



**REPUBLIC OF KENYA**

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

**MISCELLANOUS CIVIL APPLICATION NO 117 OF 2016**

**ANAKE 'MA' MUSYI LIMITED..... APPLICANT**

**VERSUS**

**PAUL KUYA.....RESPONDENT**

**RULING**

**The Application**

Judgment dismissing the Applicant's claim was delivered on 1<sup>st</sup> April 2016 in Machakos CMCC No 1264 of 2008. On 31<sup>st</sup> May 2016 the Applicant filed a Notice of Motion in this Court dated 30<sup>th</sup> May 2016 seeking the following substantive orders therein:

1. That the Applicant be granted leave to file the Memorandum of Appeal out of time and the Court to extend such time within which to file the Memorandum of Appeal.
2. That the Memorandum of Appeal he annexed be deemed duly filed upon the payment of the requisite fees.

The application is premised on the grounds that the Applicant is aggrieved by the judgment of the trial Court and wishes to lodge an appeal. However, that there was a delay of about 30 days in filing the Memorandum of Appeal due to the illness of the instructing Director of the Applicant .

The Applicant filed two supporting affidavits, one sworn by Edward Wangila, the Advocate acting for the Applicant, and the other by Charles K. Mulela, a director of the Applicant company. Both affidavits were sworn on 30<sup>th</sup> May 2016. The said Director confirmed that the judgment was delivered to his office soon after its delivery, but that he had been unwell for some time and unable to travel to his lawyers offices.

Further, that he was only able to get relief in early May 2016, and he travelled to Nairobi on 17<sup>th</sup> May 2016 to meet the Applicant's lawyers and discuss the judgment, and a decision was made to appeal against the same. He annexed copies of his treatment and a discharge notes, showing that he was admitted at New Ngei Road Nursing home between 10<sup>th</sup> and 16<sup>th</sup> April 2016. The Applicants aver that their appeal has a high change of success, and are willing to abide by any condition as to security. In addition, that no prejudice will be occasioned by allowing the application.

The Applicant's learned counsel, A.S Kuloba & Wangila Advocates, filed written submissions dated 18th November 2016, wherein the reiterated the reasons for the delay in filing the appeal, and urged that the delay in filing the appeal was not deliberate. Further, that the Appeal filed has very high chances of

success and that the Applicant should be allowed to ventilate its dissatisfaction with the subordinate court's judgment.

Furthermore, that the judgment delivered by the trial magistrate in Machakos CMCC No. 1264 of 2008 was inconsistent with the findings made in her judgment, and that the trial Magistrate erred in law and in fact by taking into account extraneous matters that had not been pleaded. Lastly, that Respondent will not suffer any prejudice if the instant application is allowed, and that if there is any prejudice, the same can be mitigated by way of costs. Reliance was placed on the decision in **Ann Mukami Muchiri Vs. David Kariuki Munda [2006] eKLR** for the argument that the Court should take into account the length of delay; the reason for delay; the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the Respondent if the application is granted.

### **The Response**

The Respondent opposed the Applicant's application in a replying affidavit he swore on 14th June 2016, which was relied upon by his learned counsel, Mr. Kamanda during the hearing held on 30th November 2016. According to the Respondent, the reasons provided by the Respondent for late Application are not satisfactory, because the Respondent is a limited liability company and the affairs of the company do not stop because a director is sick, and the Applicant should have found other ways of instructing the lawyer to file the application on time.

Further, that if the Applicant is going to rely on the same evidence relied on the trial court, the appeal has no chances of success because the trial court observed that the Applicant had insufficient evidence hence could not prove his case. Lastly, it was averred that the judgment entered by the trial magistrate on 1<sup>st</sup> April 2016 was fair to both parties.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions filed. The issue to be determined is whether the Court should exercise its discretion in favour of the Applicant and grant leave to appeal out of time. The law as regards the filing of appeals in the High Court is found in section 79G of the Civil Procedure Act which provides as follows:

**“ 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.”**

The grant of leave to file an appeal out of time is a matter of judicial discretion, which principle was espoused in the case of **Machira & Company Advocates vs Mwangi & Another**, (2002) e KLR and expounded in **Kenya Shell Ltd vs Kobil Petroleum Ltd**, (2006) 2 EA 132. The Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat – vs – IEBC & 7 Others**, (2014) eKLR laid down the principles for extension of time for filing an appeal as follows:

- 1) 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;**
- 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3) Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis;**

**4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**

**5) Whether there will be any prejudice suffered by the respondent if the extension is granted**

**6) Whether the application has been brought without undue delay; and**

**7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

The Applicants' main reason for the delay in filing his appeal is that its instructing Director became ill, and they were not able to give instructions until mid –May 2016 when he recovered, and they provided evidence of his illness. I note that the Respondent does not dispute this averment, but states that other officers of the Applicant ought to have given the needed instructions. This argument would still not have cured the delay, as the Applicant's Advocates averred they were not aware of the Director's illness, and time would still have been spent getting other officers to give instructions once the illness was known. This Court therefore finds this reason for the delay to be credible, as the delay in the circumstances was unavoidable.

In addition, I note that the instant application was eventually filed on 31<sup>st</sup> May 2016, and I do not find the delay of one month in filing the application inordinate. I will therefore allow the Applicant's prayer for leave to appeal out of time for the foregoing reasons.

I accordingly order as follows:

1. The Applicant be and is hereby granted leave to file and serve his appeal out of time.
2. The Applicant shall file and serve his Memorandum of Appeal within 14 days of the date of this ruling.
3. The Applicant shall meet the costs of the Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 20<sup>th</sup> day of December 2016.

**P. NYAMWEYA**

**JUDGE**