



## Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Subject of Tribunal case*

### BUSINESS PREMISES RENT TRIBUNAL

- 3.1 *Assessment of rent*
- 3.2 *Three tenants, rent increase through the assessment.*
- 3.3 *tenants find rent increase inordinately high.*
- 3.4 *Two out of the three tenants file appeal in the same file at the High Court (Civil Appeal 258/11)*
- 3.5 *Court held, whereas an application for stay of execution is granted, the procedure of filing one appeal for two tenants was irregular (18<sup>th</sup> July 2011 Ang'awa J)*
- 3.6 *One tenant amends memo of appeal and strikes out name from the first appeal (29<sup>th</sup> September 2011)*
- 3.7 *That tenant files Misc application 369/11 and prays for leave to file appeal out of time, to correct irregularity.*
4. *Application for leave to appeal out of time*

*Dated 11<sup>th</sup> August 2011*

- i) *Application based on the court ruling of 18<sup>th</sup> July 2011, Ang'awa J.*
- ii) *Leave be granted to file appeal out of time.*
5. *In reply.*
  - a) *Application opposed.*
  - b) *Advocate made mistake, he should bear his own negligence.*
  - c) *Application be dismissed.*
6. *Held:*

- i) *Application granted.*
- ii) *Leave to file appeal out of time within 21 days.*

7. *Case Law:*

*By the appellant:*

a) *Mwaniki Njoroge Kamau & Another*

*Vs*

*Lee Shree Pong*

*Civil Application No. 122/98*

*LLR 4114  
Gicheru JA*

b) *Touring Cars (K) Ltd – Vs – Ashok N. Mankaji*

*Civil application 78/98*

*LLR 725 CAK  
Omolo JA*

c) *S.D.A. Church (E.A.) Ltd & Another*

*Vs*

*M/s Masosa Construction Co.*

*Civil Application 349/05*

*Waki JA*

*By the respondent:*

a) *Nimrod Wangagu – Vs – A.F.C. & Another*

*HCC 50/02 Kitale  
Ombinja J*

b) *Nyokabi Wachira – Vs – Naomi Njoki*

*(2006) eKLR  
Okwengu J*

c) *Joseph Kibe Mungai (Guradia R L Shah)*

*Vs*

*John Njau Njuguna & Another*

*CA 209/07 (2008 Eklr)*

*Deverell JA*

d) *Muriithi Richard – vs – Juma Kassim & Another*

*CA 117/10 Mombasa  
Azangalala J*

e) *Sulmac Kenya Ltd – Vs – Anthony Owino*

*(2006) eKLR  
L. Kimaru J*

f) *Egerton University – Vs – Diana Luganje (suing as admin)*

*(2006) eKLR  
L. Kimaru J*

8. *Advocates :*

i) *Kamere instructed by M/s Kamere & Co Advocates for  
appellant/applicant/tenant*

ii) *E J Mutemi instructed by Nzamba Kitonga & Co Advocates for  
respondent/landlord*

REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT  
MISCELLANEOUS APPLICATION 369 OF 2011

**KINYUA GATHUITA T/A**

**MAKON FREIGHT AGENCIES ..... APPELLANT/TENANT**

**VERSUS**

**GICHUGU HOUSING CO-OP**

**SOCIETY LTD ..... RESPONDENT/LANDLORD**

*(Being an appeal arising from the judgment of Hon. D Mochache – Chairperson Business Premises Rent  
Tribunal inl Case No. 885, 980 & 977 of 2011 dated*

*3<sup>rd</sup> June 2011 at Nairobi)*

**R U L I N G**

## Application for Leave to file appeal

### Out of time

#### I. BACKGROUND

1. The genesis of the subordinate matter arose from the Business Premises Rent Tribunal. The building in question LR No. 209/138/90 Thiba House along Duruma Road, Nairobi, a commercial property has seven tenants who rents were being reviewed by way of an assessment.

