



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 533 OF 2019**

**FORWARD SAVINGS & CREDIT**

**CO-OPERATIVE SOCIETY LIMITED.....1<sup>ST</sup> APPELLANT**

**PAUL MWANGI MAINA.....2<sup>ND</sup> APPELLANT**

**JOSEPH KIRAGU GACHUHI.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**LEWIS MUTUA MBUTA.....RESPONDENT**

**RULING**

The Respondent/Applicant herein has moved this court by way of an application dated the 16<sup>th</sup> day of December, 2019 seeking orders that he be granted leave to file a cross-appeal out of time and that the costs of the application be in the cause.

The application is premised on the grounds on the face of the Motion and its supported by the annexed affidavit sworn by Lewis Mutua Mbuta, on the 16<sup>th</sup> December, 2019, in which he has deponed that he was the Plaintiff in Milimani CMCC Number 6372 of 2016, Lewis Mutua Mbuta Vs Joseph Gachuhi & another.

He avers that, failure to file a cross appeal within time was not intentional and/or wilful but was due to breakdown of communication between him and his advocate. He contends that he has an arguable cross-appeal with high chances of success and it is only fair that he be granted the orders sought herein.

He states that he attended court on the 25<sup>th</sup> February, 2019, when the matter came up for hearing on which occasion, he proceeded with and closed his case and a date was given for the defence case but owing to the fact that he resides at Loitoktok it was agreed between himself and his advocate that there would not be need for him to travel all the way to Nairobi as his attendance was not necessary and that his advocate would advise him once judgment is delivered.

He further depones that, his advocate misplaced the piece of paper where he had written down his contact and as a result, he was unable to reach him for further instructions in the matter. That it was not until the 9<sup>th</sup> December, 2019 while on a different mission in Nairobi that he decided to visit his advocate's offices when he was informed that judgement had been delivered and that liability was apportioned between him and the Appellants equally, by which time, time to file his cross- appeal had already lapsed.

He states that he is aggrieved by the said judgment and he wishes to appeal against the same. He contends that his intended cross-appeal is arguable and it has high chances of success as shown in the draft Memorandum of cross-appeal. He has urged the court to grant the orders sought in this application.

The application proceeded exparte as the respondent neither filed a response to the same nor attended court during the hearing despite having been served with a hearing notice through his counsel on record.

The court has considered the application and the supporting affidavit. The applicant has sought extension of time within which to file a cross-appeal. The orders sought are discretionary in nature though the court ought to exercise the same judiciously after considering the circumstances of each case.

The guiding principles in determining whether to grant a party leave to file appeal out of time were aptly discussed in the case of *APA Insurance Limited Vs Michael Kinyanjui Muturi (2016)* with reference to the Court Appeal case of *Thuita Mwangi Vs Kenya Airways Limited (2010)*. The said principles are the reason and the length of the delay; whether the appeal is arguable or not and the prejudice which

will befall the Respondent should the applicant be granted leave to appeal. It is my considered view that the same principles are also applicable in a case like the one before me where the applicant is seeking leave to file a Cross-appeal out of time.

On the length and the reason for the delay, the applicant is required to offer a satisfactory explanation for the delay in filing the cross-appeal on time and this requirement cannot be over emphasized. The court of Appeal in the case of **Stanley Kahoro Mwangi & others Vs Kanyamwi Trading Company Limited (2015) eKLR** held that;

***“The principles guiding the court on an application for extension of time premised upon Rule 4 of the rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is therefore, upon an applicant under this rule to explain to the satisfaction of the court that he is entitled to the discretion being exercised in his favour. (emphasis mine)”***

The reason given by the applicant for failure to file a cross-appeal on time is because there was breakdown of communication between himself and his advocate when his advocate lost his contact and as result, they were unable to reach him for further instructions regarding the matter and by the time he visited his advocate’s offices, time within which to file a cross- appeal had lapsed. In the circumstances, the delay in filing the cross-appeal was not intentional and it was beyond the control of the applicant. This court is satisfied with that explanation for the delay.

On the length of the delay, I have ascertained that the trial Court delivered its judgment on the 28<sup>th</sup> August, 2019. The application herein was filed on the 16<sup>th</sup> December, 2019 meaning that there was a delay of more than three months in bringing the motion. Upon considering the length of the delay, I do not find it to be inordinate and in any event, the same has been explained.

On whether the appeal is arguable or not, I have perused the draft Memorandum of Cross-appeal annexed to the affidavit in support of the motion and I have noted that the Cross- appeal essentially challenges the apportionment of liability between the applicant and the Appellant herein. It also challenges the award on quantum of damages as being inordinately low.

I am fully aware that at this point, it is not my responsibility to consider the merits of the appeal. Suffice it to state that I am satisfied the intended Cross-appeal raises arguable grounds which the applicant ought to be given an opportunity to ventilate on merits.

On the prejudice which will befall the Respondent, should the applicant be granted leave to Cross-appeal, none has been shown as the Respondent chose not to defend the application.

From the foregoing, I am satisfied that it would be proper exercise of my discretion to allow the applicant the opportunity of pursuing the Cross-appeal against the lower’s decision.

Consequently, the motion is allowed in respect to prayer (1). The Cross- appeal to be filed and served within 21 days from the date of this ruling.

No orders are made on the costs of the application.

**Dated, Signed and delivered at Nairobi this 23<sup>rd</sup> July, 2020.**

.....

**LUCY NJUGUNA**

**JUDGE**

**In the presence of**

.....**for the Applicants**

.....**for the Respondent**