



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC. CIVIL APPLN. NO. 297 OF 2018

SOUTH NYANZA SUGAR CO. LTDAPPLICANT

-VERSUS-

CASSIN O OBEL.....RESPONDENT

RULING

1. Before me is an application by way of the Notice of Motion dated 27/10/2018 seeking leave to file an appeal out of time together with stay of execution of the decree of the lower court pending the hearing and determination of the intended appeal.
2. The application was made on the grounds as appearing on the face thereof and was supported by the Affidavit sworn by the Applicant's Counsel on 27/10/2018.
3. The Respondent opposed the application by filing his Replying Affidavit sworn on 15/01/2019.
4. The application was thereafter heard by way of written submissions and Counsel for the Applicant filed their respective submissions and referred to several judicial decisions whereas Counsel for the Respondent relied on the Relying Affidavit hence this ruling.
5. The jurisdiction of this Court in dealing with an application for leave to lodge an appeal out of time is *inter alia* donated by **Section 79G of the Civil Procedure Act**, Chapter 21 of the Laws of Kenya. That jurisdiction however must be exercised upon reason since it is discretionary and dependent upon the fulfillment of settled cardinal principles. (See: **Mwangi Kimenyi Mugwe vs A.H. Kamau, Court of Appeal Civil Appeal No. NAI. 357 of 2003 at Nakuru (unreported)**).
6. Judicially speaking, the principles for consideration in applications for leave to appeal out of time are now well settled. The Court of Appeal in considering an application for extension of time to file and serve a Record of Appeal under the Court of Appeal Rules (which principles equally apply in the current instance) in **Gachero & Ano -vs- Pioneer Holdings (A) Ltd & Ano. (2008) KLR 315** had the following to say:

The powers of the Court (of Appeal) in an application for extension of time (under the Court of Appeal Rules, Rule 4) were discretionary and unfettered. However in executing its discretion, this Court would consider the length of the delay, the explanation or reason given for it (and) whether the intended appeal was arguable.....

The above was restated in the decision of **M.S.A Makhandia, J** (as he then was) in **Benjamin G. Ndegwa vs C. N. Murungaru (2009) eKLR**.

7. Other factors for such consideration were stated by the Court of Appeal in **Civil Application No. Nai. 41 of 2014 Samiyan Kaur Devinder Singh vs Speedway Investment Ltd & CFC Stanbic Bank Limited (UR 31/2014)** to include: -

- (a) **The effect of the delay in public administration of justice;**
- (b) **The importance of compliance with time-lines in litigation;**
- (c) **The resources of the parties;**
- (d) **Whether the matter raises issued of public importance;**
- (e) **If the Applicant has been diligent.**

8. The net effect of all the above considerations is to foster a quicker, fair and equitable disposal of disputes between parties, a calling which all persons and this Court is constitutionally-bound to uphold. However, in doing so this Court must endeavor to do justice to the parties.

9. The Applicant's Counsel admitted that judgment was rendered on 27/10/2018 and stated that the Applicant did not timeously lodge the appeal for reasons beyond its control. The said reasons were not given or at all. One of the cardinal duties of an Applicant seeking the enlargement of time to lodge an appeal is to clearly explain why the appeal was not filed within the statutory timelines and in this case within 30 days from the date of delivery of the judgment. The reasons are so central since the Court's discretion can only be exercised on those grounds. That is however not the case here. Infact the Applicant seemed to put a lot of premium on the stay of execution limb of the application and not on the leave to extend time. To me, the Applicant was to satisfy this Court on both limbs of the application.

10. The Applicant having failed to satisfy this Court as to why it did not appeal within time leave to appeal out of time cannot be granted and is hereby declined. Grant of leave is not automatic. Basis thereof must be laid more so in our adversarial system of litigation. Having failed to satisfy this Court on why the Applicant ought to be granted leave to appeal, there is no basis as well to consider the limb of stay of execution pending the intended appeal.

11 The upshot is that the application by way of the Notice of Motion dated 27/10/2018 is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of May 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Orieyo Counsel instructed by Messrs. Otieno Yogo & Company Advocates for the Applicant.

Mr. Kerario Marwa Counsel instructed by Messrs. Kerario Marwa & Company Advocates for the Respondent.

Evelyne Nyauke - Court Assistant