



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISCELLANEOUS APPLICATION NO. 91 OF 2007**

**KENYA TEA PACKERS  
LIMITED.....APPLICANT**

**VERSUS**

**MUSA MAKAI  
MULOCHI.....RESPONDENT**

**RULING**

The applicant, **Kenya Tea Packers Limited** seeks an order that the time for filing an appeal from the judgment and decree of W.N. Njage, a Senior Principal Magistrate dated 22.2.2007 in Eldoret CMCC NO. 1016 of 2003 be extended. The application is expressed to be brought under provisions of Section 79G and 3A of the Civil Procedure Act. The application is predicated upon the grounds that the applicant only learnt of the said judgment when the time within which the appeal should have been filed had lapsed; that the intended appeal has high chances of success and that the failure to file the appeal was not deliberate.

The application is supported by an affidavit sworn by Isaac Simiyu Kuloba the applicant's advocate in which it is deponed, *inter alia*, that whereas the said judgment was delivered on 22/2/2007, their firm only learnt of the same on 24/4/2007 after being served with a bill of costs; that on learning of the judgment, they sought instructions from the applicant which instructed that an appeal be lodged; that by then, the time within which the appeal was to be filed had lapsed. In the premises it is contended that the delay in filing the appeal was not deliberate and the applicant ought not to be punished for the same. Annexed to the affidavit, are various exhibits including correspondence exchanged between counsel.

The application is opposed and there is a replying affidavit sworn by Douglas Ombati, Learned Counsel for the respondent **Musa Makai Mulochi**. He has deponed, *inter alia*, that the applicant and its advocates are not diligent and aim to deny the respondent the fruits of his judgment; that as early as 2 days after the delivery of the judgment, he notified the applicant's advocates of the terms of the judgment and subsequently served the respondent's bill of costs. In those premises, according to Mr. Ombati, the applicant has not demonstrated good faith and is guilty of negligence. Annexed to the replying affidavit, are a number of exhibits including pleadings lodged in the lower court correspondence exchanged and the said bill of costs.

The application was canvassed before me on 23/11/2010 by Mr. Nyairo Learned, Counsel for the applicant and Mr. Ombati, Learned Counsel for the respondent. Counsel recited their clients' averments in their respective affidavits and maintained the stand-points therein. I have considered those stand points. I have also considered the application, the affidavits filed and the annexures thereto. Finally I have given due consideration to the submissions of counsel. Having done so, I take the following view of this matter. It is common ground that the judgment intended to be appealed against was delivered on 22/2/2007. This application was then lodged on 11/5/2007 which was slightly less than 2½ months thereafter. The reason given for that delay by counsel is that, he learnt of the terms of the judgment on 24/4/2007 when a bill of costs was served. Counsel for the respondent is of a different view. In his view the applicant's advocates were informed of the terms of judgment through his letter dated 22/2/2007 and did nothing until the period within which to appeal lapsed.

The discretion of the court under Order XLIX Rule 5 of the Civil Procedure Rules and Section 79G of the Civil Procedure Act is wide. Under the letter the applicant must satisfy the court that he had good and sufficient cause for not filing the appeal in time and under the former the concern of the court is the justice of the case. In the matter it had receipt of the letter of the respondent's advocates dated 24/2/2007 informing the applicant's advocates of the terms of the judgment is denied. The respondent's advocates have not demonstrated how the letter was served. In the premises, I accept the statement of the applicant's advocate that he came to learn of the terms of the judgment on 24/4/2007 after being served with the respondent's bill of costs. The unexplained delay is therefore of only about two weeks which I do not find in ordinate.

The applicant has exhibited a draft memorandum of Appeal. The grounds of the intended appeal cannot be described to be frivolous. The respondent has also not demonstrated that he would suffer undue prejudice if the application is allowed given that the entire decretal amount has been deposited in an interest earning bank account in the names of the parties' advocates.

In the end I will allow the application and extend the time for filing and serving the appeal. The applicant should file and serve its appeal within seven (7) days from the date hereof. I award costs of this application to the respondent.

Order accordingly.

**DATED AND DELIVERED AT ELDORET THIS 25<sup>TH</sup> DAY OF JANUARY 2011**

**F. AZANGALALA**

**JUDGE**

*Read in the presence of:-  
Khayo Ms. for the applicant and*

Mr. Kiboi H/B for Mr. Ombati for the Respondent

**F. AZANGALALA**

**JUDGE**

**25/1/2011**