



IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO. 1 OF 2020

BETWEEN

ANNET OROMO KHACHULA.....APPELLANT/APPLICANT

AND

FIRST ASSURANCE CO/ LTD..... RESPONDENT

RULING

1. Annet Oromo Khachula, the appellant/applicant herein moved the court by way of Notice of Motion dated 22nd July 2020 under section 79 G of the Civil Procedure Act. She is seeking the following orders:

- a) That leave of the court be granted to appeal out of time and the filed appeal be deemed duly filed.
- b) That costs of this application be provided for.

2. The application is premised on the following grounds:

- a) That on the 26th November 2019, the judgment was delivered without notice to the applicant.
- b) That the applicant has good grounds of appeal.
- c) That the applicant should not be denied an opportunity to be heard on appeal.

3. The application was opposed by the respondent on the following grounds:

- a) That on 19th November 2019 when the judgment was deferred to the 26th November 2019, the applicant's advocate was present.
- b) That the application lacks merit.

4. Section 79 G of the Civil Procedure Act provides as follows:

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.

5. Though the applicant contended that judgment was delivered without notice on 26th November 2019, this is not supported by the record. When I perused the lower court's file, I noted that the initial date for the judgment was 19th November, 2019. On this day, Mr. Oduor for the plaintiff and Mr. Manwari for the defendant were present. The judgment was however deferred to 26th November, 2019 when the defendant's advocate did not attend. It is not correct, therefore, to allege that the judgment was delivered without notice. The application cannot therefore turn on this ground.

6. The prescribed time lapsed on 26th December, 2019. Considering that there were three public holidays within the period, the delay to 13th January 2020 when the purported memorandum of appeal was filed cannot be said to be inordinate delay. I will therefore allow the

application to file the appeal out of time and the filed memorandum of appeal be deemed as properly filed.

7. The applicant cannot benefit from own mistakes. The costs of this application will be borne by the applicant.

8. The applicant is ordered to ensure that the record of appeal is prepared within 14 days of this ruling. Failure to do so, the respondent will be at liberty to move the court appropriately.

DELIVERED and SIGNED at BUSIA this 26th day of November, 2020

KIARIE WAWERU KIARIE

JUDGE