



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 165OF 2016

MARTIN MULWA MUENI & BONIFACE ANGINA

(suing as the Administrators of the estate of

JOSEPHINE MUENI KATUMA (Deceased)..PLAINTIFFS/RESPONDENT

VERSUS

ALBERT SIMON MWAMBO.....1ST DEFENDANT/APPLICANT

MGANGA ALBERT..... 2ND DEFENDANT/APPLICANT

RULING

1. The application dated 18th April, 2016 principally seeks orders that the honourable court be pleased to grant leave to the Applicants to appeal out of time against the judgment of the Honourable Magistrate E .Usui in Nairobi in CMCC 4569 of 2014 delivered on 8th day of March, 2016.
2. The application is predicated on the grounds stated therein and is supported by the affidavit sworn by the Sandra Nyakweba, the Claims Manager of the Applicants' Insurer. It is stated that the Lower Court delivered judgment on 8th March, 2016 for the sum of Ksh.791,496/=. The Applicants are aggrieved by the said judgment and wish to appeal. It is further stated that the delay in filing the appeal is not inordinate and that the Applicants' counsel has been following up on obtaining the judgment. According to the Applicants, the appeal has high chances of success and will be rendered nugatory if the application is not allowed.
3. The application is opposed. It is stated in the replying affidavit that no letter has been exhibited to demonstrate that the Applicants' counsel was following up on the judgment. It is stated that the application herein is an afterthought as the Applicants only moved the court to forestall execution.
4. The application was canvassed by way of written submissions. I have considered the said submissions.
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. 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.”

7. The explanation given for the delay in filing the appeal is not satisfactory. I agree with the Respondent’s position that there are no letters that have been exhibited to demonstrate that a request was made for the copies of the judgment. Be as it may, it is noted that the decretal sum was deposited herein following an application for stay of execution. I therefore exercise discretion and allow the application. The money deposited in a joint interest earning account to remain in that account pending the hearing and determination of the Appeal. The costs of this application to the Respondent.

Date, signed and delivered at Nairobi this 15th day of March, 2018.

B. THURANIRA JADEN

JUDGE