



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CIVIL CASE NO. 122 OF 2018

GERALD THAMBURA M'MUTUNGA.....APPLICANT

VS

SAMUEL MUCHANGI GACHOVI

MENYA SERVICES SACCO LTD.....RESPONDENTS

RULING

The applicants herein Samuel Muchangi Gachovi and Menya Services Sacco Ltd brought an application dated 17.8.2018 under certificate of urgency seeking leave the appeal out of time against the judgment in Nkubu SRM CC. No. 41 of 2016 which delivered on 27th June 2018.

They sought for orders of stay of execution of the judgment pending hearing and determination of the application and appeal. The grounds of appeal were that by the time judgment was brought to applicants attention and an analysis of the same done, the 30 days which an appeal is to be filed had lapsed.

That the applicants are aggrieved by the said judgment and seek leave to lodge an appeal out of time. It was argued that appeal was made without undue delay.

It was argued that applicant stands to suffer substantial loss and damage as there is likelihood that the applicant will be unable to recover the decretal sum awarded should the intended appeal succeed and as such the appeal will be rendered nugatory. It was claimed the applicants are ready to comply with reasonable conditions that the court may order to enable them an appeal including depositing the decretal sum in the court.

It was also a ground of the application that the applicant's had an arguable appeal with high chances of success. That the application was made in good faith and the Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs if application is allowed.

The application was opposed by averments in affidavit of the Respondent Gerald Thambura M'Mutunga filed on 8th October 2018. On 11.10.18 the applicants counsel Mr Ouma sought leave to file supplementary affidavit as the applicants counsel had just been served with Replying Affidavit, leave to file supplementary affidavit was of granted and as it had been agreed that application be canvassed by way of written submissions some was to be done concurrently with supplementary affidavit.

The Respondent filed written submissions. The applicants neither filed supplementary affidavit not the written submissions thus leaving the Respondents averments in Replying Affidavit in controverted and the written submissions unchallenged.

I do find the applicants have not proved that they were not aware of the judgment in Nkubu SRM CC No. 41 of 2016 as the Respondent has confirmed that their advocates brief was held and the advocate sought for 30 days stay of execution which was granted the applicant. The applicant didn't annex the decree of the court and the evidence to show the delay in obtaining judgment was anyone's fault. The question that this court asks is why the judgment that was obtained was not also annexed to the application so that the court could also assess the grievance that is alleged by the applicants as was held by Justice Lenaola (as he then was) in the authority of Loise Ruguru Kimani vs Nelson Ndege Gatimu H.C at Embu .

I do not see that the conditional discretion under order 42 Rule 6 has been proved to the satisfaction of this court and the application must fail in its entirety. Costs to the Respondent.

HON. A. ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON THIS 15TH DAY OF NOVEMBER 2018

C/A:

APPLICANT:- Ms Omari Advocate for Odongo for Applicant

RESPONDENT: Mr Mbaabu for Respondent

HON. A. ONG'INJO

JUDGE