



**REPUBLIC OF KENYA**

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

**MISC. APP. NO. 465 OF 2018**

**FIONA MOTORS LIMITED.....RESPONDENT**

**VERSUS**

**PHILIP WAMBUA THUO.....APPELLANT**

**RULING**

1. Fiona Motors Ltd, the applicant herein, took out the motion dated 4<sup>th</sup> September 2018 in which it sought for the following orders **inter alia**:

**i. Leave to file an appeal out of time**

**ii. An order for stay of execution of the judgment/decree delivered on 12.3.2013 pending the hearing and determination of the intended appeal.**

**iii. Costs of the application to abide the outcome of the intended appeal.**

2. The motion is supported by the affidavit of Silvia Wanjiru Merie.

The motion was served upon the firm of Eric Ntabo & Co. Advocates on behalf of the respondent on 11<sup>th</sup> September 2018. Despite having been served with the application, the respondent did not deem it fit to file a response to the motion.

3. The substantive prayer in this application is that for leave to appeal out of time. It is the applicant's argument that it failed to file its appeal against the decision of the trial court within the statutory period because its advocate inadvertently did not do so. This court was urged to find that the failure to file the appeal within time was purely the mistake of the applicant's advocate. This court was urged to find that the delay was not inordinate.

4. It is apparent from the material placed before this court that on 12.3.2013, the trial court entered judgement in the sum of ksh.1,529,770/= in favour of the respondent and against the appellant. It is also evident that the appellant thereafter filed an application for review before the trial court which application was heard and dismissed in a ruling delivered on 13.10.2016.

5. It would appear that the applicant decided to pursue an application for review of the judgement as opposed to its right of appeal and in the process of pursuing that avenue of redress the time to appeal lapsed. The applicant further waited for nearly two years from the date the ruling dismissing the review application was delivered before filing the current application.

6. The applicant has simply said that the delay to file an appeal was purely the mistake of its advocate. The applicant has failed to secure an explanation from its advocate as to why he/she failed to act on its instructions to file the appeal within time. I find that there is no plausible explanation for the delay. Though the applicant has claimed that the delay is not inordinate, I find that submission cannot stand.

7. I have already stated that the judgment sought to be impugned was delivered on 12.3.2013, about 5 years 8 months ago. The ruling dismissing the application for review was delivered on 13.10.2016. It took the applicant more two years to bring this application. I find the delay to seek for leave to appeal out of time to be inordinate and not explained therefore it is not excusable.

8. The other aspect which is clear on the face of the motion is that the application is premised on the provision of Rules 4 and 41 of the Court of Appeal rules and Section 7 of the Appellate Jurisdiction Act. The aforesaid provisions relate to appeals destined to the Court of Appeal.

9. The discretion of this court to determine an application for leave to file an appeal out of time is provided for under Section 79G of the Civil Procedure Act. It is clear that the jurisdiction of this court has not been properly invoked. The motion therefore is incompetent and is improperly before this court. The applicant has failed to invoke neither the procedural nor substantive or the inherent jurisdiction of this court. For the above reasons I decline to grant the order for leave.

10. The applicant has sought for an order for stay pending the intended appeal. The prayer is dependent on the grant of leave to appeal. Since this court has declined to grant the order for leave then the application for stay cannot be given since it lacks the legal foundation.

11. In the end, the motion dated 4.7.2018 is ordered struck out and dismissed with no order as to costs.

**Dated, Signed and Delivered in open court this 30<sup>th</sup> day of November, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... For the Appellant

..... For the Respondent