



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL CASE NO.E013 OF 2018**

**SUNDIP JAGDISHROY PATEL.....1<sup>ST</sup> APPELLANT/APPLICANT**

**HINA PATEL.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**AYAZ HUSSEIN MUKHI.....RESPONDENT**

**RULING**

(1) Before this Court is the Notice of Motion dated **10<sup>th</sup> December 2018** in which **SUNDIP JAGDISHROY PATEL**, (the Applicant/Appellant herein) and **HINA PATEL** (the 2<sup>nd</sup> Applicant/Appellant seek the following orders:-

**“1. SPENT**

**2. THAT this court grants the firm of Roba & Associates to come on record for the Applicants/ Appellants hereto,**

**3. Consequent to prayer two herein above being granted, the annexed notice of Change of Advocates be deemed to be duly filed and served upon payment of requisite court fees.**

**4. THAT this Honourable Court be pleased to issue an order granting the Applicants/ Appellants leave to file appeal on the ruling of the Deputy Registrar dated 25<sup>th</sup> October 2018.**

**5. THAT this Honourable court be pleased to issue an order staying the ruling of the Deputy Registrar dated 25<sup>th</sup> October 2018 and all consequential orders arising there from or attendant thereto pending the hearing of the intended appeal.**

**6. THAT this Honourable Court be pleased to issue an order staying the ruling of the Deputy Registrar dated 25<sup>th</sup> October, 2018 and all consequential Orders arising therefrom and attendant thereto pending the hearing of the intended appeal.**

**7. THAT the draft Memorandum of Appeal annexed herewith be deemed to have been properly filed upon payment of requisite statutory fees.**

**8. THAT the costs of this application be provided for.**

The application was premised upon **Order 50 Rule 6, Order 51 Rule 1, Order 49 Rule 7(2), Order 22 Rule 22, Order 9 Rule 9** of the **Civil Procedure Rules, Section 1A, 1B, 3A, 95 and 63 (e) of the Civil Procedure Act** and any other enabling provisions of the law. The same was supported by the Affidavit sworn on **10<sup>th</sup> December 2018** by the 1<sup>st</sup> Applicant.

(2) The Respondent **AYAZ HUSSEIN MUKHI** filed a Replying Affidavit dated **9<sup>th</sup> January 2019** in which he opposed the application. The application was disposed by way of written submissions. The Applicants filed their written submissions on **31<sup>st</sup> January 2019** whilst the Respondent filed his written submissions on **6<sup>th</sup> February 2019**.

**BACKGROUND**

(3) On **25<sup>th</sup> October 2018**, the Deputy Registrar **HON. S. OPANDE** delivered a ruling in which he allowed the application made by the

Respondent seeking to commit the Applicants to civil jail pursuant to an unsatisfied decree of the High Court issued in **November 2016**, vide **HCCC No.335 of 2014**. Being aggrieved by the decision of the Deputy Registrar the Applicants have moved this court seeking leave to appeal against that decision out of time. They further sought leave to have the firm of **ROBA & ASSOCIATES** come on record on their behalf.

(4) The Applicants contend that they were unaware of and had no notice of the decision of the Hon Deputy Registrar of **25<sup>th</sup> October 2018** as their advocate on record at the time failed to notify them of the decision. They plead at the material time the 1<sup>st</sup> Applicant was incapacitated and had travelled to India for major surgery accompanied by the 2<sup>nd</sup> Applicant. That the Applicants only became aware of the orders for their committal to civil jail upon being tipped off by a friend that they were to be arrested by the **OCS Jomo Kenyatta International Airport Police Station** immediately, upon their return from India. They aver that it was due to their ignorance about the existence of the orders that they failed to file their appeal within the required time.

(5) The Respondent submitted that the present application was defective, bad in law and ought to be summarily struck out for reason that the same was filed by an advocate who was not properly on record for the Applicants. The Respondent challenges the 1<sup>st</sup> Applicant's claim that he was seriously ill and hospitalized in India, and claims that this is merely a ploy calculated at abusing the court process. The Respondent submits that the present application is simply part of the applicants' ongoing attempts to deny him the fruits of his litigation.

#### **ANALYSIS AND DETERMINATION**

(6) I have carefully considered the submissions filed by both counsels as well as the authorities cited therein and the relevant case law. The following issues arise for determination:-

(i) Whether the Applicants' Advocate is properly on record.

(ii) Whether leave to appeal out of time should be granted.

#### **(i) Is the firm of ROBA and Associates properly on record?**

**Order 9 Rule 9** of the **Civil Procedure Rules** provides as follows:-

**“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”**

(7) The Respondents submit that the firm of **Roba and Associates** are not properly on record for the Applicants and as such are not authorized to file any documents on behalf of the Applicants. In the present application the firm of **Roba & Associates** did seek leave vide prayer (2) to come on record for the Applicants. However this prayer was not canvassed and indeed there is no record of such leave having been granted.

(8) Counsel for the Applicant confirmed that they had by prayer (2) sought leave to come on record for the Applicants. He submits that given that the court gave directions for the filing of submissions, this amounted tacit leave to come on record.

(9) My own take is that the failure to have prayer (2) canvassed substantially was due to an oversight. The Respondents have raised this issue at the last minute. **Section 1A** of the Civil Procedure Act enjoins a Court to administer substantive justice. **Section 1B** of the same Act provides that Courts shall handle all matters with a view to ensuring the just efficient and timely determination of all cases. **Section 3A** provides that courts are empowered to make such orders as may be necessary to meet the ends of justice and to avoid the abuse of court process.

(10) I note that **Roba & Associates** have filed and responded to the numerous applications in this matter it would be unjust to disqualify them at this point. No objection was raised by the Respondent to this firm coming on record and I fail to see what prejudice the Respondents stand to suffer if the firm is allowed to come on record for the Applicants. Accordingly the firm of **Roba and Associates** is deemed to be properly on record for the Applicants in this matter.

#### **(iii) Should leave to Appeal out of time be granted**

(11) **Order 49 Rule 7(3)** of the Civil Procedure Rules provides that a party seeking to appeal against an order of the Deputy Registrar must file such appeal within seven (7) days of the decision. In this case the impugned decision was made on **25<sup>th</sup> October 2018**. As such the Memorandum of Appeal ought to have been filed on or before **2<sup>nd</sup> November 2018**. In seeking leave to file their appeal out of time the Applicants plead that the delay in filing their appeal was not deliberate. It is averred that this delay was occasioned firstly by the failure of their previous counsel to inform them about the ruling and secondly due to the fact that they were both out of jurisdiction in India where the 1<sup>st</sup> Applicant was undergoing treatment.

(12) In **MWANGI –VS- KENYA AIRWAYS LTD [2003]eKLR**, the court held as follows:-

a. "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly: the degree of prejudice to the Respondent if the application is granted."

(13) The Applicant has attached his medical records in support of his claim that he was unwell. The document indicates that he was first seen at the **Unit Sterling Hospital in Vadodara, India on 26<sup>th</sup> November 2018**, and was later admitted on **29<sup>th</sup> November 2018**. Although the court has no document e.g passport stamp to show exactly when the Applicants travelled to India, I am willing to accept that the 1<sup>st</sup> Applicant was ailing during the material time, which ailment necessitated his travel to India for treatment.

(14) The length of delay in this matter is also a valid consideration. As stated earlier the appeal ought to have been filed by **2<sup>nd</sup> November 2018**. This application was not filed until **10<sup>th</sup> December 2018** a period of about 36 days after the ruling was delivered. In my view 36 days does not constitute inordinate delay. In any event I am satisfied that the delay has been satisfactorily explained by the absence of the Applicants from the country as well as their ignorance about the ruling. It is clear that upon being informed of the ruling the Applicants moved to engage a new lawyer and filed this application.

(15) The Applicants have prayed to have the annexed Draft Memorandum of Appeal deemed duly filed. It is not for this Court at this stage to look into the merits or otherwise of the intended appeal suffice to say that upon perusal I find that the same raises triable issues. The will be only fair to allow the Applicants to canvass their appeal before they are deprived of their liberty.

(16) Accordingly I do allow this application in terms of prayers (2), (3), (4) and (7). I grant a stay in terms of prayers (5) and (6) **SUBJECT**

(1) To the Applicants depositing as security a bank guarantee for the sum of **Kshs.20 Million** within thirty (30) days of today's date **and**

(2) **Subject** to the Applicants passports being retained by the Court until the said appeal is heard and determined.

Failure to comply with the above conditions means that the stay granted will automatically lapse and the Applicants will be subject to committal to civil jail without any further reference to themselves.

No orders on cost.

**Dated in Nairobi this 24<sup>th</sup> day of September, 2019.**

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**Justice Maureen A. Odero**