



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 35 OF 2013

KENYA POWER & LIGHTING CO. LTD.....APPELLANT

VERSUS

GEOFFREY NYANG'AU MARITA.....RESPONDENT

JUDGMENT

1. The applicant/respondent herein Geoffrey Nyangau Mariita filed a Notice of Motion dated 2nd April, 2014 under section 3A, 79(5) of the Civil procedure Act and order 42 Rule 6(2) of the Civil Procedure Rules seeking the following orders:-

1. *THAT the Honourable court be pleased to order dismissal of the appeal herein.*
2. *THAT consequent to granting prayer 1 herein above, the Honourable court be pleased to order the release of the decretal sum in Ogembo SPMCC.NO. 111 of 2011 at Credit Bank, Kisii Branch in joint account No. 0051006000246 of the Applicant.*
3. *THAT costs of this application be borne by the Appellant/Respondent.*

2. The above application was premised on grounds sworn by the applicant/respondent herein where he averred that he was the Plaintiff in Ogembo SPMCC.NO. 111 of 2011 giving rise to the appeal herein that judgment in Ogembo SPMCC.NO. 111 of 2011 was dated and delivered on 7th February, 2013 and thus the Appellant/Respondent had 30 days from the a foresaid judgment date if aggrieved by the said judgment to appeal.

3. However, that the appellant/respondent filed this appeal on the 5th day of April, 2013, it was thus mandatory for the Appellant/Respondent to seek leave to appeal out of time before filing this appeal and hence this appeal being filed without the leave of this honourable court makes the same null and void thus only fit for dismissal with costs.

4. He further averred that as a consequence to dismissing this appeal herein, the Honourable court be pleased to order that the decretal sum deposited in joint names of both counsels on record in account No. 0051506000246 at Credit Bank, Kisii Branch be released to him through his advocates on record. Lastly he contended that this appeal is only calculated at buying time and denying him enjoyment of fruits of his successful litigation.

5. The above application was opposed by the appellant/respondent's advocate's replying affidavit dated 10th June, 2014. The deponent Mitchell J.B Menezes averred by explaining that the defence case in the primary suit was closed in the 14th December, 2012 and the matter was scheduled for mention on 17th

January, 2013 to confirm whether parties had filed their submissions. That when the matter came up for mention for submission on 17th January, 2013 they (defendant/appellant) had not filed their submissions and the court granted them more time to do so.

6. Consequently, the appellant/defendant's submissions were filed on 22nd January, 2014 and subsequently, the delivery of judgment in Ogembo SPMCC.NO. 111 of 2011 took place after which he received instructions from the appellant to file an appeal against the judgment of the honourable court.

7. He further averred by acknowledging that he proceeded to file a Memorandum of Appeal dated 4th April, 2013 in the High court registry at Kisii and after filing the appeal, he proceeded on 23rd April, 2013 to file an application seeking stay of execution of judgment vide a Notice of Motion dated 18th April, 2013 in Ogembo SPMCC.NO. 111 of 2011 pending hearing and determination of the application and the appeal.

8. However, he (deponent) contends that while filing the Memorandum of Appeal he honestly believed that the judgment in Ogembo SPMCC.NO. 111 of 2011 was delivered on 7th March, 2013 and not 7th February, 2013, that neither the applicant nor the lower court which heard the application dated 18th April, 2013 corrected the wrong impression he had formed that judgment in Ogembo SPMCC. NO. 111 of 2011 was delivered on 7th March, 2013 thereby reinforcing his mistaken belief.

9. He further contended that his belief that the said judgment was delivered on 7th March, 2011 was based on information he received from his representatives who attended court on diverse dates after the close of parties cases to establish whether judgment in Ogembo SPMCC.NO. 111 of 2011 had been delivered; and based on the lower courts record of proceedings and information he was given by his representatives who attended court on 17th January, 2011 when the subject suit came up for mention for submissions; the honorable lower court ordered that a judgment date would be given in due course. Thus the said court did not give an indication as to when judgment would be delivered.

