

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 598 OF 2015

HASSAN HUSSEIN AJEB.....PLAINTIFF/APPLICANT

VERSUS

JOHN VICTOR MURIUNGI

T/A SIRVICE MOTORS.....DEFENDANT/RESPONDENT

RULING

The lower court delivered a judgment on 16th May, 2015 against the applicant herein. The applicant did not file an appeal within the prescribed time and has now come to court under Order 42 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking an order that time be extended within which to file a Memorandum of Appeal, and that the annexed draft be deemed as duly filed subject to payment of court fees.

The reasons advanced and which appear on the face of the application dated 19th November, 2015 are that the applicant has an arguable appeal, but could not move the court within the requisite period due to unavailability of funds to commence the appeal and also that the applicant was not available in good time to do so.

There is also an affidavit sworn by the applicant in support of the application. The application is opposed by way of grounds of opposition under Order 51 Rule 14 of the Civil Procedure Rules.

The respondent states that the application is pre mature and fatally defective, there has been inordinate delay which has not been explained, it is an afterthought and an abuse of the court process and therefore underserving as the applicant has come to court with unclean hands.

The order sought is discretionally which discretion has to be exercised judiciously. The court has to look at whether or not any prejudice may be occasioned on the part of either party. The applicant has the right of appeal but that right must be exercised within the set perimeters in law and facts. The judgment was delivered on 16th May, 2015. Paragraph 4 of the supporting affidavit refers to a letter applying for proceedings and a copy of receipt issued by the court on 29th May, 2015 has been annexed.

The date of the receipt as set out in paragraph 4 of the affidavit reads 11th February, 2014 but it must be a typing error, because the annexed copy of the receipt aforesaid refers to the correct case number in the lower court. Whatever the case, if the copy of the receipt refers to the letter requesting for proceedings, and there is no question raised by the respondent, the applicant expressed the desire to appeal the lower court decision.

Courts exist to do justice to the parties, and where no prejudice may be occasioned the court should facilitate this. I have looked at the draft memorandum of appeal and believe that the applicant has an arguable appeal. An arguable appeal is not one that may necessarily succeed but one which is not frivolous. Additionally the respondent has not alleged any prejudice that may be visited upon him if the application succeeds. I am persuaded that the application should be allowed.

Accordingly, time to file the appeal is extended by a period of 30 days from today and the Memorandum of Appeal is deemed to be filed subject of payment of court fees within 7 days from today. The costs of

this application shall be in the cause.

Dated, signed and delivered at Nairobi this 27th Day of September, 2016.

A. MBOGHOLI MSAGHA

JUDGE