



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPLICATION NO. 396 OF 2018

LAVINGTON SECURITY LIMITED.....APPLICANT

VERSUS

MUNYUTU WAIGI.....RESPONDENT

RULING

1) Munyutu Waigi, the respondent herein, filed an action before the Chief Magistrate's Court, Milimani against Lavington Security Ltd, the applicant herein, vide plaint dated 6/12/2016 in which he sought for payment of ksh.212,500/= and damages for mental anguish. The applicant filed a defence to deny the respondent's claim. The respondent took out the motion dated 31.3.2017 whereof he applied for the applicant's defence to be struck out and for entry of summary judgment against the applicant. The motion was heard and determined in favour of the respondent.

2) Being dissatisfied with the trial court's decision, the applicant filed the motion dated 15th September 2017 in which it sought to have the ruling delivered on 8th September 2017 reviewed and set aside. Hon. D. O. Mbeja, learned Senior Resident Magistrate heard the review application and had it dismissed via a ruling he delivered on 24th May 2018.

3) The applicant did not appeal against the decision until the time allowed to appeal lapsed. The applicant was therefore prompted to file the motion dated 13.7.2018 in which it sought for leave to appeal out of time and for stay of proceedings pending the filing and determination of the intended appeal.

4) The aforesaid motion is supported by the affidavit and a supplementary affidavit of David Kigen. When served, the respondent filed both a replying affidavit and grounds of opposition to resist the applicant's application. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions.

5) I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the grounds of opposition and the rival written submissions.

6) It is the applicant's submission that the trial court's ruling delivered on 24.5.2018 was never brought to its attention by its previous advocates namely M/s Marrirmoi Chemurgor & Co. until the time to appeal lapsed.

7) It was also stated that there was delay in obtaining a copy of the trial court's ruling due to the magistrate's colloquium. The applicant avers that it intends to challenge the trial court's decision on appeal if granted leave to do so. The applicant beseeched this court not to let it suffer for the mistakes of its previous advocate who failed to inform it of the trial court's decision. The applicant stated that its appeal raises triable issues.

8) The respondent on his part urged this court to reject the applicant's motion arguing that one A. E. Kiprono was practising with the firm of M/s Marrirmoi Chemurgor & Co. Advocates and therefore has at all times handled the matter and as such cannot rely on the same to seek for an extension of time. The respondent further pointed out that the applicants defence which was struck out was a sham and a mere denial hence the intended appeal has slim chances of success. The respondent further argued that it is not in the best interest to stay proceeding in the circumstances.

9) It would appear that the respondent does not deny the assertion that the firm of Marrirmoi Chemurgor & Co. Advocates did not inform the applicant the outcome of its motion dated 15.9.2017. The only contention raised by the respondent is that the applicant's current advocate namely A.E. Kiprono was an employee in the firm of Marrirmoi Chemurgor & Co. Advocates and therefore he had knowledge and must have informed the applicant of the ruling delivered on 24.5.2018.

10) With respect, I do not think that information can be used against the applicant. It is possible that the current advocate may not have handled the applicant's file while serving in the firm of M/s Marrirmoi Chemurgor & Co. Advocates. Even if he had handled, the information may not have been relayed to the applicant upon A. E. Kiprono leaving that firm.

11) There is also an assertion that the magistrate who delivered the ruling had gone to attend the magistrate's colloquium hence the file could not be accessed. This averment was not controverted. I am convinced that the applicant in this case was let down by its erstwhile advocate who failed to inform it of the court's ruling. I am also satisfied that the delay to file the current motion is not inordinate but excusable.

12) The intended appeal in my view raises arguable points of fact and law therefore the applicant should be allowed to file the appeal out of time. If the order for stay of proceedings is not granted, it is clear that the respondent will proceed to have the suit proceed for hearing without the participation of the applicant. In other words the applicant's right to file a defence to challenge the respondent's claim will have been dashed.

13) In the end, I find the motion dated 13.7.2018 to be meritorious.

Consequently the motion is allowed thus giving rise to the following orders:

i. The applicant is granted leave of 10 days to file an appeal out of time.

ii. There be a stay of proceedings in Milimani C.M.C.C no. 521 of 2017.

iii. Costs of the motion assessed at ksh.15,000/= is awarded to the plaintiff/respondent.

Dated, Signed and Delivered in open court this 14th day of December, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent