



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION NO.47 OF 2019

THOMAS OTIENO MBOGA.....APPELLANT

VERSUS

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

RULING

1. By a Notice of Motion 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. S.K. Onjoro** dated 21/12/2018 in **Kisii CMCC No.501 of 2004**. That the memorandum of appeal annexed hereto and marked 'X' be deemed as duly filed upon payment of requisite filing fees that costs of the application be provided for.

2. 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. The Respondent filed a replying affidavit sworn by Mr. Maurice Omondi Ng'ayo the legal Service Manager/Ag. Company Secretary of South Nyanza Sugar Company Ltd.

3. Mr. Oduk avers that the judgment in **Kisii CMCC No. 501 of 2004** was delivered on the 21/12/2018 and his office was not notified of the delivery until after the expiry of the time for appeal. That he communicated the judgment to his client who is aggrieved and has instructed them to appeal on his behalf. That time for lodging the appeal has lapsed. He has prepared the memorandum of appeal. That the applicant seeks that the application be allowed as no prejudice will be occasioned to the Respondent as the circumstances of the delay were wholly beyond the control of the applicant. That the judgment raises fundamental issues in the suit of 3rd party interference in the contract that negates the clause in the contract entered into by the parties, that the court needs to look into the propriety of the decision.

4. The Respondent avers that the judgment of the subordinate court was delivered on a date fixed in the parties presence and the applicant's Counsel was in court on that day when the said judgment was delivered. There is no evidence that the judgment was rendered on any day other than that on which it was supposed to be delivered. That the applicant's allegations are bare denials as the applicant 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 dire process of the court.

5. I have considered the application before me, in **Civil Application No.255 of 1999 Leo Sila Mutiso vs Rose Hellen Wangari Mwangi** (unreported) the 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 this court take into account in deciding whether to grant extension of time are; first the length of the delay, secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the Respondent if the application is granted”

In **Njuguna vs Magichu & 73 Others** at pgs 5 & 7 Justice Waki 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 on sound factual and legal basis”.

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 Mwangi** (Supra). The judgment in this matter was delivered on 21/12/2018. No copy of the judgment has not been annexed to the application to help me determine the date the judgment was delivered or whether both counsels were present the said date. Mr. Oduk's affidavit is very scanty. However, I will give the applicant the benefit of doubt. The judgment was delivered on the 21/12/2018 and the application was filed on April 2018, a (4) four months delay. The delay is not inordinate. Counsel blames the court for failure to notify them of the judgment dat. I have perused the memorandum of appeal and raises the issue of a 3rd party interference in the contract between the parties. In my view the Respondent shall suffer no prejudice if the application is allowed.

7. I therefore exercise my discretion and grant the applicant leave to appeal out of time against the judgment of **Hon. S.K. Onjoro** dated 21st December 2018 in **Kisii CMCC No.501 of 2004**.

8. 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 for Mr. Oduk For the Appellant

Respondent Absent

Rael Court Clerk