A total of seven tenants were affected. Four in the basement, three on the front ground floor and one on the 1<sup>st</sup> floor. The issue before the tribunal was one of assessment of rent.

2. Only three tenants appear to have challenged the assessment. They were

- 2.1 Kinyua Gacuta t/a  
Makon Freight Agencies  
Basement floor, Shop B1
- 2.2 Joyce Wairimu Waithiga  
Front ground floor  
Shop G1
- 2.3 Yusuf Hussein  
1<sup>st</sup> floor

The files of the three tenants were consolidated by the tribunal.

3. Being dissatisfied by the decision of the chairperson of the tribunal on the assessment of rent two out of the three tenants filed appeal in

High Court appeal case 258/11. This was M/s Makon Freight Agencies and Yusuf Hussein.

4. Joyce Wairimu Waithiga did not appeal.

5. By an application dated 14<sup>th</sup> June 2011, the two tenants sought for a stay of execution of the tribunal's orders. Whereas the High Court granted the application for stay of execution on 18<sup>th</sup> July 2011, (Ang'awa J) the court did make comment that there ought to have been two separate appeals filed and not one file. (Even though the files had been consolidated in the subordinate tribunal.)

6. M/s Makon Freight Agencies name was struck out of the appeal by way of an amendment, voluntarily so done by the parties and leaving the name of Yusuf Hussein on record.

7. It is noted under Order 42 r 3 Civil Procedure Rules that an amendment to the memorandum of the appeal may be made before the giving of directions.

8. M/s Makon Freight Agencies now comes before this court by way of a miscellaneous application seeking leave to have the appeal, he wishes to file, be so filed out of time.

#### II APPLICATION DATED 11<sup>TH</sup> AUGUST 2011

##### FILED ON 18<sup>TH</sup> AUGUST 2011

9. The applicant relied on the ruling delivered on 18<sup>th</sup> July 2011 that there be separate appeals filed. The purpose of enlarging time to file appeal out of time, is to bring in place the appeal for the applicant whose rights and grounds of appeal be as agitated by the other appellant Yusuf Hussein.

10. This application was opposed by the respondents on the grounds that the mistake laid with the

advocate. It therefore means that the advocate should be held liable for the mistake of filing the said appeal in one file instead of separate files. That relying on case law that now states, it is no longer the litigant who should suffer but that the advocate should bear the negligence imposed as a result of his actions. The insurance company would pay for this fault.

11. The case law relied on being:

**Nimron Wanguhu – Vs – A.F.C. & Another**

HCC 50/02 Kitale.

Ombinja J

Where the advocate was held to be liable for mistake of filing a misapplication instead of an appeal. An application for leave to file an appeal out of time was dismissed. The litigant was to sue the advocate in negligence.

12. The applicant's advocate relied on several case law. One being

**Touring Cars Ltd – Vs – Ashock N Mankagi**

Civil Appeal No. 78/98

LLR 728 CAK

Omolo JA

where technicalities of law should not be used to clog the path of substantial justice.

13. Further that it was at the court's discretion to grant leave to appeal out of time.

III **FINDINGS**

14. I took the privilege of calling up file CA 258/11. The application for stay of execution had been granted because this court was of the view that a prima facie case had been made out to warrant such stay of execution.

15. The circumstances of this application has its roots in the ruling dated 18<sup>th</sup> July 2011. The appellant took directing from that said ruling emanating in this application before court.

16. I would consequently allow this application and granted the orders as prayed.

17. That leave be and is hereby given to the appellant to file appeal out of time. That the mention order of appeal be filed within 21 days of today's date upon reading of this ruling.

18. The costs be in the appeal.

**DATED THIS 22<sup>ND</sup> DAY OF FEBRUARY 2012 AT NAIROBI**

**M.A. ANG'AWA**

**JUDGE**

*Advocates* :

- i) *Kamere instructed by M/s Kamere & Co Advocates for appellant/applicant/tenant*
- ii) *E J Mutemi instructed by Nzamba Kitonga & Co Advocates for respondent/landlord*