

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC APPLICATION NO. 385 OF 2018

BONFIDE GENERAL CONTRACTORS COMPANY LIMITED.....APPLICANTS

VERSUS

JOHNSTONE MWANTHI MBINDYO.....1ST RESPONDENT

BONFIDE CLEARING & FORWARDING CO. LIMITED.....2ND RESPONDENT

R U L I N G

This is an application by way of Notice of Motion under Sections 1A and 3A of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules for orders that the applicant be granted leave to appeal out of time against the judgment of the lower court delivered on 30th November, 2017 and that the Memorandum of Appeal annexed to the application be deemed as duly filed and served.

The application is supported by an affidavit of the advocate for the applicant alongside the grounds set out on the face of the application. The same is opposed and the respondent has filed grounds of opposition together with the replying affidavit.

Both parties have filed submissions which I have noted. This is not the first time the applicant has raised the issue of filing the appeal out of time. In a ruling delivered on 21st June, 2018, Githua J, made an observation relating to the same but going by the wording of the said ruling, the applicant herein asked for extension of time while opposing the Respondent's application for appeal to be dismissed as it had been filed out of time.

The learned Judge observed that such an application should be made formally and not in the course of arguments or submissions in response to that application. It was then observed that, not a single reason was advanced by the applicant herein for failure to file the appeal within the prescribed time.

The present application may have been prompted by the observations of the judge in that ruling. I say so because the applicant has now provided reasons why the appeal was filed out of time. In opposing the application the respondents have raised the issue of *res judicata*.

As I have observed, the court did not address the application because that issue was canvassed by way of submissions. In any case, it was not the applicant's application and the observation was made in reply to the Respondent's application then. This cannot be said to be a re-visit of the same application and therefore, the principle of *res judicata* cannot apply.

The order sought by the Applicant is discretionary which discretion should be exercised by taking into consideration the cases for both sides. The explanation for the delay or for filing the Memorandum of Appeal one day after the expiration of time was that of computation of time over the holidays. My observation is that, this was not deliberate but an honest mistake on the part of the Applicant's advocate. It is obvious that it cannot be attributed to the applicant as a client, neither can it be said this shall prejudice the respondents in any way. Indeed, such prejudice has not been alleged by the Respondents.

I have looked at the Memorandum of Appeal that is sought to be filed. Clearly, there is an arguable appeal and the applicant should not be driven out at the seat of justice before the appeal is heard.

I am inclined to allow the application which I hereby do. The time to file the appeal out of time is hereby extended by 7 days from today such that the Memorandum of Appeal should be filed within the said 7 days from today. The circumstances of this application call for the applicant to pay the costs of the application to the respondents.

Orders accordingly.

Dated, signed and delivered at Nairobi this 28th day of May, 2019.

A.MBOGHOLI MSAGHA

JUDGE