

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 102 OF 2016

KENYA POWER LIMITED PLAINTIFF

VERSUS

STELLA AYUMA OMBOYADEFENDANT

RULING

The appellant was the defendant in the lower court while the respondent was the plaintiff. The lower court awarded the respondent a sum of Kshs. 472,140/= being general damages, special damages and costs after a full trial. The applicant was aggrieved by the said judgement but did not file an appeal within the stipulated time blaming this omission on inadvertence of the part of counsel. This is an application for leave to file the appeal out of time. A draft memorandum of appeal has been annexed.

It is the applicant's case that the appeal has good chances of success and the mistake of an advocate should not be visited upon the litigant. It is also the applicant's case that if orders sought are not issued the applicant will suffer irreparably and it will not be possible to prosecute the intended appeal. The application is opposed and there is a replying affidavit sworn by one Jared Ombwayo Madara the next friend of the minor respondent.

Following an order for parties to file written submissions only the applicant complied. Before the filing of this application the applicant filed an application before the lower court for a stay of execution of that judgment. I do not have the result of that application but one of the pleadings in that application is that the applicant was willing to comply with any condition of the court and in particular depositing the decretal sum in a fixed deposit interest earning account in the joint names of the parties.

The applicant has the right of appeal and the draft memorandum of appeal presents what the court considers arguable issues. I recognize the fact that a successful litigant should enjoy the fruits of his or her judgment but at the same time justice looks at both sides.

The order sought is discretionary and I have looked at the cited authorities in that regard. I agree that a mistake by counsel should not be visited upon the litigant and especially where such a mistake and or omission has been satisfactorily explained. In this application counsel has honestly admitted the mistake and I believe the application should be granted. See **John Kasimu Kilatya Vs. Chairman Machakos Land Disputes Tribunal and two others (2015) e KLR and Rosemary Muthoni Njuguna Vs. Kamuthi Farmers Co- Operative Society Limited (2009) e KLR.** In the event an order for security was not made in the lower court at the hearing of the application for stay, the same shall be included in the order I am just about to make.

The application is hereby allowed, and the memorandum of appeal shall be filed within 7 days of this ruling. The applicant shall cause the decretal sum to be deposited in an interest earning account in the joint names of counsel for the parties within 30 days from the date of this ruling. This is in the event such an order was not made by the lower court. The costs shall be on appeal.

Dated, signed and delivered at Nairobi this 21st Day of February, 2017

A. MBOGHOLI MSAGHA

JUDGE