



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL APPEAL NO. 256 OF 2018**

**TRANS-MARA SUGAR COMPANY LIMITED.....APPLICANT**

**VERSUS**

**THOMAS ONDIEKI OSITU.....RESPONDENT**

**RULING**

1. The Applicant herein, **Trans-Mara Sugar Company Limited**, moved this Court by a Notice of Motion dated 02/07/2018 (hereinafter referred to as '**the application**') seeking orders of stay of execution of the ruling and order made on 08/03/2018 and the judgement delivered on 13/07/2017 in **Migori CMCC No. 1493'B' of 2016** (hereinafter referred to as '**the suit**') pending the filing, hearing and determination of an intended appeal. The Applicant further prayed for leave to file an appeal out of time.

2. The application was premised on the grounds appearing on the body thereof and was supported by the Affidavit of one **Emanuel Letaya ole Seriani** sworn on 02/07/2018 and filed on 03/07/2018.

3. The application was opposed by the Respondent herein, **Thomas Ondieki Ositu**, by way of Grounds of Opposition dated 20/07/2018 and filed on 23/07/2018.

4. I have carefully considered this matter in light of the background of the suit. The Applicant's main contention is that it was served with a Notice to Act in Person, a Notice to Withdraw the suit and a Statutory Declaration all filed on 28/03/2017 on 02/05/2017 and it accordingly knew that the suit had effectively been terminated. By that time the Applicant's Counsels had been served with a Hearing Notice for the suit on 12/04/2017 indicating that the suit had been set for hearing on 18/05/2017. Resulting from the filing and service of the documents indicating that the suit had been withdrawn the Applicant did not bother to attend court for the hearing of the suit. However, the hearing of the suit instead proceeded on 18/05/2017 as scheduled and a judgment was rendered on 13/07/2017 where the suit was allowed as against the Applicant. Execution of the decree followed soon thereafter.

5. The Applicant then applied to set aside the *ex parte* judgment which was determined by the ruling subject of this application. The lower court in a ruling delivered on 08/03/2018 found that the Applicant had been duly served with the Hearing Notice and did not explain its non-attendance. The court however allowed that application on condition that the Applicant pays throw away costs of Kshs. 20,000/= to the Respondent's Counsel and satisfies the Auctioneer's charges.

6. The application was heard by way of written submissions where both parties complied and filed rival submissions. Decisions were as well referred to. Needless to say, I have carefully read all the materials placed before me.

7. I am by now called upon by the law to consider whether the conditions in **Order 42 Rule 6(2)** of the **Civil Procedure Rules 2010** were satisfied. The Notice of Intention to Act in Person and the Notice to Withdraw the Suit were deemed to have been done and filed by the Respondent. They were filed in the suit file and served on the Applicant's Counsels. The effect thereof was that the suit was no more and the Applicant's Counsels needed not to attend court on the hearing date.

8. This Court is yet to see the suit file and the proceedings. Serious issues come to the fore including whether a withdrawn suit can be legally heard, whether the Respondent is the one who actually testified, whether the Respondent's Counsel was duly instructed by the Respondent in the first place in view of the contents of the Statutory Declaration among many others. If these issues are settled in favour of the Applicant, then there will be no basis to order the Applicant to pay any costs. I am therefore satisfied that subjecting the Applicant to pay costs at this point in time is to unnecessarily burden it. To me there are serious issues to be first determined before the issues of costs can arise. Subjecting the Applicant to pay the costs in light of the foregone circumstances amount to a derogation of the right to a fair hearing on the part of the Applicant which right is guaranteed under **Article 50(1)** of the **Constitution**.

9. Further, since the lower court set aside the *ex parte* judgment and in view of the unique circumstances of this case coupled with the foregone, I do not see the need to order the provision of any security on the contested issue of costs.

10. As to whether the Applicant ought to be allowed to lodge an appeal out of time, I note that the application was filed immediately the execution process was instituted. Prior to that the Applicant knew that there was no pending suit. I find this as a suitable case to grant leave.

11. Consequently, the application succeeds. Prayers 5, 6, 7, 8 and 9 of the Notice of Motion dated 02/07/2018 are hereby granted. Costs of the application to abide the outcome of the intended appeal.

12. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 9<sup>th</sup> day of April 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Mr. Oguttu-Mboya** Counsel instructed by the firm of Messrs. Oguttu-Mboya & Co. Advocates for the Applicant.

**Mr. Odingo** Counsel instructed by the firm of Messrs. Odingo & Co. Advocates for the Respondent.

**Evelyne Nyauke** – Court Assistant