

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NO. 37 OF 2020

MARA MACHINERIES ONSONGO.....APPLICANT

VERSUS

HENZRON GETUMA ONSONGO

T/A HEGEMONS AUCTIONEERS.....RESPONDENT

RULING

1. The applicant seeks various orders in its application dated the 29th June 2020. The applicant seeks a stay of execution and leave to appeal out of time against ruling and order given in Kisii Civil Application No. 141 of 2018 between the parties herein. The applicant argues that impugned the ruling was delivered in the absence of the applicant and without notice of delivery of the ruling. Miss Nyandoro swore an affidavit in support of the application. According to her the ruling the subject of this application was delivered on the 14th February 2020. That the firm of Bosire Gichana advocate was not aware of the ruling as they were nor served with the notice of delivery of the said ruling. That it is not until the proclamation was done by the respondent that they became aware of the ruling. That their client is dissatisfied with the ruling and has instructed them to appeal, that they seek leave to appeal out of time as time to file the appeal has run out. That the applicant paid the sum of Kshs. 38009/- as it feared that the respondent could move to execute the decree against them. That the applicant has a right of appeal against the decision and that the intended appeal has high chances of success and will be rendered nugatory if the orders sought are not granted.

2. The applicant was opposed. The respondent submitted that the application has been overtaken by events. That the applicant paid the entire decretal sum to the respondent. That the application has been overtaken by events. The application was filed in bad faith and is a waste of the court's time. That the application should be dismissed.

3. Having considered the oral submissions by the parties it's not in dispute that the applicant has paid the sum of Kshs. 38,609/- to the respondent. The applicant has explained that it paid the decretal sum because it feared execution as its goods had been proclaimed. With the amount already paid to the respondent I find that granting an order of stay will not serve any purpose.

4. However, the applicant as a litigant is entitled to appeal against a decision if it feels aggrieved. The applicant seeks to appeal out of time. The proclamation was done in June 2020. The applicant filed the application in June 2020. None of the parties attached the proceedings of the lower court to enable me decide whether the court issued a notice of the impugned ruling. In my view the delay has been reasonably explained. The draft memorandum of appeal challenges the respondent's actions whilst executing the warrants. For this reason, I will grant the applicant leave to appeal out of time. The applicant will file its appeal with 30 days from the date of this ruling and serve it on the respondent, in default this order shall vacate. No order as to costs. This file is closed.

Dated, signed and delivered at KISII this 14th day of October 2020.

R.E. OUGO

JUDGE

In the presence of:

Miss Nyandoro For the Applicant

Mr. Were For the Respondent

Ms Rael Court Assistant