

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL CASE NO. 826 OF 2014

ALL PACK INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

BONIFACE KYALO MAINGIDEFENDANT

RULING

1. The Motion for consideration is dated 24th November, 2014. It is expressed to be brought under Sections 95, 1A, 1B and 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. It seeks that the time for filing of an appeal from the judgment of Hon. Obulutsa Ag. Chief Magistrate delivered on 22nd October, 2014 be extended.
2. The grounds for the application were set on the face of the Motion and in the Supporting Affidavit of Phona Rwangyezi sworn on 24th November, 2014. These were that; judgment in NRB CMCC No. 3205 of 2012 was delivered on 22nd October, 2014 without notice to the parties; that the Applicant's Advocates only discovered the delivery of the judgment, this fact, on 21st November, 2014 upon perusing the court file; that the Applicant is dissatisfied with the judgment and intends to appeal against it. It was also contended that as at the time the delivery of judgment was discovered, time for filing the appeal had lapsed and that there had been no unnecessary delay.
3. For an Applicant to succeed in such an application what the court considers is the reasons for the delay, the length of the delay, the prejudice suffered or to be suffered by the other party and whether the intended appeal is arguable.
4. The application was opposed on the basis of the grounds of opposition dated 15th December, 2014. It was contended for the Respondent that the application was vexatious and frivolous; that the application was bad in law and was meant to delay the Respondent from enjoying the fruits of his judgment and that any appeal will not be rendered nugatory. Learned counsels for the parties orally submitted which submissions have been considered alongside the Affidavit on record.
5. The Applicant's assertion that the judgment sought to be appealed against was delivered ex parte was denied. Such delivery of judgment was irregular as it breached the provisions of Order 21 Rule 1 of the Civil Procedure Rules which provides:-

“In suits where a hearing is necessary the Court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties.”

6. It is also not denied that the Applicant's Advocates only discovered the delivery of the judgment on 21st November, 2014. The present application was filed exactly five (5) days after such discovery. It is clear, therefore, that applicant acted with dispatch upon discovery of the outcome of the Judgment.
7. To my mind, considering that the judgment was irregularly delivered (without notice to the parties) coupled with the dispatch with which the present application was filed, I am not satisfied that the application was intended to delay the Respondent from enjoying the fruits of his judgment as is contended. I have also seen the draft Memorandum of Appeal, I cannot say that it is frivolous. At least to me it looks arguable.
8. As regards prejudice likely to be suffered if the application is granted, none was alleged and my part, I see none.
9. For the foregoing reasons, the application has merit and it is hereby allowed. The Memorandum

of Appeal be filed and served within 15 days of the date of this ruling. The costs of the application will abide the outcome of the appeal. It is so ordered.

DATED and **DELIVERED** on the 27th day of February, 2015.

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A. MABEYA

JUDGE