



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA A NAIROBI**

**CIVIL CASE NO. 414 OF 2012**

**CELL TOURS & TRAVEL LIMIED.....PLAINTIFF/APPLICANT**

**VERSUS**

**CHARLES MAINA MURIITHI.....1<sup>ST</sup> DEFENDANT/1<sup>ST</sup> RESPONDENT**

**REAL INSURANCE LIMITED.....2<sup>ND</sup> DEFENDANT/2<sup>ND</sup> RESPONDENT**

**RULING**

The application dated 18<sup>th</sup> July, 2018 seeks leave to file an appeal out of time and that the Notice of Appeal be allowed upon payment of requisite fees. The application is supported by an affidavit sworn by the advocate for the applicant in addition to the grounds set out on the face thereof. The application is opposed and there is a replying affidavit sworn by Rita Musyoki, advocate who is attached to the firm of advocates for the respondents.

There is on record submissions by both counsel addressing the application in question. Some authorities have also been cited the contents of which I have taken into consideration. The ruling that prompted this application was delivered on 19<sup>th</sup> June, 2018. Soon thereafter, the applicant is said to have applied for copies of the proceedings and rulings which were subsequently delivered on 11<sup>th</sup> July, 2018, which was 21 days from the delivery of ruling. Section 79 G of the Civil Procedure Act provides as follows,

**“79G. Time for filing appeals from subordinate courts. 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.”**

The power to enlarge time within which to file an appeal is discretionary, which discretion should be exercised judicially. In so doing, the courts should bear in mind that they are enjoined to advance substantial justice and that the application is presented in good faith. See **Daphne Parry vs. Murray Alexander Carson (1963) EA 546**. See **also First American Bank of Kenya Limited vs. Gilab P. Shah & 2 Others (2002) 1 EA 65**.

The present application was filed seven days after the receipt of the proceedings. It will be noted therefore that the delay in lodging the same has sufficiently been explained and may not be blamed on the applicant. In any case, the said delay is no unreasonable or inordinate. See **Salkas Contractors Limited vs. Kenya Petroleum Refineries Limited (2004) e KLR** where the court stated as follows,

**“The principle that pervades these decisions is that the court has to be satisfied that the inordinate delay is excusable and if so satisfied, then the court has to consider whether justice can still be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable, and then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution.”**

The other issue that comes to mind is whether or not the defendant will suffer any prejudice in the event the application is allowed. From the material presented it is not alleged, neither is it apparent, that the defendant is likely to suffer any prejudice.

I refrain from commenting on the chances of appeal succeeding and leave it for the province of the main hearing. For now, the court is satisfied that leave to file the appeal out of time should be, and is hereby granted. The notice of appeal shall be deemed as duly filed upon payment of the requisite fees which should be made within 7 days of this ruling. The costs shall abide by the outcome of the appeal.

**Dated, Signed and Delivered at Nairobi this 27<sup>th</sup> day of May, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

In the presence of:

Mr. Ranah h/b for Mr. Wachakana for the plaintiff

N/A for 1<sup>st</sup> defendant.

Mr. Opondo h/b for Mr. Michuki for the 2<sup>nd</sup> defendant/respondents