



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

MISC. CIVIL APPLN. NO. 62 OF 2019

SUKARI INDUSTRIES LIMITED.....APPLICANT

-VERSUS-

OCHOLA PETER ARIYO.....RESPONDENT

RULING

1. Before me is an undated application by way of the Notice of Motion 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. The application was filed on 07/10/2019. I will hereinafter refer to it as '**the application**'.
2. The application was made on the grounds appearing on the face thereof. It was supported by the Affidavit sworn by the Applicant's Accountant on 07/10/2019.
3. The Respondent opposed the application by way of his Replying Affidavit sworn on 14/10/2019.
4. The application was thereafter heard by way of oral submissions. Both parties were represented by Counsels.
5. The Applicant's case was that the judgment in the lower court was scheduled for delivery on 25/06/2019. However, the same was not delivered as scheduled and instead it was delivered on another date without notice to the Applicant. The Applicant contended that it only became aware of the judgment when the Respondent levied execution. The Applicant further contended that its application for stay of execution before the trial court was dismissed on 26/09/2019 hence the current application. It contended that it was not indolent as it was not duly informed of the judgment date as required in law. The Applicant also drew the attention of this Court to the persuasive decision in **Homa Bay High Court Civil Appeal No. 60 of 2017 Sukari Industries Limited vs. Jeremiah Otieno Madara** in contending that the judgment is a nullity as the lower court lacked the jurisdiction over the matter.
6. On the issue of stay of execution of the judgment, the Applicant submitted that it was ready to comply with any order of this Court precedent to the grant of the stay including depositing the whole decretal sum in Court. To the Applicant, the Respondent shall not suffer any loss.
7. The application was opposed. The Respondent submitted that indeed judgment in the lower court was delivered as scheduled on 25/06/2019. He further submitted that he assessed his costs and executed the decree. The Respondent posited that upon execution of the decree the Applicant filed an application by way of Notice of Motion dated 07/08/2019 (hereinafter referred to as '**the Motion**') where it never raised the issue of delivery of the judgment. To the Respondent the application is an afterthought and ought to be dismissed.
8. The Respondent also submitted that the Applicant woke up from slumber after the delivery of the decision in **Homa Bay High Court Civil Appeal No. 60 of 2017** (supra).
9. 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)**).
10. 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.

11. 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.**

12. 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.

13. The Applicant countered the manner in which the judgment in the trial court was delivered. However, the Applicant did not avail the proceedings to support its position even after the Respondent disputed the Applicant's position. Being a factual issue and in view of the status of the record, the issue fails. I therefore find that there is no evidence that the judgment in the lower court was not rendered on 25/06/2019.

14. In buttressing the foregone finding my attention is drawn to the Motion. The Motion was filed to arrest execution of the decree. I have seen the prayers as contained in the Applicant's submissions annexed to the Respondent's Replying Affidavit. The prayers were only limited to how the warrants of execution were issued. The contention was that the warrants were irregularly issued. The Motion had nothing to do with the delivery of the judgment. The Applicant is before Court with unclean hands.

15. The application was filed on 07/10/2019. That was almost 4 months' post judgment. There is absolutely no explanation why the Applicant did not prefer the appeal within the prescribed time in law. I agree with the Respondent that the Applicant was woken up by the decision in Homa Bay High Court Civil Appeal No. 60 of 2017 (supra).

16. The upshot is that there is no justification as to why this Court ought to exercise its discretion in favour of the Applicant on extension of time. The limb fails.

17. The Applicant having failed to satisfy this Court as to why it did not appeal within time, there is no basis to consider the limb of stay of execution pending the intended appeal.

18. The upshot is that the application by way of the Notice of Motion filed on 07/10/2019 is hereby dismissed with costs. I hereby assess the costs at Kshs. 25,000/=.

19. Pursuant to the order made in Migori High Court Misc. Civil Application No. 61 of 2019 on 14/10/2019 this ruling shall apply mutatis mutandis in the said Misc. Civil Application No. 61 of 2019.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 11th day of December, 2019.

A. C. MRIMA

JUDGE

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

Mr. Mulama Counsel instructed by Messrs. Ogejo, Olendo & Company Advocates for the Applicant.

Mr. Brian Mboya Counsel instructed by Messrs. Tom Mboya & Company Advocates for the Respondent.

