



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL MISC. APPL. NO. 476 OF 2017**

**SIMON WAWERU MAIGO AKA**

**SIMON WAWERU MAIGO.....APPLICANT**

**VERSUS**

**JOSEPH KAMAU NGIGI .....RESPONDENT**

**RULING**

1. The application dated 2<sup>nd</sup> October, 2017 seeks orders that:

**“1. Spent**

**2. Spent**

**3. Spent**

**4. That the proposed Appellant be granted leave to appeal out of time against the judgment of Senior Principal Magistrate in Nairobi CMCC No. 2486 of 2014 delivered on 21<sup>st</sup> March, 2017.**

**5. That the said leave do operate as a stay of proceedings in Nairobi CMCC No. 2486 of 2014.**

**6. That the Memorandum of Appeal annexed hereto be deemed as duly filed and served.**

**7. That the costs of and incidental to this application be costs in the intended Appeal.”**

2. The application is predicated on the grounds stated therein and is supported by the affidavit of Veronica Waweru, the Executive Assistant Claims Manager of the Applicant’s Insurer. It is stated that the Lower Court judgment was delivered on 21<sup>st</sup> March, 2017. The Applicant is dissatisfied with the said judgment and wishes to appeal. The delay in filing the appeal is blamed on the advocates who the Applicant had instructed first. It is further stated that the delay is not inordinate and that the intended appeal has high chances of success and the Applicant stands to suffer irreparable loss if the application is not allowed.

3. The application is opposed. It is stated in the replying affidavit that there is no evidence of the alleged appointment of an advocate and that delay has not been explained truthfully.

4. I have considered the application, the reply to the same and the submissions filed.

5. Section 79G of the Civil Procedure Act provides that:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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.”**

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

6. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

**“No order for stay of execution shall be made under sub-rule (1) unless –**

**a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

7. The court therefore has the discretion to extend time within which to file an Appeal. As stated by the Court of Appeal in the case of **Aviation Cargo Limited v St. Mark Freight Services Limited [2014] eKLR:**

**“...whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”**

8. The application herein was filed on 3<sup>rd</sup> October, 2017, that is seven (7) months after the delivery of the judgment. The delay has been explained. The substantial loss to be suffered has not been demonstrated. It is for example, not alleged that the Respondent is not capable of refunding the decretal sum. It is however noted that the decretal sum is in excess of Ksh.3,500,000/= which is not a small amount.

9. To balance the competing interests of both parties, I exercise discretion and allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning bank account of the counsels for both parties herein or in court within 30 days from the date hereof.

10. The intended appeal to be deemed as dully filed upon payment of requisite court fees. The same to be paid within 7 days from the date hereof. Costs in cause.

**Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of March, 2018**

**B. THURANIRA JADEN**

**JUDGE**