



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL MISC APPL. NO. 412 OF 2016

RIARA GROUP OF SCHOOLS LIMITED.....APPELLANT/APPLICANT

- V E R S U S -

NICHOLAS ADALO BURUNA.....DEFENDANT

RULING

1) Riara Group of schools Ltd, the applicant herein, took out the motion dated 16.8.2016, in which it sought for inter alia:

1. THAT leave be and is hereby granted to the applicant to file an appeal out of time in respect of the judgment of honourable magistrate Lilian Arika in Nairobi CMCC No. 6202 of 2010; Nicholas Adalo Buruna vs. Board of Governors Riara Group of schools.

2. THAT in the alternative the time within which to file an appeal against the judgement delivered on 24th May 2016 by the Honourable magistrate Lilian Arika in Nairobi CMCC No. 6202 of 2010; Nicholas Adalo Buruna vs. Board of Governors Riara Group of schools be and is hereby enlarged.

3. THAT the annexed memorandum of appeal be deemed as duly filed upon payment of the requisite court fees.

4. THAT this honourable court do make appropriate orders for the service of this application upon the respondent and further give directions for the hearing of this application inter partes.

5. THAT the costs of this application be provided for.

2) The motion is supported by the affidavit of Philip Nyachoti. When served, Nicholas Adalo Buruna, the respondent herein filed grounds of opposition to resist the motion. When the motion came up for inter partes hearing, this court gave directions for the motion to be disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion plus the facts deponed in the supporting affidavit and the grounds of opposition. I have also taken into account the rival written submissions. A critical examination of the motion will reveal that the applicant is basically seeking for two main prayers. First, is an order for leave to appeal out of time and secondly, is a prayer for an order for stay of execution pending the hearing and determination of the intended appeal. The respondent filed a compensatory suit before the Chief Magistrate's Court for the injuries he suffered as a result of an accident which occurred on 15th September 2009. It is said that the respondent was injured when the applicant's wall came tumbling. The case was heard and determined in favour of the respondent on 24.5.2016 whereof the

respondent was awarded ksh.1,702,000/= as damages. It is the submission of the applicant that the aforesaid judgment was delivered without notice to it. The applicant stated that the trial magistrate initially fixed the date for judgment on 13.5.2016 but come that date its advocate was informed by the court staff that the trial magistrate would not be sitting on that date. The applicant further stated that it only came to know that judgment was delivered on 24.5.2016 when the respondent's advocate served a notice of intention to execute on 18.7.2016, nearly two months after judgment was delivered. The applicant is aggrieved by the aforesaid judgment and it now seeks for leave to appeal since the statutory period fixed for a party to appeal has lapsed. It is the submission of the applicant that it has good and arguable grounds of appeal. The applicant has also sought for an order for stay pending appeal stating that unless the order is given, it would suffer substantial loss since the respondent may not be in a position to refund if the money is paid and the intended appeal turns successful.

4) The respondent on the other hand has filed grounds of opposition to resist the motion. It is said that the motion was filed after along and inexcusable delay. It is further argued that the motion is meant to delay and frustrate the respondent from enjoying the fruits of his judgment. It is said that the intended appeal lacks merit since the applicant did not tender evidence at the trial to challenge the respondent's evidence.

5) After a careful consideration of the arguments of the parties, it is clear in my mind that the applicant's averment, that it was not notified of the date of delivery of judgment is not controverted. I am therefore convinced that the applicant came to know of the delivery of judgment way after the time to appeal had lapsed. For this reason, I am satisfied the applicant is entitled to leave to appeal. I have looked at the proposed memorandum of appeal attached to the affidavit of Philip Nyachoti and I am satisfied that the same raises arguable grounds. Consequently I grant the applicant leave of 10 days to appeal out of time.

6) The respondent has stated that if the intended appeal turns successful, the respondent may not be in a position to refund the decretal sum. The assertion is made on oath. The respondent did not deem it fit to controvert this assertion. In the circumstance I am convinced that the applicant is entitled to an order for stay of execution. The applicant has offered to provide security for the due performance of the decree. The applicant stated that it came to know the existence of the judgment on 18.7.2016. This application was filed on 16.8.2016. I am satisfied that the motion was timeously filed.

7) In the end, I allow the motion and grant the following orders:

i. The applicant is granted leave of 15 days to file an appeal out of time.

ii. An order for stay of execution pending appeal is given on condition that the decretal sum of kshs.1,702,000 is deposited in an interest earning account in the joint names of the advocates or firms of advocates appearing in this matter within 30 days from the date hereof. In default, the motion will be deemed as having been dismissed. Costs of the motion to abide the outcome of the 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