



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CIVIL APPEAL NO. 122 OF 2010**

**KISIMA FARM LIMITED ..... IST APPELLANT**  
**PETER MURIUKI MBAYA ..... 2ND APPELLANT**  
**MICHAEL C.A. DYER ..... 3RD APPELLANT**

**-VERSUS-**

**RUTH NCEKEI M'TURUCHIU AND EDWIN KUBANIA M'TURUCHIU**  
**(Administrators of the Estate of DANIEL KINOTI M'TURUCHIU(DECEASED))**

**RULING**

1. The Respondents/Applicants by an application dated 22<sup>nd</sup> January, 2015 brought pursuant to Section 1A,1B,3,3A and 79 G of the Civil Procedure Act seeks the following orders:-

- 1. That this Honourable court be pleased to grant leave to the 1<sup>st</sup> and 2<sup>nd</sup> respondents to file a cross appeal in this matter to be heard together with this appeal.**
- 2. That the memorandum of appeal by way of cross appeal by the applicants annexed hereto be deemed as properly filed.**
- 3. That costs of this application be provided for.**

2. The Respondents/Applicants' application is based on the ground on the face of the application interalia;

**(a) That there is an appeal pending for hearing herein emanating from CMCC. NO. 364 of 2008 wherein the applicants were the plaintiffs and the appellants herein were the 1st,2nd and 5<sup>th</sup> defendants.**

**(b) That the applicant is aggrieved by an error made by the trial magistrate who deducted the damages under the Law Reform Act from the award under the Fatal Accident Act which the applicant intends to canvass in the cross appeal herein among others.**

**(c) That the prayers sought shall not prejudice the appellants in any way as the appeal is yet to be heard.**

The application is further supported by the first respondent/applicant's affidavit dated 22<sup>nd</sup> January 2015 which affidavit avers that the trial magistrate awarded general damages under the Law Reform Act at Kshs 140,000 and under Fatal Accident Act being loss of dependency at Kshs. 800,000. However the trial court made a serious error by deducting the award under the Law Reform Act from the Fatal Accident Act award. That the error from the trial court can only be rectified on appeal thus the necessity for an application to enable the respondent be heard on appeal. That the trial court considered a multiplicand which was too low considering the stature and income of the deceased who was confirmed to be a mechanic. That the application will not prejudice the appellants since the appeal is yet to be heard and that the application is brought in good faith for fair determination of the appeal.

3. The Appellants/respondents on their part are opposed to this application and rely on their grounds of opposition dated 12<sup>th</sup> February, 2015 in which they have stated as follows;-

1. **That the judgment of the subordinate court was delivered on 14<sup>th</sup> September 2010, a period of over four (4) years ago. The application is clearly an after thought and has been brought after an unreasonable delay.**
2. **That the applicants have not demonstrated any ground of appeal.**
3. **That the application lacks merit and is meant to delay or frustrate the disposal of the appeal herein.**
4. **That allowing the application would create a bad precedent.**

5. I have carefully considered the pleadings, counsel submissions in support and in opposition of the Respondents/applicants application. The issue for consideration is whether the applicants have met conditions for extension of time for filing a cross appeal?

6. The judgment which the respondents/applicants are seeking to appeal against was delivered on 14<sup>th</sup> September 2010. The Appellants filed their appeal on 14<sup>th</sup> October 2010. The court record reveal that the Respondents/applicants counsel through a letter dated 9<sup>th</sup> June 2012 to the Deputy Registrar sought for the Appellants appeal to be dismissed because after service of Memorandum of Appeal more than a year lapsed without the Appellants having taken any action. The Respondents/Applicants draft cross appeal is dated 22<sup>nd</sup> January 2015 and was filed together with the instant application after a period of 4 years and 3 months.

7. An appeal from the subordinate court to the High Court is required to be filed within a period of 30 days from the date of the judgment provided an appeal may be admitted out of time if the appellant satisfies the court that he has good and sufficient cause for not filing the appeal in time. **Section 79 G of the Civil Procedure Act** provides as follows;

***“79 G. every appeal from a subordinate 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 anytime 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 satisfied the court that had good and sufficient cause for not filing the appeal in time.”***

8. The Civil Procedure Act and/or the Civil Procedure Rules do provide for a time limit within which a cross appeal ought to be filed. The Appellant argued that if the respondents/appellants were aggrieved by what they referred to as glaring and obvious apparent error they would have been the first to file an

appeal or an application for review instead of waiting for a period for over four (4) years before making up their mind on whether to cross appeal at such a stage.

9. The Appellants contention is that the respondents/applicants have not satisfied the conditions for granting of extension of time relying on the case of Nyeri HC. Misc. App. No. 194 of 2008 Robert Kinyua Migwi -vs- Manya Bettarello & another (2009) eKLR where court held;

*“ . . .The law as regards the principles to be applied when dealing with applications of this nature is now well settled. The starting point is that the court has unfettered discretion in dealing with such an application. However, like all judicial discretions, the court has to exercise its discretion upon reasons and not whims. To guide the court on what to consider when exercising this discretion, the case law has established certain matters that must be taken into account. These are first, the period of delay must be considered. Second, the court has to consider carefully the reasons given for such a delay. Thirdly, the court would consider whether the appeal or intended appeal ...is arguable ... Fourthly, the court is required to consider if the respondent . . . will be prejudiced if the application is granted. . . .”*

10. I agree that the above mentioned case sets out the main principles to be considered but the principles as set out are by no means exhaustive and cannot be exhaustive by all means as the exercise of discretion demands that court should not be restricted in its option. The court in exercise of its discretion should not be bound by technicalities but should be concerned with doing substantive justice to all parties. The period for delay in this matter with all due respect is inordinate, the respondents have not given nor have they attempted to give reasons for the delay but having perused the grounds of appeal, I am satisfied the intended appeal raises arguable grounds; arguable grounds am aware that they do not mean the appeal shall succeed or not . The appellants appeal is yet to be set down for hearing and some of the issues raised in the appellants appeal are similar to the grounds that the respondents would like to raise in the intended appeal such as the issue of multiplicand . I believe by allowing the intended cross-appeal inspite of the delay of over 4 years and bearing in mind there is no limited period within which a cross-appeal should be filed will not prejudice the appellants as both will be able to canvass the appeal and all relevant issues in their respective appeals. The application for leave to file a cross-appeal though filed after 4 years I am satisfied would ensure substantive justice is done to all parties herein. That the appellants would not be prejudiced by allowing cross-appeal to be filed in this matter.

That I am satisfied in the interest of justice the application ought to be granted.

11. The upshot is that the application dated 22<sup>nd</sup> January 2015 is allowed but due to the delay by the respondents/applicants for a long period in filing this application; the appellants are awarded costs at any event to be taxed as agreed upon determination .of the appeal. The respondents/applicants to file the memorandum of appeal by way of cross appeal to be deemed as properly filed upon payment of the prescribed fees within 15 days from the date of the ruling.

**DATED at Meru this 18<sup>th</sup> day of June 2015**

**J.A. MAKAU**

**JUDGE**

**18.6.2015**

**Delivered in open court in the presence of:**

**Mr. G. Anampiu for respondent**

**M/s. B. Mbai & Associates for appellants**

**Court clerk – Penina/Mwenda**

**J.A. MAKAU**

**JUDGE**

**18.6.2015**