



**REPUBLIC OF KENYA**

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

**MISC. APPEAL NO. 143 OF 2014**

**STEPHEN OBONYO ODHIAMBO).. .....1ST APPLICANT**

**WILLIAM ONYANGO OLIECH)..... 2ND APPLICANT**

**VERSUS**

**FREDRICK PAUL OKELLO ..... RESPONDENT**

**RULING**

By the Notice of dated **15th July, 2014** the applicants sought orders as follows:-

1. That the application be certified urgent and heard exparte in the first instance.
2. That there be a stay of execution of the judgment dated **21st May, 2014** in **PMCC 247 OF 2010** at **Maseno** and any consequential orders pending the hearing of this application interpartes.
3. That this Honourable Court be pleased to grant leave to the applicants to file their appeal out of time.
4. That the costs of the application be provided for:

The application was premised on grounds inter alia that the applicants were dissatisfied with part of the judgment and had instructed their advocates to appeal yet time to do so expired on **21st June, 2014**; that the delay in filing the appeal is excusable and is not inordinate and further that the applicants are likely to suffer substantial loss and damage should the respondent execute the decree and as the appeal is likely to be rendered nugatory. The last ground is that the appeal is meritorious and stands a high chance of success.

The application is supported by the affidavit of **Lilian Munyi** the Team Leader Legal Department of the Africa Merchant Assurance Co. Limited who were the insurers of the applicant's motor vehicle. She deposes that the delay in filling this appeal was occasioned by an error of their record clerks in misfiling the letter dated **28th May, 2014** advising them of the judgment of subordinate court and that consequently she only became aware of the judgment on **30th June, 2014**.

The Respondent filed a replying affidavit in which he deposes inter alia; that no sufficient grounds have been adduced as to why the appeal was not filed within the stipulated period; that the applicants did not adduce any evidence at the lower court and the intended appeal is a delaying tactic intended to deny him of the fruits of his judgment and further that the delay is inordinate and ought not to be excused by this court. He urges the court to dismiss the application with costs.

The application was canvassed by way of written submissions. Only **prayer 3** of the application remains to be determined, **prayer 1 and 2** being spent.

The time limited for appeals from the subordinate court to the High Court is thirty days but the High Court has unfettered discretion to extend time where the appellant satisfies it that he has good and sufficient cause for not filing the appeal in time-(see **Section 79 G Of the Civil Procedure Act**). The discretion of the court must as always be exercised judicially based on accepted principles in **African Airlines International Ltd V. Eastern & Southern African Trade & Development Bank (2003) KLR 140** the Court of Appeal held as follows:-

**“ 4. All relevant factors must be taken into account in deciding how to exercise discretion**

**to extend time; these factors include:-**

**a) the length of the delay;**

**b) the reasons for the delay;**

**c) whether there is an arguable case on the appeal; and**

**d) the degree of prejudice to the defendants if time is extended.**

The applicant herein intend to appeal against the measure of damages awarded to the respondent. It is their contention that the same was so manifestly excessive as to constitute an erroneous estimate of the loss suffered by the plaintiff. They have, in my view given a plausible explanation for not filing the appeal in time. They do as have an arguable Appeal bearing in mind that an arguable appeal is not one that must succeed. The delay in bringing this application through inordinate is excusable and I do not find that the respondent will be greatly prejudiced if the time for bringing this appeal is extended.

Accordingly, the application is allowed on terms that the intended appeal be filed and served within thirty days of this ruling. The applicants shall bear the costs of the application.

It is so ordered.

**E.N. MAINA**

**JUDGE**

**Signed, Dated and Delivered at Kisumu this 23rd day of April, 2015.**

**In the presence of:-**

No appearance for the Applicant

Respondent in person

Moses Okumu- Court clerk

