



**REPUBLIC OF KENYA**

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

**[CORAM: MRIMA, J.]**

**MISC. CIVIL APPLN. NO. 22 OF 2019**

**JOSHUA ODIPO ONDONG.....APPLICANT**

**VERSUS**

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

**RULING**

1. The Applicant herein filed a Notice of Motion dated 20/03/2019 seeking extension of time to file an appeal against the judgment in *Migori CMCC No. 795 of 2005* (hereinafter referred to as '**the suit**'). The application was supported by the Affidavit sworn by the Applicant's Counsel on 20/03/2019.

2. The Applicant averred that judgment in the suit was delivered on 13/12/2018 and immediately applied for copies of the proceedings for purposes of lodging an appeal. That, the same are yet to be availed.

3. The Respondent opposed the application by filing a Replying Affidavit sworn on 10/07/2019 by its Legal Services Manager one **Maurice Omondi Ng'ayo**.

4. The application was thereafter heard by way of oral submissions. Counsel for the Applicant wholly relied on the filed application and added that the reason why the Applicant was yet to file a Memorandum of Appeal was due to the lack of the proceedings since the grounds of appeal must be grounded on the decision appealed against.

5. The application was opposed on the grounds that the Applicant is guilty of delay of 106 days' post-judgment, that the Applicant has been indolent and that no Memorandum of Appeal is annexed to application to enable this Court ascertain whether the appeal is arguable.

6. The jurisdiction of this Court to deal with an application for leave to lodge an appeal out of time is donated by **Section 79G of the Civil Procedure Act**, Chapter 21 of the Laws of Kenya. The power is however discretionary and must be exercised judicially.

7. 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.....*

8. The foregone principles were restated in **Benjamin G. Ndegwa vs C. N. Murungaru (2009) eKLR** and **Mwangi Kimenyi Mugwe vs A.H. Kamau, Court of Appeal Civil Appeal No. NAI. 357 of 2003 at Nakuru** (unreported).

9. 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 issues of public importance;**

**(e) If the Applicant has been diligent.**

10. 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.

11. It is a fact that since the delivery of judgement the Applicant has not been availed with the proceedings it sought. A letter dated 20/12/2018 was received by the lower court on 21/12/2018. Given that the proceedings sought are yet to be availed by the lower court the Applicant cannot be accused of failing to file a Memorandum of Appeal. I agree with Counsel for the Applicant that the grounds of appeal must emanate from the proceedings and decision appealed against. As such, it will be without any justifiable cause to condemn the Applicant more so in the absence of evidence that the proceedings have been available for collection. Likewise, the Applicant cannot be accused of delay. I also note that the issue of an arguable appeal is not one of the considerations in appeals in the High Court.

12. I therefore find that the application merited. It is allowed in the following terms: -

**(a) The Deputy Registrar of this Court shall avail the proceedings in Migori CMCC No. 795 of 2005 within 15 days of this order;**

**(b) Upon receipt of the proceedings the Applicant to file and serve a Memorandum of Appeal within 10 days thereof;**

**(c) Costs shall be in the appeal.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 15th day of October 2019.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open Court and in the presence of: -**

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

**Mr. Marvin Odero** Counsel instructed by Messrs. Okong'o Wandago & Company Advocates for the Respondent.

**Evelyne Nyauke** - Court Assistant