



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION NO.44 OF 2019

GEORGE OBUYA OWUOR.....APPELLANT/APPLICANT

-VERSUS-

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

RULING

1. By a Notice of Motion dated the 9th April 2019 the appellant/applicant seeks to be granted leave to appeal out of time against the judgment of Hon. Lutta dated 30/10/2018 in **Kisii CMC No.1524 of 2004**. That the memorandum of appeal annexed hereto and marked 'X' be deemed as duly filed upon payment of the requisite filing fees and that costs of the application be provided for. The application is supported by grounds stated on the face of the application and a supporting affidavit of Mr. Ezekiel Oduk the applicant's Counsel. The application was opposed.

2. The Respondent filed a replying affidavit dated the 12/6/2019 sworn by **Maurice Omondi Ng'ayo** the legal services Manager/Ag. Company secretary of South Nyanza Sugar Company Ltd.

3. Mr. Oduk avers that the judgment in **Kisii CMC No.1524 of 2004** was delivered on the 30/10/2018 but his office was not notified of the delivery until after the expiry of the time for appeal. That the applicant is aggrieved by the judgment and has instructed him to appeal. That the application has been brought without unreasonable delay, and that no prejudice will be caused to the Respondent as the delay was beyond the control of the applicant. That the judgment raises a fundamental issue in the suit of the 3rd parties interference in the contract which negates the clause in the contract entered into by the parties and that is important that the court looks into the propriety of the decision.

4. The Respondent avers that the judgment in the subordinate court was delivered on a date fixed in the parties presence and the applicant's counsel was in court on the day the judgment was delivered. That there is no evidence that the judgment was rendered a day other than that on which it was supposed to be delivered. That the applicants allegations are bare allegations as the applicant has failed to indicate how they got to know of the judgment and has failed to properly explain the failure to file a timely appeal. That the delay in filing the application is in itself inordinate, and has not been explained. The application is scandalous vexatious and an outright abuse of the due process of the court.

5. I have considered the application before me, in **Civil Application No.255 of 1997 Leo Sila Mutiso vs Rose Hellen Wangari Mwangi** (unreported) that court held as follows;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary.

“It is also well settled that in general the matters which the court take into account in deciding whether to grant an extension of time are: first the length of the delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.”

6. This court is being called upon to exercise its discretion to grant leave to file the appeal out of time. I bear in mind the principles stated in the case of **Leo Sila Mutiso vs Rose Hellen Wangari** (supra). The judgment as per 'MONI' was delivered on the 30th October 2018. The copy of judgment attached indicates that counsels for both parties were present. It is therefore not true as stated by Mr. Oduk that his firm was not represented. Counsels were present and the applicant's counsel must have heard the judgment and take note of the date of its delivery. The applicant was to file his appeal within 30 days. He failed to do so. His Counsel's affidavit is quite scanty it does not state what happened after 30th October 2018.

7. It is clear from what is before me that the applicant's counsel is to blame for the delay in not filing the appeal on time and not the court. It could have been an inadvertent omission or innocent mistake by his counsel.

8. I have read the proposed memorandum of appeal there are issues raised on the court's finding on the contract between the parties. **Waki JA in Njuguna vs Magichu & 73 others 2003 KLR 507** stated as follows;

“The main concern of the court is to do justice between the parties. Nevertheless the discretion has to be exercised judicially that is a sound factual and legal basis”.

9. The delay in not filing the appeal is about (5) five months. It is not inordinate delay. I have stated that the applicant’s counsel is to blame for not filing the appeal on time. I will not punish the applicant for the acts of his counsel. No prejudice will be caused to the Respondent.

10. I therefore exercise my discretion and grant the applicant leave to appeal out of time against the judgment of Hon. Lutta dated 30th October 2018 in Kisii CMCC No.1524 of 2004. The appeal shall be filed and served within **21 days** from the date hereof. Costs of the application shall be in the cause.

Dated, signed and delivered at Kisii on the **16th** day of **July** 2019.

R.E. OUGO

JUDGE

In the presence of

Mr. Wesonga h/b Mr. Oduk For the Applicants

Respondent Absent

Rael Court Clerk