



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL CASE NO.16 OF 2013**

**NOAH MISIKO & 26 OTHERS.....APPELLANTS/APPLICANT**

**VERSUS**

**REGISTERED TRUSTEES OF CHRIST**

**THE KING CATHOLIC CHURCH KIBERA.....1<sup>ST</sup> RESPONDENT**

**JENNIFER MUTHONI.....2<sup>ND</sup> RESPONDENT**

**MBUTO LISERO.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

The application for determination is the Notice of Motion dated 5<sup>th</sup> February 2013 brought under order 51 Rule 1 of the Civil Procedure Rules and Section 27 of the Limitation of Action Act, section 3A of the Civil Procedure Act and Article 159 of the Constitution and all enabling Provisions of the Law. The Applicant seeks the following orders:

- 1. That the honourable court be pleased to grant leave and extend time to the Applicant to file an appeal out of time to challenge the ruling and order issued by the honourable chairman at the rent restriction tribunal court on 27/11/2012 being rent restriction tribunal civil case number 150 of 2012.**
- 2. That the honourable court be pleased to admit memorandum of appeal already filed in court which is civil appeal number 16 of 2013 and the same be deemed as properly filed.**

The Applicants complain that they were not accorded a fair hearing at the Rent tribunal which according to them is violation of the principle of natural justice and their fundamental rights as enshrined in the Constitution. The Applicants argue that they were ready to proceed with the hearing on 27<sup>th</sup> November 2012 before the honourable chairman Mr. Hillary K. Korir and two other members. Their advocate Mr. Onyango from Rachier & Omolo & Co. was not present but he had sent another advocate to hold his brief. The tribunal went ahead and dismissed their case and ordered that they vacate the premises within 60 days. The Applicants were aggrieved by the decision of the honourable chairman and instructed the current advocate Nyangito & Co. to lodge an appeal in the High Court. The Notice of Appeal together with the Memorandum of Appeal was lodged on 18<sup>th</sup> December 2012 after the appeal time had expired. The parties appeared before Waweru J for further directions and after perusing the pleadings the court directed the Applicant to seek an extension of time to enable them proceed with the appeal. The Applicants averred that their advocate miscalculated and underestimated the stipulated time to lodge

anotice of appeal and the memorandum hence counsel's mistake cannot be re-visited on innocent litigants.

The application is opposed. The Respondents filed a replying affidavit which is not dated. The Respondent states that the court has in several occasions accommodated the Applicant. They state that the tribunal allowed the Applicants to look for their counsel until 2 pm when the order was made. The Respondents complain that the Applicants have been buying time since the filing of the suit in February 2012 to 27<sup>th</sup> November 2012 when the eviction orders were issued.

The Respondents aver that the 1<sup>st</sup> Respondent is the lawful owner of the 28 structures being forcefully occupied by the Applicants for more than 9 years without paying rent. The Respondent maintains that the Applicant's interest in this matter has not been to pursue justice, but to pursue delay so that they can continue being in occupation of the Respondent's structures whose ownership is not disputed.

I have considered the Applicant's application in detail, the brief submissions by each party and the contents of both the supporting and replying affidavits of both counsel.

On the enlargement of time, Order 50 rule 6 gives the court powers to enlarge time and provides as follows:

**“Where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge such time upon terms (if any) as the justice of the case may require and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed at provided that cost of any application to extend such time and any order made therein shall be borne by the parties making such application unless the court order otherwise.”**

Whether or not the order for extension of time should be granted therefore lies entirely in the discretion of the court. A court will allow the extension of time to prefer an appeal where the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. **Section 79 G of the Civil Procedure Act** states:

***“79 G. 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 burden of proof to offer a satisfactory explanation for the delay in filing an appeal lies on the Applicant. The Rent Restriction (Appeals) Rules state that an appeal to this court shall be filed within 15 days from the date of the decision. In the instant case, the appeal was filed on 18<sup>th</sup> December 2012 while the ruling was delivered on 27<sup>th</sup> November 2012. The 15 days in this case lapsed on 14<sup>th</sup> December 2012 and the appeal was filed after a delay of 4 days. The reason given by the Applicant for the delay is that the advocate miscalculated the stipulated time for filing the appeal. As stated by the Applicant this is a mistake of an advocate which should not be visited upon the litigant. This accordingly appears to be a case where the Application should be considered favourably subject, however to other relevant factors raised. The decision in the case of **LUCY BOSIRE Vs KEHANCHA DIV LAND DISPUTE TRIBUNAL & 2 OTHERS [2013] eKLR** where **Odunga J** stated as follows:

**“In this case the dispute revolves around land which is very emotive subject in this country. Accordingly such matters ought to be heard on merits as far as possible so that parties do not feel that they were driven out of the seat of justice without being**

**afforded an opportunity of being heard. In this case the blame is placed at the door steps of the Applicant's advocates. It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits. See Philip Keipto Chemwolo & Another Vs. Augustine Kubende [1986] KLR 492; (1982-88) 1 KAR 1036 at 1042; [1986-1989] EA 74.**"

I have, however, carefully also perused the documents upon which this application is grounded and the affidavits in response. I have not failed to observe that the suit at the lower Tribunal was based upon the failure of the Applicant herein to pay the relevant monthly rent to legalize occupation of the premises from which the Rent Restriction Tribunal eventually made eviction orders of the applicant within 60 days. The Tribunal first gave the applicant time to await his advocate until 2.00 p.m. When the Advocate did not appear, the Tribunal appears to have given the Applicant opportunity to represent himself in the case but on failure to do so, proceeded to make orders now intended to be appealed from.

I also further notice that although the Applicant was given opportunity to file this application for leave to file the appeal within 7 days by Waweru, J. he failed to do so within the seven days but did so outside the prescribed period.

Notwithstanding above short-comings on the part of the Applicant, this court has decided not to oust the Applicant from the seat of justice. However, justice is a two-way traffic and having taken into account all the relevant factors, this court notices that the Applicant does not deny the asserted facts that he occupies the relevant premises since the year 2004 without having paid the agreed or reasonable monthly rents.

The granting of application to appeal out of time will accordingly be based upon the deposit in court or a bank saving interest earning account awaiting the hearing and final determination of the intended appeal.

## **ORDERS**

**1. The leave to appeal out of time is hereby granted on condition that the outstanding rents shall be first deposited in court within 60 days of this order in such a way that: -**

- a) The Memorandum of Appeal shall be presumed as timely filed on the 30<sup>th</sup> day from the date hereof.**
- b) Half the rent due shall have been deposited in court on the 28<sup>th</sup> day from today.**
- c) The remaining half the total rent shall have been paid to court on or before the 60<sup>th</sup> day of this order.**

**2. In default of payment to court of the 1<sup>st</sup> half total rent before or on the 28<sup>th</sup> day of this order, or default of payment of the 2<sup>nd</sup> final instalments of the 2<sup>nd</sup> half of the total rents due on or before the 60<sup>th</sup> day hereof, the filed appeal shall automatically stand dismissed without more.**

**3. Costs of this application are to the Respondents in any event.**

**4. Mention after 75 days on 25<sup>th</sup> May, 2015.**

Dated and delivered at Nairobi this 19<sup>th</sup> day of February, 2015.

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**D A ONYANCHA**

**JUDGE**