REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

MISCELLANOUS CIVIL SUIT NO. 30 OF 2010

MACKSON MWANGO
GEORGE KALAMA KAI .....APPLICANTS

VERSUS

THOMAS NGUMBAO MBIMI *(legal representative of the estate of*

JUMWA MURIMI KARISA (DECEASED).....RESPONDENT

R U L I N G

The Notice of Motion dated 16th October 2010 is made under section 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act and Order L Rule 1 Civil Procedure Rules, seeking for enlargement of time within which to file an appeal.

The application is premised on grounds that:

(a) The respondent obtained judgment against the applicants on 9-9-10.

(b) The applicants were dissatisfied with the said judgment and wish to appeal

(c)The judgment was delivered in the presence of the applicant's counsel and stay of execution was granted for a period of 45 (forty-five) days

(d) The 45 days expire on 24th October 2010.

(e) The time for lodging the appeal lapsed on 8th October 2010.

(f) The delay was caused by a breakdown in communication between the appellant's counsel and there

instructing client M/s Africa Merchant Assurance Co. Ltd.

(g) The delay is inordinate.

In the supporting affidavit sworn by the 1st applicant he depones that his dissatisfaction with the judgment was relayed to his insurer M/s Africa Merchant Assurance Co. well before time for lodging the appeal lapsed but due to a communication breakdown the instructions to appeal against the judgment reached his advocate three days after the deadline for lodging appeals had lapsed – the letter to his advocate is annexed as ex MMM1.

He pleads that he is an innocent litigant who should not be punished for the mistakes of his counsel as the delay was not caused by a mistake on his part as the litigant.
He further states that the appeal raises serious triable issues and if his application is not allowed, then he will suffer irreparably.

The application is opposed, and in a replying affidavit sworn by Thomas Ngumba Mbimi (the respondent, he depones that judgment was delivered in the presence of all parties and the applicant even sought and obtained orders of stay of execution.
As a consequence, he terms the present application as being bad in law, and incompetent, an afterthought and a delaying tactic intended to prevent him from reaffirming the fruits of the judgment.

It is the respondent's contention that applicant does not specify the nature of the communication breakdown or the purported mistake of counsel saying a lot of what is stated by applicant is unsubstantiated.

In any event respondent deems this application as being prejudicial to him.

At the hearing of the application, Mrs. Omondi appeared for the applicant while Mr. Wambua represented the respondent.

Mrs. Omondi submitted that the delay was not inordinate, as only 3 days had lapsed and the issue going on appeal was a merited one as it touched on the trial court's pecuniary jurisdiction and that there is an arguable appeal. She sought to be guided by the decision in the case of **Wasike v Swala (1984) KLR 591** -which held that delay, was not inordinate and the applicant had a merited appeal. she also referred to the case of **Dickson Ndegwa v City council of Nairobi CA No. 112 of 2009 at pg 4,** a decision by Hon. Justice Onyango Otieno (J.A) which noted that delay had been explained and the intended appeal was not frivolous.

Mr. Wambua in opposing the application submitted that when judgment was delivered, the applicant's counsel sought stay so as to organize payment of the decretal sum and there was no contemplation of an appeal – which is why the application is termed an afterthought. He also argues that section 95 which has been cited does not apply, because that relates to enlargement of time within which a party should comply with an order of the court and not for appeal, pointing out that time to appeal is governed by Statute and this court has no jurisdiction to enlarge time to appeal.

Mr. Wambua faults the wording of the application saying it ought to have been a prayer for leave to appeal out of time, and not an enlargement of time to appeal. He also wonders who is dissatisfied in this instance, whether it is the applicant or his insurer saying no good or sufficient cause has been shown why the prayer should be allowed. He terms the entire application as being fraught with buckpassing blaming the insurance company for some undisclosed communication breakdown which led to delay, and also blaming the advocate for undisclosed mistakes. Counsel submits that the claim about delay in communication is not genuine and that the appeal stands no chance of success as the question regarding excessive jurisdiction is not true and the decided cases cited have no relevance because Court of Appeal Rules are different from what is applicable in the High Court.

Mrs. Omondi urges this court not to find fault with the wording of the application, pointing out that the nature of what they seek is clear and is understood to mean an application for leave to file appeal out of time. She seeks refuge under Order L rule 12 saying citing the wrong provision should not be a reason to decline a prayer.

Without dwelling into too much legalese, what applicant seeks simply is for extension of time within which to file the appeal – time having lapsed by three days. Unlike the scenario in the **Dickson Ndegwa Case** where the applicant and his counsel were not only aware of the judgment, but were in fact present when the judgment was delivered, it is apparent that applicant and his counsel were waiting or some signal from the insurer whether to pursue the appeal or not and by the time the insurer gave the nod, time had elapsed. There is a purported breakdown in communication – it is not clear to me what this means – what has so far been demonstrated is that the insurer did not act expeditiously in communicating its decision to the applicant, and all those lyrics about being a busy person serving many clients in African really says nothing.

As per the purported mistake of counsel, quite honestly I don't know what the mistake was – applicant does not specify it and I am unable to sieve it out from the application, affidavit or even submissions by counsel.

Really what was the reason for the delay?

Both **Ndegwa's case** and **Wasike's case**, had definite explanation as to what events had caused delays – in the present instance, sweeping statements are being made without being specific.

Has the applicant been diligent in moving the court? The lapse of time cannot be said to action without to inordinate delay and although it appears that applicant has acted with haste in filing this application I think this was only upon realization that the stay period was about to expire and there was a risk of execution. In fact it would appear that once the stay orders were obtained, applicant was happy to sit back and do nothing, then upon realizing that in another 8 days the stay orders would lapse and there would be no other "protection", this present application was made. My perception is that the applicant simply intends to delay matters as much as possible to the prejudice of the respondent who had obtained a favourable judgment. I am of the opinion that applicant is not deserving of the orders sought and I decline to grant them. The application is thus dismissed.
Costs of this application shall be borne by the applicant.

Delivered and dated this **21st** day of **February 2011** at Malindi.

H. A. Omondi
JUDGE

Mr. Nyabena holding brief for Omondi for appellant
Mr. Kilonzo for respondent