



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPLICATION NO. 57 OF 2021

THE STANDARD GROUP PLC.....APPLICANT

-VERSUS-

L.G. MENEZES & COMPANY ADVOCATES.....RESPONDENT

RULING

The application dated 3rd March 2021 seeks the enlargement of time, to enable the Applicant lodge an appeal against the Ruling delivered by the trial court on 19th January 2021.

1. The Applicant concedes that the appeal ought to have been filed by 18th February 2021.
2. The explanation tendered for the delay in filing the appeal was that the Applicant's advocates, **MS NYAMURONGI & COMPANY ADVOCATES** were relocating their offices from New Sansora Complex to Lengetia Place. It was because of that process, (of relocating offices), that the Applicant's advocates inadvertently failed to lodge the appeal.
3. In order to have a better appreciation of the matter, it is necessary to give some background to it.
4. The Respondent, **L.G. MENEZES & COMPANY ADVOCATES** had sued the Applicant. In the said proceedings, the court granted Judgment in favour of the Plaintiff, on the grounds that the Defendant had failed to Enter Appearance and also to file a Defence.
5. Apparently, the Applicant first became aware of the suit when they were served with a Proclamation, in the process of execution of the decree.
6. The Applicant was aggrieved, as they had been condemned without having been afforded an opportunity to be heard. Therefore, the Applicant filed an application to set aside the *ex parte* judgment.
7. By the Ruling delivered on 19th January 2021, the learned trial magistrate set aside the default judgment. However, the trial court ordered the Applicant to pay to the Plaintiff, the thrown away costs amounting to Kshs 30,000/=.
8. The Applicant felt aggrieved by the order requiring them to pay the thrown away costs. They therefore instructed their advocate to appeal against the said order. However, the advocates failed to take action within the time allowed by law.
9. Pursuant to the proviso to **Section 79G** of the **Civil Procedure Act**, 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 on time.
10. As the Respondent submitted;

*“The decision to either grant leave to
appeal or not, again calls for your
exercise of discretion, and there are
factors to consider.”*

11. It is well settled that the Court's discretion, in that respect, is unfettered. Some of the relevant factors to be taken into account include;

(a) The period of delay;

(b) The reason for the delay;

(c) The prejudice, if any, to the

respondent if the application

was granted.

(d) Sometimes, the chance of the

appeal succeeding, if the

application was granted.

12. The Respondent urged this Court to find that there was

“..... intolerable laxity and disorganization”

on the part of the Defendant.

13. In my considered view, the Applicant cannot be said to have been guilty of the alleged laxity and disorganization. I so find because the Applicant issued instructions to their advocates, promptly.

14. I also find that the Applicant's advocates have provided a plausible explanation for the delay in lodging the appeal.

15. Furthermore, the application for extension of time was brought without any inordinate delay.

16. Finally, I find that the extension of time would not prejudice the Respondent in any manner. I so hold because the Respondent will be accorded an opportunity to substantively canvass its response to the appeal. Therefore, if the appellate court was persuaded that the interests of justice would be best served by upholding the decision of the trial court, it will sustain the said decision.

17. But there is a possibility that the appellate court could hold a view that was not consistent with that of the trial. In either eventuality, the Court would have accorded both parties, an equal chance to advance their respective cases.

18. Accordingly, I do now order that the time for the filing of the intended appeal be enlarged. The Applicant is allowed 10 Days to file the said appeal.

19. As regards costs of the application dated 3rd March 2021, I order that each party shall meet his own costs. I so hold because although the application was successful, the reason why it had to be lodged, in the first instance, is attributable to an inadvertent oversight on the part of the Applicant's advocates. It would thus be unfair to condemn the Respondent to pay costs which the Applicant and its advocates could have avoided.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF MARCH 2022

FRED A. OCHIENG

JUDGE