



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 4 OF 2017

BIDII MUIMI.....1ST APPLICANT

BONIFACE KINUVA MUTUNGU.....2ND APPLICANT

VERSUS

PATRICIA MUNANIE MUTEMI.....1ST RESPONDENT

CHARLES KYALO (Suing on behalf

of OLIVER NGOMANGO (Deceased).....2ND RESPONDENT

RULING

1. By a Notice of Motion dated the 15th day of February, 2017 the Applicants who have described themselves as Appellants seek orders as follows:

(a) That this Honourable Court be pleased to grant the intended Appellant leave to file a Memorandum of Appeal as per the attached draft against the decision and Judgment of Honourable Kimtai dated the 16th August, 2016 and Record of Appeal out of time and/or that time for filing and serving the same be extended.

(b) That in the alternative leave to file a Memorandum of Appeal as per the attached filed Appeal to operate retrospectively to the said filed Appeal Number 34 of 2016.

(c) That this Honourable Court be pleased to give such orders and directions as it may deem fit and just.

2. The application is premised on grounds that the delay in filing of the Appeal was occasioned by the insurers, a factor that was beyond their control. That the Appeal has a high chance of succeeding as the General Damages awarded are inordinately high since the trial Court failed to take into account the pleadings and submissions; the **Appeal No. 34 of 2016** was filed one (1) day after the statutory time under the mistaken opinion that the Public Holiday of **12th September, 2016** accorded them more time and the Respondents shall suffer no prejudice if the order sought is granted. An affidavit in support of the application was deposed by **Dorry Wamugo Advocate** who averred that after the Judgment was delivered on the **16th day of August, 2016** they informed **Britam General Insurance** about the decision and the communication of the intention to appeal reached them on the **15th September, 2016**. They filed the Appeal a day after the statutory time under a mistaken opinion that **12th September, 2016** being **Idd Ul Adha** would not be counted.

3. The Respondents filed Grounds of Opposition arguing that the application was an afterthought and unmeritorious.

4. The application was canvassed by way of written submissions that I have taken into consideration.

5. Time within which an Appeal should be filed in Civil Cases is provided for in **Section 79G** of the **Civil Procedure Act** that provides 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.”

6. The Supreme Court considered circumstances that should be looked at positively in exercising the discretion to extend time in the case of **Nicholas Kiptoo arap Korir Salat vs. Independent Electoral and Boundaries Commission and 8 Others (2014) eKLR** thus:

“– Whether there is reasonable reason

for delay.

- Whether there will be any prejudice suffered by the Respondents if the extension is granted.

- Whether the application is brought without undue delay.”

7. The Memorandum of Appeal in **High Court Civil Appeal No. 34 of 2016** was filed on the **19th September, 2016**. The Judgment in the Lower Court was delivered on the **16th August, 2016**. The explanation given is that there was a Public Holiday in the course of the month and it was believed that the days would be taken into consideration. This was indeed a plausible reason.

8. Looking at what transpired after the Appeal was filed, an application for stay of execution was also filed. The application was compromised by the consent of both parties. The Respondents were paid **Kshs. 500,000/=**. Parties herein were desirous to have the matter disposed of expeditiously. Therefore the Respondents will not suffer an injustice. In the circumstance it will be in the interest of justice to have the time enlarged. The application was filed immediately the error was pointed out. There was no delay in filing the same.

9. In the premises I allow the application by granting the leave sought. The **Appeal No. 34 of 2016** be and is hereby deemed to have been filed within time.

10. Costs shall abide the outcome of the Appeal.

11. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of April, 2018.

L. N. MUTENDE

JUDGE