



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISCELLANEOUS CIVIL APPLICATION 8 OF 2008**

**FRED LWANDE T/A MARKART .....APPELLANT/APPLICANT**

**VERSUS**

**KENYA INDUSTRIAL ESTATES LTD.....RESPONDENT/DEFENDANT**

**R U L I N G**

The amended Notice of Motion dated 20-11-08 is made under section 3A Civil Procedure Act and Order XLIX Rule 5 and Order L Rule 2 Civil Procedure Rules. It seeks that the court do grant leave to the appellant/applicant to file an appeal out of time from the ruling in **PMCC MInd 387 of 2004 Kenya Industrial Estates Ltd v Fred Lwande** which was delivered on 25<sup>th</sup> July 2007.

It is premised on grounds that;-

- (1) The learned trial magistrate erred by entering summary judgment against the defendant when the defence disclosed several triable issues.
- (2) The applicant did not make this application earlier because he was not aware about the judgment until after it was executed on 25<sup>th</sup> January 2008.
- (3) The applicant will suffer substantial loss which cannot be compensated in monetary terms as its properties attached pursuant to the judgment were grossly undervalued and no attempt made to ascertain the true value before sale so as to satisfy the respondent's claim and revert whatever residue to the applicant.
- (4) The applicant has filed an application seeking leave to file appeal out of time and is willing to give security for costs.
- (5) The applicant has a good appeal with overwhelming chances of success.
- (6) The respondent will not be prejudiced in any way if the orders sought are granted.

The application is opposed on grounds that it is bad in law, vexatious and an abuse of the court process

and the orders sought do not lie. Further that the application is incurably defective and unsustainable in law.

In the affidavit supporting the application, it is deponed that summary judgment was entered on 25-7-07 against the applicant but his then advocate on record M/s Muli Ole Kina and Co. Advocates never informed him about that and he only got to realise the state of things when the execution process begun. That was on 20-3-08, when he received information from one of his employees Ali Said that respondent had gone ahead and instructed auctioneers to attach his property at a time when the premises was closed. At that particular time the country was in a state of turmoil due to the post election violence and it was not easy for the applicant to learn what had transpired as his premises were still closed.

Subsequently his present advocates requested for certified copies of proceedings and judgment/ruling on 31<sup>st</sup> march 2008, but to date they have not been issued with any nor is there a certificate of delay released by the court. The applicant therefore made his own efforts to type the proceedings after being informed by a court clerk, one Mr. Ndonge, that the court computers had broken down and it would take substantially longer to obtain the proceedings – applicant has since submitted the proceedings he had typed, for proof reading at the court – copies of the same are annexed and marked FL II.

He points out that there are irregularities in the manner in which respondent got to obtain the judgment and that the auctioneers took away everything from the workshop without making an inventory; and that the calculations made relating to the decretal amount owing, as wrong – meaning the application should not have been allowed in the first instance.

Applicant laments that even his tools of trade were attached and the state didn't realize the decretal amount due.

A draft memorandum of appeal is annexed to this application.

At the hearing of the application, Mr. Okuto advocate, submitted on behalf of the applicant that there were several triable issues in the statement of defence and so it was erroneous for the trial magistrate to enter judgment summarily. Further that despite execution having taken place, if the appeal were to succeed, respondent would be able to compensate the applicant as it is a public corporation with good financial standing and would be able to compensate the plaintiff without prejudice. He points out that upon learning about the entry of judgment, applicant took several steps inter alia:

- (1) Applying for stay of execution (which was dismissed on technical grounds as he had not complied with the provisions of Order III Rule 9)
- (2) Personally having the proceedings and judgment typed and presenting them to court for proof reading – these were subsequently proof read by court and later admitted as representing a true record of the court.

Mr. Okuto explains that these events affected the time within which the applicant could expeditiously bring this matter to court and also demonstrates that applicant was not indolent.

Mr. Mouko in opposing the application on behalf of the respondent submits that the amendment that was effected in this application was improper as Order XLIX and L Rule 2 do not provide for *ex parte* Notice of Motion and that in any case the Notice of Motion proceeded *inter partes* and that one cannot amend a non-existent Notice of Motion.

It is Mr. Mouko's contention that the only relevant ground raised is with regard to filing of appeal out of time. He points out that it was the duty of applicant's former advocate to advise him that judgment had been evicted. What's more by the time applicant was attempting to obtain stay, execution had already been levied and this application is belated as sale has been finalized and returns made.

Mr. Mouko argues that the fact that applicants goods were not valued before sale cannot be a basis for

appeal as there were many small items sold, and returning them might not be possible.

Mr. Okuto in response argues that the amendments are not defective as the application seeks leave to file appeal out of time as per the provisions of Order XLIX Rule 5. He explains that at the first instant, the applicant moved *ex parte* and that is why the application is headed “*Ex parte Notice of Motion*” and that what Mr. Mouko raises now is a technical matter which does not go to the substance of the application.

He says if the former firm of advocates did not inform applicant about the entry of judgment, then that should not be visited on the applicant who took immediate corrective steps upon learning about the judgment.

Applicant recognizes the fact that sale already took place but is insistent that if appeal succeeded respondent would be in a position to pay him compensation – meaning he does not necessarily seek return of the goods.

What the applicant seeking extension of time for filing appeal, is to explain the cause of the delay. A useful guide is the Court of Appeal decision in **Leo Sila Mutiso V Rose Hellen Wangari Mwangi Civil Application No. Nrb 251 of 1997** which stated that:

***“it is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled tht in general matters this court takes into account in deciding whether to grant an extension of time re first the length of the delay, secondly the reason for the delay, third (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is not granted”***

The cause of the delay in filing in the appeal is given as lack of information – that once judgment was delivered his then counsel on record never informed him about that and he only got to realize that judgment had been delivered when auctioneers appeared at his workshop – judgment was delivered on 25<sup>th</sup> July 2007, execution took place on 25<sup>th</sup> January 2008 that was six months after judgment. Why was there delay? Immediately upon learning about the judgment, applicant made an attempt to stay execution – this failed on a technical ground and caused further delay because he had now changed advocate and the legal provisions under Order III Rule 9 had to be met. That delay was compounded by the post election vents in the country which interfered with the applicant ability to act expeditiously in his matter. I find the explanation given by the applicant satisfactory and I accept it – although the delay was long – there is a merited reason given.

What are the chances of appeal succeeding? The mere fact that execution took place does not mean that appeal will not succeed, or that in the event of the appeal succeeding appellant will not made any recovery – it is indicated that he would pursue compensation – I suppose as an alternative to restitution – what I can say is that having considered the history of this matter, the nature of the dispute between the parties, the events after entering of summary judgment is that applicant has an arguable appeal.

Finally is the issue of prejudice – applicant says he lost his property though auction including his tools of trade – the worse scenario for him would be to lose the appeal, the best would be the appeal succeeding and hopefully with orders for compensation – the middle road is that it is fair and just that applicant be given a chance to fight for what appears to have been his source of livelihood.

Consequently, I find merit in the application as applicant has sufficiently demonstrated that he deserves time to be extended. I therefore extend time within which to file the appeal by 14 (fourteen) days from the date of this ruling.

The applicant shall thereafter file and serve records of appeal within 14 (fourteen) days thereof.

Applicant shall bear costs of this application.

Delivered and dated this 9<sup>th</sup> day of July 2009 at Malindi.

**H. A. OMONDI**

**JUDGE**

Mr. Okuto for applicant

Mr. Mwadilo holding brief for Mouko for respondent