



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

**MISC APP NO. 112 OF 2017**

**G4S SECURITY LIMITED..... 1<sup>ST</sup> APPLICANT**

**BENSON NGUGI KAMOTHO..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**JOSEPH KINYUA NGORE.....RESPONDENT**

**RULING**

The Applicants filed the Notice of Motion dated 13<sup>th</sup> March, 2017 seeking leave to file an Appeal out of time, that the Court be pleased to fix the time for filing the intended Memorandum of Appeal and that the costs be provided for. The application is premised on the provisions of section 79G and 95 of the Civil Procedure Act, Order 22 Rule 22 of the Rules therein and Article 159 of the Constitution.

The judgment sought to be appealed against was delivered on 27<sup>th</sup> January, 2017 and the instant application was filed on 14<sup>th</sup> March, 2017. The Supporting Affidavit of **CHRYSOSTOM XAVIER AKHAABI** the Applicant's Advocate dated 10<sup>th</sup> March, 2017 seeks to explain the reasons for the delay which delay the Advocate avers, is not inordinate and the same can be excused by the Court. Mr. Akhaabi depones that on the same day the judgment was delivered, he wrote to the Applicant seeking instructions on whether to appeal the decision or to proceed and make the payment. However on 1<sup>st</sup> March, 2017 the instructing client emailed the Advocate informing him that he had not received the letter dated 27<sup>th</sup> February, 2017 and instructing him to make an application to appeal out of time. That, following the instructions, the deponent prepared a draft Memorandum of Appeal dated 2<sup>nd</sup> March, 2017 which is also annexed. It is further deponed that the delay was an oversight on the part of the Counsel which was purely inadvertent and not deliberate and that the same should not be visited upon the Applicant. The Applicants plead that they have an arguable appeal, that the Respondent will not be prejudiced and that they are ready to ensure that the Appeal will be prosecuted expeditiously.

The Application is opposed by the Respondent via a Replying Affidavit dated 19<sup>th</sup> May, 2017 sworn by **SAMUEL AKOLO WANYANGA**, the Advocate for the Respondent wherein he depones that the Applicant obtained stay of execution orders and did not take advantage of the same until the period lapsed and that the Applicants are deliberately wasting the courts time to delay payment of the decretal sum. It is also deponed that the Applicants are not intent on filing an appeal as they have already settled another claim arising from the same accident. The Respondent deponed that in case the application is allowed, the court should secure the decretal sum by ordering that the same be deposited in a joint interest earning account.

The Application was canvassed by way of oral submissions. I have read and considered the application,

the affidavits on record and the submissions made by the Counsels for both parties. The relevant provisions of law are section 79G of the Civil Procedure Act and Order 50 Rule 5 of the Rules therein.

**Section 79G of the Civil Procedure Act** provides for the timelines for filing an appeal where it states that,

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

**Order 50 Rule 5 of the Civil Procedure Rules** provide that

***“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:***

***Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”***

Extension of time to file an appeal is a discretionary power which the court ought to exercise judiciously after considering the circumstances of the case. The law provides that appeals from subordinate courts to the High Court should be lodged within 30 days from the date of delivery of the judgment. The only consideration for admitting an appeal out of time is where the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal on time. The issue which this court will have to determine is whether the applicant herein has satisfied the court that he had a good and sufficient cause for not filing the appeal in time.

From the Applicant’s affidavit, it appears that there was a communication breakdown between the Counsel and his client, the Applicant. Whereas the Applicant was informed of the judgment on the same day it was delivered, an email dated 1<sup>st</sup> March, 2017 to his advocate instructing him to file an appeal was not received on time. Upon receipt of the email, he drafted the memorandum of appeal the following day, 2<sup>nd</sup> March, 2017. It is clear from the above that the delay was not intentional.

In the circumstances, I find that the delay is not inordinate, the same was not intentional and the Applicants have laid a basis for the exercise of this court’s discretion to allow them file the Appeal out of time. The Applicants are desirous of lodging the Appeal and have expressed willingness to prosecute the same promptly.

The Supreme Court Decision in **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR** laid down the guidelines for extension of time to file an appeal out of time where it was held that , *“As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:*

(a) *“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.*

*“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:*

- (a) extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court
- (b) a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
- (c) whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
- (d) where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
- (e) whether there will be any prejudice suffered by the respondents, if extension is granted;
- (f) whether the application has been brought without undue delay; and
- (g) whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied].”

The requirement of an applicant to give a satisfactory explanation for delay in filing of the appeal in time cannot be over emphasized. The Court of Appeal in the Case of **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015) eKLR** also held that

***“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.”***

The fact that the Applicant has decided to settle a decree in reference to another suit arising from the same accident does not deny him his right of Appeal in the instant matter. Each case should be treated differently and on its own merits. The Respondent urges the Court to give an order that the decretal amount be deposited in a joint interest earning account to be operated by the Parties’ Advocates.

Therefore and in the interest of substantive justice to the Parties herein I will allow the Application with directions that the Appeal be filed within 14 days from the date of this ruling and the decretal amount in the sum of Kshs. 900,000/= be deposited in an interest earning account within 30 days from the date of this ruling which account is to be opened in the joint names of both Counsels. Failure to comply the orders herein shall lapse.

Dated, Signed and Delivered at Nairobi this **19<sup>th</sup>** Day of **March, 2018**.

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... *For the Applicant*

..... *For the Respondent*