



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**MISC. CIVIL APPLICATION NO.14 OF 2020**

**ABDI KARIMI ALI.....1<sup>ST</sup> APPLICANT**

**DIAMOND WHOLESSELLERS LTD T/A DIAMOND FUELS.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**CATHERINE MASITSA HAYADI (Suing as legal Administrators of the ESTATE**

**OF ELISHA MATANOBI KHYAYATI.....RESPONDENT**

**RULING**

1. The Application coming for Ruling is dated 2/7/2020 seeking the following Orders

**i. THAT the Application be certified urgent, fit and proper and be heard Ex-parte and service be dispensed with in the first instance (SPENT)**

**ii. THAT leave be granted to the Applicants to file Appeal out of time from Kericho CMCC No.285 of 2018.**

**iii. THAT the costs of the Application be provided for.**

2. The Application is based on the grounds on the face of it and supported by the Affidavit of **GEOFFREY WESONGA OKELLO** dated 2/7/2020 in which he deposed as follows:-

**i. THAT Kericho CMCC. No.285 of 2018 was slated for mention on 12/2/2020 to confirm filing of submissions.**

**ii. THAT the Judgment herein was delivered on 30/4/2020 in the absence of both parties.**

**iii. THAT on 26/6/2020, the Respondent's Advocates served him with a letter dated 26/6/2020 giving a notice of 10 days within which the Applicants should settle the Judgment inclusive of costs all totaling Kshs.2,187,245/=.**

**iv. THAT the instructing client (**BRITAM GENERAL INSURANCE CO. LTD.**) is aggrieved by the Judgment and has instructed him to Appeal against the said Judgment.**

**v. THAT he became aware of the Judgment on 26/6/2020 which is 57 days after the Judgment was delivered and the time for Appeal had already elapsed.**

**vi. THAT the delay to file the Intended Appeal is not intentional.**

3. The Plaintiff/Respondent filed a Replying Affidavit sworn on 6/8/2020 by **CATHERINE MASITSA KHAYADI** in which she deposed as follows:-

**i. THAT she is the Plaintiff/Respondent herein and competent to swear the said Affidavit.**

**ii. THAT both parties were present in Court on 12/2/2020 when the case was slated for Judgment on 1/4/2020 but due to Covid-19 Pandemic, the same was delivered on 30/4/2020.**

**iii. THAT** the Applicant had an Equal Obligation as that of the Plaintiff to check on the status of the file.

**iv. THAT** the delay is intentional and intended to deprive the Plaintiff/Respondent the fruits of her Judgment.

4. The parties were directed to file Written Submissions in the Application dated 2/7/2020 which I have duly considered.

5. Section 79G of the Civil Procedure Act provides that:

**“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”.**

6. The principles to be considered in exercising the discretion whether or not to enlarge time were considered in the case of **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** and the court said the following factors have to be taken into account;

(i). the explanation if any for the delay;

(ii). the merits of the contemplated action, whether the matter is an arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

(iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

7. The issues for determination in this ruling are as follows:-

i. Whether the Applicant is entitled to leave to appeal out of time.

ii. Whether the delay is inordinate.

iii. Whether intended appeal has chances of succeeding.

8. I find that this Court has discretion to extent time for filing the appeal for “good and sufficient cause”.

9. The Applicant stated that he was not aware of the Judgment date. This Court Judicial Notice of the fact the courts were closed due to the Covid-19 Pandemic regulations.

10. I find that there is “good and sufficient cause” for the Applicant’s inability to file this appeal within 30 days after the delivery of Judgment.

11. I also find that the delay is not inordinate since the Applicant learnt about the Judgment on 26/6/2020 and this Application was filed on 2/7/2020.

12. I accordingly allow the Application dated 2/7/2020 on the following terms:-

**i. THAT** the intended appeal be filed within 30 days of this date.

**ii. THAT** half the decretal sum be deposited in an interest earning account held by both Counsels in this case.

**iii. THAT** the Applicant bears the costs of this Application.

**Delivered, signed and dated at Kericho this 23<sup>RD</sup> day of October 2020.**

**A. N. ONGERI**

**JUDGE**