



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO. 220 OF 2017**

**BENJAMIN DEON MUSAU.....APPLICANT**

**VERSUS**

**NAIROBI BOTTLERS LIMITED.....RESPONDENT**

**RULING**

1. The Applicant herein brought a notice of motion dated 4<sup>th</sup> June, 2018 under Section 66 of the Civil Procedure Act; Order 50, Rule 6 and Order 42, Rule 6 of the Civil Procedure Rules. The motion is supported by the grounds set out in the body thereof and the facts deponed in the sworn affidavit of **Lewis Kyengo**.

2. The Applicant is seeking the following orders:

*(i) THAT he be given leave to file a Notice of Appeal out of time against the judgment delivered by Justice Sergon on 24<sup>th</sup> November, 2017.*

*(ii) THAT the attached Notice of Appeal be deemed to have been properly filed and served.*

*(iii) Spent.*

*(iv) THAT costs of the Application abide by the outcome of the appeal.*

3. In his supporting affidavit, **Lewis Kyengo** averred that this court vide its judgment delivered on 24<sup>th</sup> November, 2017 found that the purported execution against the Respondent was unlawful and proceeded to set aside the judgment of the lower court and all consequential orders.

4. Further, that this court granted the Respondent leave to file its defence out of time and ordered that the matter be heard afresh before another magistrate of competent jurisdiction, thus prompting the lodging of the appeal.

5. The deponent admitted that the appeal was lodged out of time but added that such delay was occasioned by mistake on the part of the Applicant's counsel.

6. It was the deponent's averment that unless the application is allowed, the Applicant stands to suffer substantial loss, the risk of being cited for contempt and lose his right to appeal.

7. The Respondent in turn filed a notice of preliminary objection and grounds of opposition dated 6<sup>th</sup> July, 2018 arguing that the application is untenable, misconceived and an abuse of court process.

8. Similarly, in his replying affidavit sworn on 27<sup>th</sup> September, 2018 **Cyrus Gitau** contended that upon delivery of the judgment, the Applicant neither sought a stay nor applied for certified copies of the proceedings, thus showing no intention of appealing.

9. That the Respondent filed an application seeking for the release of its motor vehicle by the Applicant and an order was made to that effect which the Applicant failed to abide by.

10. That the court further ordered the Applicant to deposit the subject motor vehicle in court but this order has similarly not been complied

with. That the Applicant only complied with a subsequent order that he deposit Kshs.1,000,000 in a joint interest earning account.

11. The deponent further argued that the application is a mere afterthought intended to waste the court’s time and undermine judicial authority by being in contempt of court orders, adding that as a matter of fact, there are contempt proceedings pending in court against him.

12. The deponent added that the reinstated suit is ongoing and has an impending hearing date. That the Applicant has not afforded any explanation for failing to lodge the appeal in good time and in any case, the draft Memorandum of Appeal does not raise arguable grounds and that the applicant has come to court with unclean hands.

13. Having carefully considered the application; grounds of opposition; reply; annexures thereto and submissions it is clear that the bone of contention revolves around whether this court should allow the appeal to be filed out of time.

14. The timelines for filing an appeal from the High Court to the Court of Appeal are clearly set out in **Rule 75 (1) and (2)** respectively of the Court of Appeal Rules.

15. It has been admitted that the notice of appeal was filed out of time. The issue to be determined therefore is whether there was reasonable excuse for the same. The Applicant submitted that the delay was caused by mistake on the part of his advocate, who mistook the implications of the judgment of 24<sup>th</sup> November, 2017.

16. This court is satisfied that the Applicant’s counsel made an effort in applying for certified copies of the proceedings and judgment through the letter dated 4<sup>th</sup> June 2018 in addition to preparing the Notice of Appeal, albeit late in the day. Whereas it is evident that there was a delay this court opines that the same was instigated by the advocate and it would be unfair to fault the Applicant for the mistake of his counsel.

17. As concerns the provision of security, the Respondent confirmed that the Applicant complied with the court order of 25<sup>th</sup> April, 2018 requiring him to deposit in a joint interest earning account the sum of Kshs.1,000,000 equivalent to the value of the motor vehicle.

18. On whether prejudice will be occasioned, the Respondent has argued that it stands to suffer prejudice. However, this has not been demonstrated, leading this court to conclude that no prejudice will arise. In any case, the security has already been provided for by the Applicant.

19. In view of the above, this court allows the motion in terms of prayers (i), (ii) and (iv).

Dated, Signed and Delivered at Nairobi this 23<sup>rd</sup> day of November, 2018.

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**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent