

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL APPLICATION NO. 109 OF 2017

JOHN NJUE.....APPLICANT

VERSUS

MARGERY WAWIRA KIARAGORESPONDENT

RULING

1. This is a ruling on a notice of motion dated 4/12/2017 seeking for leave to appeal out of time against the judgment of Hon. Gicheru, Chief Magistrate delivered on 30/10/2017 in Embu CMCC No. 15 of 2015.
2. The motion is grounded on the affidavit of Pauline Waruhiu who describes herself as the Claims Director of Directline Assurance Company Limited the insurers of motor vehicle registration No. KAV 079 U belonging to the applicant. She deposes that judgment was entered against the defendant at 100% liability. The defendant was also ordered to pay KShs.1,178,598/= plus costs of the suit and interest at court rates.
3. Being aggrieved by the judgment, the applicant instructed their advocates M/s Kairu & McCourt to file an appeal which they failed to do within the time limit of 30 days. The advocate concerned prepared the memorandum of appeal on time but before he filed it, he was taken seriously ill. The colleague who took over was not briefed of the matter. By the time the advocate who had the conduct of the matter reported back to work the time for filing an appeal had lapsed.
4. There is need for extension of time to appeal and this court is empowered under Section 95 of the Civil Procedure Act and Order 50 Rule 5 to enlarge time. The delay was inadvertent and is highly regretted. The applicants should not be penalized for the mistakes of the advocates. The applicant intends to appeal against both liability and quantum.
5. The respondent was served with the application but did not file a replying affidavit. M/s Duncan Muyodi & Co. filed a notice of appointed on 13/12/2017. The application is therefore unopposed.
6. The judgment in this case was delivered on 30/10/2017 and the application was filed on 5/12/2017 which translates into a delay of about six days. It has been explained that the counsel who had prepared the memorandum of appeal was taken ill and the one who took over was not briefed of the matter. Considering that the delay was for a few days, the court is satisfied with the explanation given by the applicant.
7. The applicant has explained that he was dissatisfied and aggrieved by the whole judgment against which he intends to appeal. He has a right to appeal against the orders of the learned magistrate. From the explanation given and the documents attached and in the absence of any evidence to the contrary, the court is satisfied that the applicant has an arguable appeal. In the event that the orders sought are not granted, this appeal may be rendered nugatory.
8. I find the application merited and it is hereby allowed as prayed.
9. The intended appeal should be filed within 7 days from the date of this ruling. During the 7 days period, this court grants interim stay pending the filing of the appeal and a formal application for stay of execution.

10. Since the application was not opposed, there will be no order as to costs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 20TH DAY OF DECEMBER, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Okwaro for respondent