



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

**MISC APP NO. 596 OF 2015**

**JAMES AKHATIOLI AMBUNDO..... APPELLANT/APPLICANT**

**VERSUS**

**LION OF KENYA INSURANCE COMPANY LTD.....RESPONDENT**

**RULING**

The Applicant filed a Notice of Motion dated 17<sup>th</sup> December, 2015 seeking leave to file an Appeal out of time. The application is premised on the provisions of Order 42 and 51 of the Civil Procedure Rules.

The judgment sought to be appealed against was delivered on 26<sup>th</sup> June, 2015 and the instant application was filed on 18<sup>th</sup> December, 2015. The Supporting Affidavits of JAMES AKHATIOLI AMBUNDO, the Applicant herein, and that of NAMADA SIMONI, the Applicant's Advocate both dated 17<sup>th</sup> December, 2015 seeks to explain the reasons for the delay the which delay Advocate avers, its excusable. Mr. Namada depones that he prepared and signed a Memorandum of Appeal on the 22<sup>nd</sup> July, 2015 and instructed his Clerk Mr. Anami to proceed and file the same and serve the Respondent. The said Memorandum of Appeal dated 22/7/2015 is annexed to his Affidavit.

Mr. Namada further depones that unknown to him, the said Clerk did not file the Memorandum of Appeal and he realised it on 4<sup>th</sup> December, 2015 when they were doing a bring up of files in office and the inaction led to serious disciplinary action against the said Clerk. The applicant further avers that he has an arguable appeal and it would be unfair to have it not admitted for the mistake of the Counsel and any delay occasioned to the Respondent could be cured by an award of costs.

The Application is opposed by the Respondent vide a Replying Affidavit dated 14<sup>th</sup> January, 2016 sworn by GEORGE MAHUGU, an Advocate for the Respondent where he depones that the Applicant failed to exercise due diligence and follow up on the file having been indolent for 6 months. He further stated that the Applicant has treated the matter in a casual manner and the delay is inexcusable and that the application is an abuse of the court process which calls for dismissal with costs.

The Application was canvassed by way of written 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.

**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.”***

It is trite law that extension of time to file an appeal is a discretionary power which the court ought to exercise judiciously and in accordance with the law. The law provides that appeals from subordinate courts to high court should be so lodged within 30 days. The only consideration for accepting 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 in time. Therefore, the issue which this court will seek to determine is whether the applicant herein has satisfied the court that he had good and sufficient cause for not filing the appeal in time.

The Memorandum of Appeal is dated 22<sup>nd</sup> July, 2015 and it is the Applicant’s Advocate contention that he handed over the same to his Clerk for filing who inadvertently kept the file away and completely forgot about it. As a disciplinary action, the Applicant’s Advocate served the said Clerk with a Notice to Show Cause and in a response to the same, which Response is attached to the Affidavit, the Clerk is remorseful for the mistake and explains that he had 46 files pending on his desk, the instant file being one of them. He regrets the mistake.

The orders sought herein by the Applicant are discretionary in nature which a Court will only grant where a sufficient cause has been shown. Even though the delay was long, I find that the explanation given by the Applicant is plausible. It has been argued that the mistake of an advocate should not be visited upon the Client, this may not be so, always, but in this case, I find that the Client having given out instructions for the Appeal to be filed, it would not be just to punish him for the mistake of his Counsel and the clerk.

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 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.”*

I will treat the evidence by the Respondent’s Counsel that he met an advocate from the firm of Namada & Co. Advocates who told him that they were not going to file an Appeal as hearsay evidence as the said Advocate, has not deponed to those facts. The Respondent has not established any prejudice to be suffered which cannot be compensated by an award of costs in the event that the application is allowed.

In the interest of substantive justice to the Parties herein, I will allow the Application with costs to the Respondent. The Appeal to be filed within 21 days from the date hereof.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 20<sup>th</sup> day of December, 2017

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of:-**

.....**for the Appellant/Applicant**

.....**for the Respondent**