



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC APPLICATION NO 507 OF 2013

SILANGA RELIABLE SECRETARIES.....APPLICANT

VERSUS

KENYA SISAL BOARD LIMITED.....RESPONDENT

RULING

1. The Applicant has applied by **notice of motion dated 13th May 2013** for leave to file appeal out of time against the decree of the lower court in ***Milimani CMCC No. 371 of 2009*** passed on 15th August 2012. As this application was filed on 13th May 2013, and given the provisions of **section 79G** of the **Civil Procedure Act, Cap 21** (the Act) the delay is about 8 months.

2. Under the **proviso** to section 79G aforesaid, an appeal may be admitted out of time if the Appellant satisfies the court he had **good and sufficient cause** for not filing the appeal in time.

3. How has the Applicant explained the delay? The supporting affidavit is sworn by one **Geoffrey Ndung'u**, the managing director of the Applicant. He has deponed at paragraphs 4, 5, 9, 10, 11, 12 and 13 as follows –

(i) That the Applicant had instructed its present advocates to file appeal but they were unable to do so in time because the lower court file could not be easily traced at the registry, and that subsequent efforts to have the court file traced involved several visits to the registry.

(ii) That it also took a while for the Applicant's present advocates to come on record as explained in paragraph 5 of the affidavit.

(iii) That on 21st September 2012 the Applicant's present advocates discovered at the registry that execution proceedings against the Applicant had issued on 18th September 2012 notwithstanding that the lower court file could still not be traced.

(iv) That the lower court file was finally traced on 24th September 2012 and the Applicant immediately filed an application for stay of execution pending appeal which was allowed on 9th November 2012.

(v) That the Applicant then filed on 18th October 2012 a **previous, similar application** for leave to appeal out of time by notice of motion dated 15th October 2012.

(vi) That the court (Ang'awa, J) declined to hear the application on 11th December 2012 upon the basis that the Applicant's present advocates, Kipkenda & Co., were not properly on record. The application was thus withdrawn and the present one subsequently filed.

(vii) That the delay has thus not been deliberate but was due to circumstances beyond the Applicant's control.

4. The Respondent has opposed the application by **replying affidavit filed on 11th June 2013** which is sworn by one **Naomi Kamau**, acting managing director of the Respondent. Grounds of opposition emerging from this affidavit include –

(i) That the Applicant is guilty of indolence, and that there is no evidence that it or its counsels applied themselves diligently to do all that was necessary to file the appeal in time, or to minimize the delay.

(ii) That there is no good or sufficient reason given why the present application was filed on 13th May 2013, five months after 11th December 2012 when the previous similar application was withdrawn.

(iii) That it is also apparent that the Applicant applied for proceedings in the lower court as recently as 18th February 2013, and no good or sufficient explanation for the delay has been offered.

(iv) That there is no evidence, say in the form of a letter from the court, that the lower court record was missing at any time.

(v) That the present application is only meant to delay the Respondent's enjoyment of the fruits of its judgment.

5. At the hearing of the application there was no appearance for the Respondent despite the hearing date having been taken by consent. I have considered the submissions of the learned counsel for the Applicants. No authorities were cited.

6. Whereas I was prepared to excuse the Applicant's lapses and delays prior to 11th December 2012 when the previous, similar application for leave to file appeal out of time was withdrawn, I cannot find in the supporting affidavit any good and sufficient cause why the present application was not immediately filed after withdrawal of that previous one. Why did it take another long five (5) months to file the present application? There is no credible reason offered for that further delay.

7. In the circumstances the Applicant has not satisfied the court that he had good and sufficient cause for not filing its appeal in time. I must refuse the application by notice of motion dated 13th May 2013. It is dismissed with costs. Any interim stay of execution in place is forthwith vacated. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 4th DAY OF JUNE 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 11TH DAY OF JUNE 2014