



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**MISCELLANEOUS CIVIL APPLICATION NO. 72 OF 2015**

**JANAI LALAI TUNGUSHO**

**ALICE NADUPOI LENAITUKUSHO (Suing as the legal administrators  
of the Estate of ESMARE NDANAITUKUSHO .....PLAINTIFFS**

**-VERSUS-**

**EAST AFRICAN MISSION ORPHANAGE..... 1<sup>ST</sup> DEFENDANT**

**SPINKS RALPH.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The application before me was filed on 2/1/2015 under Section 79G of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules. It seeks that the court enlarges time to enable the Applicants lodge an appeal in respect of a decision delivered on 24<sup>th</sup> June, 2015, dismissing the Applicant's suit.
2. The main thrust of the Supporting affidavit sworn by the Applicant **Janai Lalai Tungusho** is that despite being aggrieved by the dismissal he and the Co-applicant had no means, until a well-wisher came by, to pursue the appeal. This is the explanation offered for the delay.
3. During the hearing of the application Miss Mukira, counsel for the Applicants, contended that delay had been explained and further that, the intended appeal is not frivolous. By their grounds of opposition and oral arguments the Respondents argue that the delay of five months was inordinate and not explained sufficiently.
4. I have considered the material canvassed before me. The court's discretion under Section 79G of the Civil Procedure Act must be exercised judicially considering the length of delay, the explanation offered; and possibly, the chances of the intended appeal succeeding; and the degree of prejudice to the Respondent. (**See Niazsons (K) Ltd -Vs- China Road and Bridge Corporation (Kenya) Ltd [200] eKLR and Mwangi -Vs- Kenya Airways Ltd [2003] KLR 486.**)
5. No doubt the period of five months is long but for the explanation given, which to my mind is reasonable in this context, the delay is not inordinate. Poverty can and does adversely affect the ability by parties to pursue what they consider their rightful claims.
6. Under Article 159 (2) (a) of the Constitution this court is obligated to ensure that justice is done to

all irrespective of status. This is the spirit captured in **Bagajo Vs- Christian's Children Fund Inc. [2004] 2 KLR 73** where Ringera J (as he then was) emphasised that in exercising the discretion relating to the extension of time, **“the court's primary concern should be to do justice to the parties.”** The court, has despite the delay, to look to see whether justice can still be done between the parties (**See Ivita-Vs- Kyumbu [1984] KLR 441**).

7. On the face of it, the proposed appeal does not seem frivolous. There is no indication that the Respondent will be unduly prejudiced by this court allowing the filing of an appeal out of time. Balancing all relevant aspects, I think that the justice of the situation leans towards affording the Applicants an opportunity to file and canvass his appeal. In circumstances, I do grant prayer 2 of the Notice of Motion and direct that the Applicants file the appeal within 21 days of today's date.

8. Costs will abide the outcome of the appeal.

Delivered and signed at Naivasha on this **23<sup>rd</sup>** day of **June, 2016**.

In the presence of:-

For the Applicant : Mr. Njuguna holding brief for Miss Mukira for Applicant

For the Respondents : N/A

Court Clerk : Barasa

**C. MEOLI**

**JUDGE**