an appeal to this court is governed by the provisions of section 79G of the Civil Procedure Act which provides;

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 satisfies the court that he had good and sufficient cause for not filing the appeal in time. (Emphasis added).

From the evidence on record, it is not disputed that judgement was entered on 16th October, 2019, on 9th December, 2019, the applicant filed an application to set aside the judgement. The application was dismissed on 30th April, 2020 and the instant application filed on 19th June, 2020.

A computation of time shows that the statutory period for filing the appeal lapsed on 30th May, 2020. A period of 20 days had lapsed by the time the application was filed.

The law however under the aforesaid section gives an applicant a window to appeal out of time provided ***the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

The section donates to the court the discretion to grant such leave and it is upon the applicant to furnish the court with satisfactory reasons for the delay. Time and again, the courts have extended such time upon adequate explanation by the applicant.

In *Aviation Cargo Support Limited V St. Mark Freight Services Limited [2014] eKLR*, G.B.M. Kariuki, JA. observed;

..... Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.

In the instant case, the delay complained of in approximately 28 days. The applicant explains this delay to have been occasioned by the communication breakdown between the applicant and the advocates then on record.

In the interest of justice and taking into account the rights of each party, this court finds it just and fair to grant the applicant leave to file appeal out of time and consequently make the following orders; -

1. The applicant is granted leave to appeal to this Court within **Thirty (30) days** from the date of this ruling failure of which the order automatically lapses.
2. Costs of this application shall abide by the outcome of the intended appeal.

It is so ordered.

DATED AT BUNGOMA THIS 4TH DAY OF JUNE, 2021

S. N RIECHI

JUDGE