



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 499 OF 2018

ADVENT VALUERS LIMITED.....APPLICANT

-VERSUS-

STUDIO GRAPHICS LIMITED.....RESPONDENT

RULING

1. The Notice of Motion before me is dated 27th September, 2018 supported by the grounds set out on the body thereof and the facts deponed to, in the sworn affidavit of *Timothy Saruni*. The applicant herein seeks the orders hereunder:

i) Spent.

ii) THAT the applicant be granted leave to appeal out of time against the ruling delivered by Honourable Orenge (Senior Resident Magistrate) on 29th May, 2018 in CMCC NO. 918 OF 2017.

iii) Spent.

iv) THAT there be a stay of proceedings in CMCC NO. 918 OF 2017 pending the hearing and determination of the intended appeal.

v) Spent.

vi) THAT there be a stay of execution of any decree arising in CMCC NO. 918 OF 2017 pending the hearing and determination of the intended appeal.

vii) THAT the costs of the application be provided for.

2. Timothy Saruni, the director of the applicant, deponed that upon filing of the suit and service of summons by the respondent, the applicant entered appearance and filed its defence. That the applicant later on sought leave of the court to amend its defence, which leave was granted. That the amended defence and counterclaim were filed but not served or placed in the court file due to an inadvertent error by the applicant's counsel and consequently, the court expunged the defence and documents vide its ruling delivered on 29th May, 2018.

3. The deponent further stated that the applicant filed an application seeking to have the expunged documents lodged out of time but that the same was dismissed by the court on 14th September, 2018. The applicant avers that it is desirous of appealing against the earlier ruling of 29th May, 2018.

4. The motion stands opposed by way of a reply sworn by *Wachira Njuguna* on 12th October, 2018. The deponent contended that judgment was entered on 3rd August, 2018 and hence the prayer for leave to appeal against the ruling delivered on 29th May, 2018 is incompetent and incurably defective. Similarly, that the prayer for a stay of the proceedings is incompetent, bad in law and incurably defective since the judgment was previously entered by the lower court.

5. The deponent in turn averred that the ruling of 14th September, 2018 which upheld the earlier ruling of 29th May, 2018 has not been appealed against. He added that the original defence was also filed out of time and without leave of the court, thereby making it incompetent *ab initio*. That once the applicant was granted leave to amend its defence, the original defence ceased to exist. It is contended that the amended defence purported to have been filed was neither served upon the respondent nor properly before the court.

6. In his supplementary affidavit in response thereto, *Timothy Saruni* stated that the judgment entered is a consequence of the impugned ruling of 29th May, 2018 and the same applies to the ruling of 14th September, 2018. Further, that the lower court cannot be functus officio

since the execution proceedings are pending.

7. The motion was canvassed by way of written submissions. This court has considered the motion, replying and supplementary affidavits, the parties' submissions and the authorities cited by the respective parties.

8. The first issue is on whether the applicant should be granted leave to appeal against the ruling of 29th May, 2018 out of time. The applicant cited the judicial precedent of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* and submitted that the delay in appealing resulted from the fact that it had previously filed an application on 7th June, 2018 which was only determined on 14th September, 2018. That such delay is not inordinate and is excusable. The applicant further argued that the respondent will in no way be prejudiced if the prayer is allowed and that it is the applicant who instead stands to suffer prejudice since the lower court expunged all its documents from the record and it has been condemned unheard.

9. The respondent challenged the above by submitting that the prayer for leave to appeal out of time is incompetent since there is a judgment already in place and the same has not been appealed against or set aside. Further, that the second ruling of 14th September, 2018 has likewise not been appealed against. The respondent also contended that the intended appeal does not include the ground that all orders made subsequent to the ruling of 29th May, 2018 be set aside. The respondent in turn argued that the applicant is guilty of inordinate delay and the same has not been explained.

10. Having noted the positions taken by the respective parties in addition to perusing the file, it is clear the respondent filed a request for judgment on 21st June, 2018. No copy of the ex parte interlocutory judgment has been availed, though a copy of the decree is annexed to the replying affidavit as **WN1B**. To this court's mind, the circumstances surrounding the obtainment of the aforesaid judgment are suspicious; however, this court does not wish to play the role of an appellate court and will limit itself to the application.

11. On the issue of delay, I am of the view that the delay of about four (4) months in bringing the motion is not inordinate. To add on, the explanation given by the applicant that there was a pending application which was determined days before the motion is satisfactory. That notwithstanding, it has not been disputed that the interlocutory judgment was entered against the applicant. Besides, there is no indication that the same has been appealed against and/or set aside. In this sense, the rulings of 29th May, 2018 and 14th September, 2018 have been surpassed by the judgment, making it impossible for this court to make a determination on the ruling to which the application relates. It appears the prayer for leave to appeal out of time is therefore untenable. Having established the above, there is little need to delve further into the remaining aspects of this particular prayer.

12. The second issue relates to a stay of both the proceedings and execution. In first addressing the stay of execution, since I am not inclined to grant the prayer on appeal, this prayer automatically fails and is consequently rejected. In regards to a stay of the proceedings, the applicant argued that the interlocutory judgment was irregularly entered and ought to be stayed together with the decree; with the respondent conversely maintaining that such prayer is incompetent since judgment has already been entered.

13. In deliberation thereof, I wish to reiterate my position above that there is a judgment in place and the applicant has not sought to have the same set aside. Under the circumstances therefore, I am not persuaded that there is any reason to grant the prayer for a stay of the proceedings.

14. The upshot is that the motion is found to be without merit and I decline to grant any of the prayers sought. I make no order as to costs.

Dated, signed and delivered at NAIROBI this 7th day of February, 2019

L. NJUGUNA

JUDGE

In the presence of:

..... for the Defendant/Applicant

..... for the Plaintiff/Respondent