



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. 474 OF 2018**

**JOHN NGUGI MUTHONI.....APPLICANT**

**-VERSUS-**

**IRUNGU PETER.....1<sup>ST</sup> RESPONDENT**

**FRANCIS MUTHAURA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The cause of action in this matter, arose out of a road traffic accident involving the appellant/applicant that occurred on or about the 18<sup>th</sup> of December, 2010. Consequently, the said appellant/applicant filed a suit against the respondents in CMCC NO. 2796 OF 2012 seeking both general and special damages for injuries sustained as a result of the accident.
2. Ultimately, the trial court vide its judgment of 6<sup>th</sup> June, 2018 dismissed the applicant's suit and the applicant is desirous of appealing against the said judgment.
3. Before me now for determination, is an ex parte Notice of Motion dated 12<sup>th</sup> September, 2018 and filed by the applicant. The same stands supported by the grounds set out on its face and the affidavit sworn by *Irine N. Sikuku*. The applicant is seeking leave of this court to lodge an appeal against the aforementioned judgment and an order that the draft memorandum of appeal annexed to the application be deemed as duly filed and served.
4. It is the deponent's assertion that upon delivery of the judgment, the applicant's file was misplaced hence resulting in a delay in informing him of the outcome of his case and in turn delayed the receipt of instructions to file an appeal in good time.
5. The Motion was canvassed through written submissions which I have duly considered together with the cited authorities, the facts as deponed on the face of the Motion and its supporting affidavit.
6. Having done so, I turn to **Section 79G of the Civil Procedure Act** which stipulates that a party desirous of appealing against the decision of a subordinate court should file an appeal within 30 days from the date of the judgment.
7. Since it is not in dispute that the time for lodging an appeal has since lapsed, the elements to be considered by this court in determining whether or not to grant the applicant leave to appeal out of time are well established in the Court of Appeal case of *Thuita Mwangi v Kenya Airways Limited [2003] eKLR* as follows:
  - a. the length of delay;
  - b. the reason for the delay;
  - c. whether the appeal is arguable; and
  - d. the degree of prejudice that will befall the respondent.
8. In respect to the first element, the record confirms that the Motion has been brought slightly over three (3) months since the delivery of the impugned judgment. Whereas there has been a delay, I do not find the same to be unreasonable.

9. In addressing the second element, I turn my attention to the explanation given in the supporting affidavit and echoed in the submissions in this respect, save to add that the mistake was on the part of the applicant's counsel.

10. I am alive to the legal principle that the mistake of an advocate should not be visited on the client. In this instance, there is no doubt in my mind that there was an inadvertent error on the part of the advocate and the same has been acknowledged. It is therefore clear that the applicant should not be faulted for the same.

11. This brings me to the other element. It is the applicant's submission that the respondents will not suffer any prejudice if the applicant is granted leave to file his appeal out of time.

12. It is noteworthy that the applicant's suit before the trial court was dismissed with costs to the respondents. In the premises, I am therefore satisfied that the applicant stands to suffer a greater deal of prejudice if denied the chance of appealing against the judgment while on the flip side, it is unlikely that the respondents will be prejudiced.

13. In the end, prayer i) of the Motion is allowed. The applicant is hereby ordered to file and serve the memorandum and record of appeal within 30 days from today.

**Dated, signed and delivered at NAIROBI this 28<sup>th</sup> day of March, 2019**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:

.....for the Applicant

.....for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents