



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. 102 OF 2013

THABIT SAID SWALEH 1ST APPLICANT

ALPHONCE WANJE MWANGALA2ND APPLICANT

KAZUNGU SAFARI KARISA3RD APPLICANT

V E R S U S

ALFRED JEFWA KALU RESPONDENT

RULING

1. By a Notice of Motion dated 23rd July 2013 the Applicant seeks leave of this Court to file an appeal against **Malindi CMCC No. 362 of 2010** out of time.
2. The Applicant supported that application with the grounds that the judgment was delivered in the Chief Magistrate's Court on 16th April 2013 in absence of all the parties. That the Applicant Counsel came to know of the judgment on 22nd May, 2013. That by that time the time within which an appeal ought to have been filed had expired. See Section 79G of the Civil Procedure Act Cap 21. The Applicant's Insurance Company being aggrieved with the judgment of **Malindi CMCC NO. 362 of 2010** desired to file an appeal. That the Applicant's learned Counsel has already sought for the typed proceedings of the lower Court.
3. The application was opposed by the Respondent. The Respondent submitted that the Applicant was not diligent in following up the matter of the lower Court judgment. That the lower Court did not deliver its judgment on 2nd April but delivered it on 9th April 2013. The Respondent submitted that the Applicant was particularly indolent in filing the present application even though they were informed by the Respondent by 22nd May 2013 that judgment was entered by the lower Court. That despite having that information the Applicant did not make the present application until 24th July 2013.
4. The Respondent also submitted that the application was incompetent and bad in law because it was supported by an affidavit of a legal officer of African Merchant Assurance Company Limited. The Respondent termed the legal officer as a busy body. Further that the legal officer failed to state under which authority she swore the affidavit in support of the application. In that regard the Respondent relied on the case of **COURT OF APPEAL 1941 MRUFIN -VS- ASHBRIDGE & MARTIN** where the Court stated-

“Although the insurers had control of the proceedings and could take any step to those proceedings in the name of the Defendant, they were not parties to the action and no application or appeal could be made in their name.”

It also was the submission of the Respondent that the legal officer failed to state her place of abode as required under Order 19 Rule 4 of the Civil Procedure Rules, 2010. To support that submission the Respondent relied on the case **ELITE EARTHMOVERS LTD -VS-KRISHA BEHAL & SONS [2005]1 KLR 379** where the Court stated-

“1. It is now a matter of judicial notoriety that an

affidavit by a corporation whether of verification of a plaint or an application thereunder, will be struck out on the ground of being defective and incompetent if it is not authorized and signed by a person who is not only an officer of the corporation, but must also be authorized to so sign.

2. ***The deponent of the affidavit, as General Manager of the Plaintiff decree holder was required under law to say in that capacity of General Manager, he is or has been authorized to sign the affidavit failing which, the law will regard his affidavit as defective and incompetent.”***
5. The Respondent sought another affidavit sworn by the Applicant's learned Advocate to be struck for having been sworn by an Advocate in what the Respondent called contested matters.
6. In response to the submissions that the Applicant did not act with diligence the Applicant reiterated that the judgment of the lower Court was delivered in the absence of both parties. The Applicant also relied in the case **CIVIL APPLICATION NO. NAI 6 OF 2006 GEORGE CHEGE KAMAU -VS- ESTHER WANJIRA KAMAU** where the Court of Appeal quoted from the case of **RAT MAN -VS- CAMARASAMY [1964]3ALL ER 933** as follows-

“The rules of Court must prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time, which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

7. The Court of Appeal also in the case **CIVIL APPLICATION NO. NAI 178 OF 2003 PAULA WAHETI MUCHINA -VS- HENRY WANJOHI MUCHINA** expressed itself as follows in respect of an application for leave to file an appeal out of time-

“I think on the whole the explanation given does not wholly exonerate Paula from blame as she ought to have realized earlier than later that her Advocates were not executing her instructions. It is not lost to me however that the Respondent did nothing over the period to have the order for stay of execution set aside or to pursue the costs of the litigation before the superior court. Paula may well have been lulled into a false sense of security.”

8. Just as stated in the case of **PAULA WAHETI** (supra) the judgment in the lower Court was delivered on 16th April 2013. Despite that judgment being entered on that date the Respondent did nothing to execute it. Even upto today the Applicant has not made an application for execution. The Respondent therefore cannot be heard to say that he will suffer prejudice if leave is granted as sought. To reiterate the words of that case ***'the status quo did not change'*** even after the entry of the lower Court's judgment. I do find in view of what is stated by the Applicant that the delay in filing the appeal and the present application is excusable.
9. The objection raised that the Legal Officer of the Insurance Company had no business swearing

the affidavit in support of the application is I believe far fetched. To take that submission to its logical end would mean that no one but the parties in a matter would ever be allowed to swear affidavits in such matters. Also the objection that the said Legal Officer failed to state her place of abode is not supported by the material before the Court. The Legal Officer in her affidavit stated that she was a resident of Nairobi. There is nothing in Order 19 rule 4 which requires the deponent to state the street or house number of their abode. The statement therefore which is made by the Legal Officer suffices for the purpose of Order 19 rule 4.

10. There is no Rule which forbids an Advocate to swear an affidavit on

behalf of his client. There are instances where an Advocate has personal knowledge of a matter they are conducting and they cannot be forbidden to swear affidavits in that regard. Rule 9 of The Advocates (Practice) Rules does however forbid an Advocate to appear in a matter where he may be required to be a witness. That Rule provides as follows-

“No Advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

The depositions by the learned Counsel Elizabeth Wangui Munyari does not fall within the ambit of what is forbidden by Rule 9 above.

11. The Court finds that the interest of justice would best be served by

granting leave as sought by the Applicant. Accordingly the Court grants the following orders-

- a. **The Applicant is hereby granted leave to file an appeal within twenty one (21) days from the date hereof against the judgment in Malindi CMCC 362 of 2010.**
- b. **The costs of the Notice of Motion dated 23rd July 2013 shall abide with the outcome of such an appeal.**

Dated and delivered at Mombasa this 19th day of December, 2013.

MARY KASANGO

JUDGE