



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC APPL. NO. 424 OF 2016

GENERAL PLASTICS LIMITED.....APPLICANT

- V E R S U S -

SIMON KYENGO KYENZE.....RESPONDENT

RULING

1) General Plastics Ltd, the applicant herein, took out the motion dated 22nd August 2016 whereof it sought for the following orders *interalia*:

- 1. THAT there be stay of execution of the decree herein pending the hearing and determination of the intended appeal against the judgment and order of the honourable magistrate.***
- 2. THAT the honourable court be pleased to grant the applicant leave to file appeal against the lower court judgment out of time.***
- 3. THAT the attached Memorandum of Appeal be deemed as duly filed upon payment of court fees.***
- 4. THAT cost of this application be provided for.***

2) The motion is supported by the affidavit of Linda Mukami. When served with the motion, Simon Kyengo Kyenze, the respondent herein filed the replying affidavit he swore to resist the application. When the motion came up for hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also taken into account the rival submissions. It is the submission of the applicant that it could not appeal within the time prescribed by the statute against the judgment of the trial court because the judgement was delivered without notice being given to the applicant. It is said that the applicant came to know of the existence of the judgement when it was served with a notice of demand of payment of ksh.281,400 on account of damages and ksh.102,430/= on account of costs. The applicant argued that it has a good appeal with arguable points. The applicant further beseeched this court to issue an order for stay pending the hearing and determination of the intended appeal. It submitted that unless the aforesaid order is issued, the intended appeal will be rendered useless. The applicant pledged to provide security for the due performance of the decree.

4) The respondent on the other hand urged this court to dismiss the motion because the applicant was

present in court on 19.7.2016 when the trial court delivered its judgment. In other words the delay to file an appeal within time was intentional and calculated to delay the conclusion and settlement of the dispute. It is also pointed out by the respondent that the appellant's intended appeal has no chance of succeeding.

5) It is not in dispute that the applicant failed to file its appeal within the time prescribed by the statute. The applicant has however stated that the cause of the delay is that there was no notice given to it of the date of delivery of judgment. The respondent has stated that the applicant was present in court during the delivery of judgment. The respondent did not avail to this court the proceedings of the trial court of 19.7.2016 to show those who were present at the time of delivery of judgement. It is not in dispute that the judgment was initially scheduled for 25.5.2016 but come that date the same was rescheduled to 19.7.2016. The applicant avers that it was not present in court. There is no credible evidence to controvert this assertion. I have no reason to disbelieve the applicant. I am satisfied that the applicant has provided a plausible explanation for the delay.

6) The applicant has stated that the award on future medical expenses was not justified hence it will be challenging the award on appeal. This in my view is an arguable ground of appeal. If the order for stay is not given, the appeal will obviously be rendered nugatory.

7) In the end, I find the motion dated 22.08.2016 to be meritorious. The applicant is granted leave of 15 days to file an appeal out of time. In the meantime the applicant is granted an order for stay of execution of the decree pending the hearing and determination of the intended appeal on condition that the applicant deposits the decretal sum i.e. ksh. 383,830/= in an interest earning account in the joint names of learned counsels or firms of advocates within 30 days from the date hereof. In default, the motion will be treated as having been dismissed. Costs of the motion to abide the outcome of the intended appeal.

Dated, Signed and Delivered in open court this 2nd day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant