



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC CIVIL APPLICATION 291 OF 2017**

**BEATY OMARE & 3 OTHERS.....APPLICANTS**

**VERSUS**

**DAMARIS ADHIAMBO ABANDE.....RESPONDENT**

**RULING**

1. By a notice of motion dated 26.12.17 brought under Section 1A and 1B of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules, the applicants pray for orders that:-

1. This Honourable Court be pleased to enlarge time for filing an appeal against the judgment of Hon. M. Agutu (RM) delivered on 15th December, 2017 in **Kisumu CMCCNo. 434 of 2013 DAMARIS ADHIAMBO ABANDE V BEATY OMARE & 3 OTHERS**

2. Costs of the application be provided for

2. The application is based on the grounds among others that:

a) The applicants are aggrieved by the judgment and wish to appeal

b) The applicants were not aware of the judgment of the lower court until 4th December, 2017

3. The application is supported by an affidavit sworn on 26th December, 2017 by **Ritah Orindi**, the 4th applicant who reiterates the grounds on the face of the application. Annexed to the supporting affidavit is a copy of the Judgment of the lower court, letter by applicant's advocate complaining of failure to be informed of the delivery of the judgment, draft Memorandum of Appeal, application for proceedings and judgment marked **JO- 1, JO2** and **JO3 a, b** and **c** respectively. In her supplementary affidavit sworn on 26.1.18, the deponent annexes a letter from court confirming that notice of delivery of judgment was not served on their advocate.

4. The application is opposed on the grounds set out in a replying affidavit sworn by the respondent on 19.1.18. She faults the applicants for not making a follow up on the status of the judgment.

5. In a supplementary affidavit sworn by the 4th applicant on 26.1.18, she annexes a letter from court confirming that notice of delivery of judgment was not served on their advocate.

**Issue for determination**

6. The main issue for determination is whether the applicants ought to be granted a stay of execution of the decree in **Kisumu CMCC No. 434 of 2013 DAMARIS ADHIAMBO ABANDE V BEATY OMARE & 3 OTHERS** and leave to appeal out of time.

7. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered.

8. The parameters for exercise of court's discretion were concisely laid out in the case of **Mwangi v Kenya Airways Ltd[2003] KLR** where the Court of Appeal expressed itself thus:-

***“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”.**

**Reason for the delay**

9. It is on record that neither the applicants nor their counsel were notified by the court of the date for delivery of the impugned judgment. It therefore follows that the applicants cannot be faulted for not filing the intended appeal within the requisite time.

10. Having said that, I need not belabor on the issue of length of delay, the chances of appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted.

11. Consequently and for the reasons stated hereinabove, the notice of motion dated 26.12.17 is allowed in the following terms:

- a. ***Time for filing an appeal against the judgment of Hon. M. Agutu (RM) delivered on 15th December, 2017 in Kisumu CMCC No. 434 of 2013 DAMARIS ADHIAMBO ABANDE V BEATY OMARE & 3 OTHERS is hereby enlarged and the applicant is granted 30 days from today’s date to file the intended appeal***
- b. ***Costs of this application shall be costs in the appeal***

**DATED AND DELIVERED THIS 8th DAY OF January, 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant** - Felix

**Applicants** - Mrs Obat/Mr Odeny

**Respondent** - N/A