10. Furthermore, he (deponent) avers by contending that he finds it strange that after the court had already indicated that a judgment date would be given and after granting the appellant more time to file their submissions, the record for proceeding shows that the court set 7th February, 2013 as the dates of judgment while on 28th February, 2013 he sent one of his representatives to find out if judgment had been delivered and she was in turn informed by the registry officials that the judgment would be delivered on 7th March,2013.

11. Moreover he avers that if indeed judgment was delivered on the 7th February, 2013, then on the 28th February, 2013 when his representatives made enquiries about the judgment at Ogembo Civil Registry the registry officials would have informed her that judgment had already been delivered and the file would have been at the registry, that the appellant (his client) stands to be prejudiced if the application is allowed as it has an arguable appeal with considerable probability of success.

12. Lastly, he contended that the above application is incompetent as the same amounts to an abuse of court process since it has been prepared and filed by a person who is not currently qualified to practice law.

13. In a quick rejoinder, Samuel Nyabuto Nyachae(the advocate for the applicant respondent) obtained leave before Sitati, J. on 10th July, 2014 to file a supplementary affidavit. Indeed the said supplementary affidavit was filed on 15th July, 2014 and the respondents/applicants advocate attested to the fact that he had always taken out a practicing certificate every year and indeed attached an online copy of a page in the Kenya Law Society Website which proved that indeed his practicing status for the year 2014 is active.

14. On 17th October, 2014 counsels representing both parties appeared before me and confirmed that they had filed their written submissions and I have read them. Since the issue that the respondent/applicants

advocate had no practicing certificate when he filed the above application has been rebutted by the supplementary affidavit he filed, the only issue that his court needs to determine is whether or not the defendant/appellants pending appeal should be struck out due to the fact that it was filed out of time without obtaining leave.

15. Section 79G of the Civil Procedure Act Cap 21 provides;

“Every appeal from a subordinate court to the High court shall be filed within a period of thirty days from the date of the decree or order appealed against excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:-

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time?

16. In the instant case it is an undisputed fact that judgment in Ogembo SPMCC.NO. 111 of 2011 was delivered in the 7th day of February, 2013, that the appeal herein was filed in the 5th April, 2013 and that it was mandatory for leave to be sought for and granted before filing an appeal out of time. The appellant/respondents contention that he believed that the said judgment in Ogembo SPMCC.NO. 111 of 2011 was delivered on the 7th day of March, 2013 in my humble view is believable as none of the parties appeared for the judgment that notwithstanding once he discovered the fact that he was late in filing the said Appeal nothing prevented him from making an application to file the said appeal out of time and no court would reject such an application. Justice M.J. Anyara Emukule in the case of **Gerald M. Limbine vs. Joseph Kangangi(2009) eKLR** was confronted with an application for leave to file an appeal out of time and held as follows:-

“My understanding of the proviso in Section 79G is that an Applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period.

17. That holding, which I wholly adopt was to the effect that when a party wishes to obtain leave to file an appeal out of time such a party must file the appeal and as provided in the proviso of section 79(5) and then he must seek leave to admit that appeal out of time. In the present scenario, the appellant/respondent has not done so. The judgment and decree of Ogembo SPMCC.NO. 111 of 2011 is clearly dated 7th February, 2013 while the decree dated 27th February, 2014. This only means that there was no judgment read in Ogembo SPMCC.NO. 111 of 2013 on 7th March, 2013.

18. What the appellant/respondents replying affidavit is trying to do is justifying why he did not file his client’s application on time. In my humble view therefore, what the appellant/respondent’s advocate should have done is filed the appeal simultaneously application seeking leave to file his appeal out of time citing the grounds he has advanced in his replying affidavit dated 16th June, 2014.

19. As the situation stands right now, no leave to appeal out of time was ever obtained. In the circumstances, the appeal herein is incompetent and it is hereby struck out with costs to the respondent. The costs shall include the costs of this application. The decretal sum in Ogembo SPMCC. NO. 111 OF 2011 AT Credit Bank, Kisii Branch in joint account No. 0051006000246 shall be released to the respondent through his advocates, S.N. Nyachae & Co. Advocates.

20. It is so ordered.

Dated and delivered at KISII this 1st day of December, 2014.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Nyachae for the appellant.

N/A for the respondent

Edwin Mongare Court Clerk.