



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPLICATION NO. 558 OF 2014

1. DAVID KARIUKI

2. BUDGET PAYLESS CAR HIRE & TOUR.....APPLICANTS

VERSUS

JOSHUA WAMBUA MUTHAMA.....RESPONDENT

RULING

1. The applicants filed the notice of motion dated 1st August, 2014 under **orders 50 rule 6, order 51 rule 1** of the **Civil Procedure Rules, 2010** and **section 79G** of the **Civil Procedure Act (Cap 21) Laws of Kenya**. The applicants seek the leave of this court to file and serve the appeal out of time.

2. The application is premised on the grounds that the court failed to serve the applicants with the notice of delivery of judgment; that the judgment was not delivered on 5th December, 2013 as indicated on the notice rather it was delivered on 10th February, 2014; that the applicants filed an interlocutory application on 10th February, 2014 whose ruling was to be delivered on 14th May, 2014 but no ruling was delivered on the said date; that no notice of the ruling was served on the parties; that the interlocutory application was struck out on 4th July, 2014 but the file was available for perusal on 28th July, 2014 and that the applicants are ready and willing to furnish security.

3. The supporting affidavit of Jackson Omwenga sworn on 1st August 2014 reiterated the grounds above.

4. The application is opposed by the respondent's grounds of opposition dated 7th August, 2014. The grounds of opposition are as follows:

i ...spent

ii...spent

iii. ...spent

iv. The ruling on application for extension of time to appeal was given on 4th July, 2014 as per notice on the door of the courtroom and per notice duly posted on the daily cause list and posted on the internet.

v ...spent

vi. No sufficient reasons have been given in the supporting affidavit to warrant extension of time within the terms set by section 79G of the Civil Procedure Act.

viii...spent

ix. The application is res judicata same reliefs having been sought and rejected and that the only remedy is an appeal against those orders.

5. Whether or not to grant an order for extension of time or leave to file an appeal out of time is discretionary. The discretion is to be exercised judicially with a view to doing justice. For the court to exercise that discretion in favour of an applicant, he must demonstrate that the delay in filing the appeal is excusable and not inordinate. Where the delay is inordinate, an applicant must give a plausible reason.

6. It is clear in the instant case and from the applicants' supporting affidavit that time lapsed while they laboured on a similar application in the subordinate court. In my view this is excusable considering also that the ruling in the subordinate court was delivered on 4th July, 2014. In the circumstances, I find and hold that the delay in filing the memorandum of appeal was not inordinate and is excusable.

7. Applications for stay of execution do not decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are capable of being altered or varied by subsequent applications for the same relief. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based. To my mind such an application cannot therefore be said to be *res judicata*. I wish to reiterate the words of Sitati J in *Mini Bakeries (K) Ltd v. George Ondieki Nyamanga (2014) e KLR* where in referring to *Apondi v. Canuald Metal Packaging (2005) 1 EA 12* where Waki J discouraged litigation by instalments she stated as follows:

“in the instant case, there is no litigation by instalments because the orders granted by the lower court are now spent and a whole new process of execution has commenced, necessitating the filing of the instant application.”

8. In view of the foregoing I find merit in the application and allow it. Costs shall be in the cause.

Dated, Signed and delivered in open court this 14th day of November, 2014.

J.K.SERGON

JUDGE

In the presence of:

.....for the Applicants

.....for the Respondent