



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPLICATION NO. 361 OF 2015

CASEMENT FABRICATION WORKS LIMITED.....APPLICANT

VERSUS

AGRI HANDWARES (E.A) LIMITED.....1ST RESPONDENT

DAVID KAMAU

GLADYS NJERI

CASEMENT INDUSTRIES LIMITED.....2ND RESPONDENT

RULING

1. The Notice of Motion dated 26th September, 2016 seeks orders that:-

1. THAT leave granted to the Applicant to file an appeal out of time on 11th March 2016 and consequential orders be extended.

2. The background to the application under consideration is an application dated 21st August 2015 which sought, *inter-alia* orders for leave to file appeal out of time and stay of execution pending the hearing of the intended appeal. The said application was allowed on 11th March 2016 on condition that the appeal be filed within ten (10) days. The appeal was not filed within the ten days, hence the instant application. The reason given for the failure to file the appeal within the timelines given by the court is that the Applicant's counsel who is a sole practitioner fell sick and was hospitalized.

3. The application is opposed. The 1st Respondent filed the grounds of opposition dated 25th October 2016. The said grounds are as follows:-

1. THAT the application though filed on 26th September 2016 and scheduled for inter parties hearing for 27th October 2016, the same was only served on 24th October 2016 indicative of the Applicant's utter contempt of the law and practice.

2. THAT the Applicant was on 11th March 2016 given ten (10) days to file its appeal instead it makes application for leave, six (6) months later, again indicative of its indolence and reckless negligence.

3. ***THAT leave having been given, cannot be re-issued, the application being res judicata.***
4. ***THAT the application doesn't establish legal or factual basis for the orders sought.***
5. ***THAT the alleged indisposition of the Applicant's lawyer is not discharged, the attachment being scanty and suspect.***
6. ***THAT the Applicant and its Lawyers are abusing the court process to defeat the judgment that issued to the 1st Respondent on 12th April 2013.***
7. ***THAT the application violates Article 159(2) (b) of the Constitution and Section 1A and 1B The Civil Procedure Act, Cap. 21.***
8. ***THAT the application is for dismissal.***

4. The 2nd Respondent did not oppose the application.

5. The application was canvassed by way of written submissions which I have considered.

6. The ruling which gave the Applicant ten (10) days within which to file the appeal out of time was delivered on 11th March 2016. The medical documents exhibited in support of the assertion that the Applicant's counsel was indisposed are dated 12th April 2016 and 26th April 2016. By the time the Applicant's counsel was seen by the doctor as per the said documents, a period of more than 30 days had lapsed. There is therefore no explanation given why the appeal was not filed within ten (10) days as for the court's orders.

7. A perusal of the file herein reflects that the Applicant's intended appeal is in respect of his objection to the attachment by auctioneers of motor vehicle registration No. KBQ 230 H which the Applicant claims belongs to him and not to the Judgment Debtor. The proclamation of attachment reflects the value of the said motor vehicle as Ksh.350,000/=. Without undue regard to technicalities of procedure, this court is inclined to allow the application on condition that the Applicant do deposit security in the sum of Ksh.300,000/= for the due performance of the decree. The said amount to be deposited in a joint interest earning bank account of the counsel's herein or in court within 30 days, in default execution to proceed. In the meantime the Applicant to file the appeal within 14 days from the date hereof. Orders accordingly. Costs in cause.

Date, signed and delivered at Nairobi this 15th day of June, 2017

B. THURANIRA JADEN

JUDGE