**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CIVIL APPEAL NO. 54 OF 2006**

***(Appeal arising from BGM CM CC No.285 of 2003)***

**JAPHETH MUTASI KHISA**
**STANLEY WANYONYI MASINDE.....APPELLANTS**

**~VRS~**

**AKAMBA PUBLIC ROAD SERVICES.....RESPONDENT**

**RULING**

In his application dated 27/11/2006, the intended Appellants Japheth Mutasi Khisa and Stanley Wanyonyi Masinde seeks for orders that this appeal be admitted out of time. The application is brought under section 79 of the Civil Procedure Act. The grounds are contained on the face of the application and in the supporting affidavit of Japhet Mutasi Khisa.

The Applicants argue that the application has been brought without delay and that the intended appeal has high chances of success. It is contended that the Defendant in the lower court case number CM CC No.285 of 2003 should not be allowed to derogate from the consent recorded by the parties.

The facts leading to the filing of this intended appeal are that a consent was recorded on liability in CM CC No.285 of 2003 by the advocates for the parties for judgment in favour of the Plaintiffs against the Defendant. At that time Letangule & Co. were on record for the first Defendant. Messrs Menezes & Co. later came on record, replacing Letangule & Co. The first Defendant later applied to set aside the consent judgment on grounds that it did not give any instructions on the judgment. The insurance company (Jubilee) denied giving any instructions to its advocate or to any other person to record consent judgment. Evidence was tendered through affidavits that one Mr. Waswa of Wabwile & Co. Advocates now representing the intended Appellants herein had tricked the counsel Mr. Barasa who appeared in court on that day by handing over to him a note allegedly authored by the advocates of the first Defendant. The firm of Letangule & Co. disowned the said note which had led Mr. Barasa to believe that the first Defendant's counsel had given instructions on behalf of his client that consent judgment be entered. The firm of Wabwile & Co. Advocates came on record for the Plaintiffs when another advocate Odhiambo & Co. was still on record. Wabwile & Co were not properly on record for the Plaintiffs when the consent judgment was entered. It was that of advocates which listed the matter for mention on 10/02/2006. As a result of the consent judgment recorded a decree was obtained and the first Defendant's property proclaimed. The magistrate heard the first Defendant's application dated 25/04/2006 and set aside the judgment. The court then condemned Mr. Waswa to personally pay the costs of the application and those of the auctioneers if any in respect of the property proclaimed. It is against this ruling that the intended appeal is challenging.

The Respondent in its grounds of opposition contends that the applicant is guilty of laches and that the application lacks merit. Further that the Applicants failed to apply for leave to appeal against the ruling since such an appeal does not lie as a matter of right. Parties recorded a consent on the 08/03/2011 that this application be heard by way of written submissions. The Defendant in his submissions filed by L.G.M. Menezes & Co. argued that the intended appeal has no chances of success and that it was filed long after the ruling of the court which was delivered. The Applicants explain the delay in its submissions that the court's ruling was delivered without notice to them after being postponed on the scheduled date. It took time for the Applicants to know that the ruling had been delivered.

The record is clear that the magistrate's ruling was delivered on 7th July 2006. This application was filed on 19th January 2007 which was about six (6) months later. The court had scheduled the ruling for 30th June 2006 but it was postponed due to the absence of the parties. The 1st Applicant in his affidavit depones that he was in court on 30/06/2006 and inquired about the ruling from the court clerk. It is not convincing for the applicants to claim that they did not know of the next ruling date. When they inquired from the clerk, the new date must have been communicated to them. The application pending the ruling was seeking to set aside judgment in the Applicant's favour. The ruling was of utmost importance to them. It would be expected that the Applicant would use due diligence to ensure they attended court during the next ruling date. I am not convinced that the Applicants took six (6) months before they knew that the ruling had been delivered. The time the Applicants came to know of the ruling has not been disclosed. The delay in filing this application has not been explained to the satisfaction of the court. I find the delay inordinate in part of the Applicants.

The Applicant argues that their appeal has high chances of success. The Applicant never opposed the application which led to the said ruling. It would have been prudent for the Applicant's counsel to seek for time to file a replying affidavit to the application. Instead he flatly refused to participate in the application protesting the fact that his preliminary objection was not heard. The court in its ruling relied on the evidence of the advocates who explained that the consent judgment was explained fraudulently. As a matter of fact the counsel was not properly on record when the judgment was obtained. The only thing the magistrate would have done was to set aside the consent judgment which the parties had not authorized. I am not convinced that the intended appeal stands any chances of success.

The Applicants complain that they are being punished for accepting the consent order. This is not true since the court clearly explained that it found that the consent judgment was obtained fraudulently. The order of the court is still in force. The court condemned the counsel who was the author of the said consent to personally pay the costs of the application to set aside the judgment. The issue of punishing the Applicants or any other person does not arise.

It is the Respondent's submission that the applicants did not apply for leave to appeal against the ruling delivered on 7th July 2006 as required by the law. The counsel for the applicant in his submissions argues that the leave is no longer necessary with the new Civil Procedure Rules. The new rules came into force on

17th December 2010. The ruling of the court was delivered in 2006 before the new rules came into force. Section 75 of the Civil Procedure Act and Order XLII provide for orders against which an appeal lies as a matter of right. Any other orders not included in those provisions require that the leave of the court be obtained. The orders made in the ruling of the magistrate delivered on the 7th July 2006 requires leave to appeal be obtained from the court. The Applicants failed to comply with this legal requirement. Any appeal made without compliance of the law is unlikely to succeed. With all these shortcomings, the intended appeal has no chances of success.

It is the Applicant's argument that the magistrate proceeded to hear the application of the Respondent seeking to set aside consent judgment and ignored the objection raised by the Applicant's counsel that the application was incompetent. The Applicant had filed a notice of preliminary objection dated 2nd May 2006 citing non-compliance with Order 3 Rule 9A of the Civil Procedure Rules. Rule 9A requires an order of the court in the event of change of advocate or intention of the party to act in

person in a suit where judgment has been entered. Although the objection was not argued, it appeared that the Applicant was challenging the 1st Defendant's advocate Menezes & Co notice of change of advocates. The firm came on record replacing Letangule & Co Advocates. It follows that Menezes & Co came on record after the consent judgment was entered. The magistrate ruled that the application dated 25/04/2006 and to which the Applicant had not filed any grounds of opposition or a replying affidavit should proceed because it was the one fixed for hearing on that day. I note that the issue of service of the notice of objection came up. The Respondent's counsel had not been served with the notice of preliminary objection by Wabwile & Co. The counsel could not produce any evidence of service. In absence of any evidence of service of the notice of preliminary objection, the magistrate was entitled to proceed with the application fixed for hearing on that day.

This court has unfettered jurisdiction to allow extension of time to appeal. The discretion must be exercised reasonably having regard to all circumstances of each case. I rely on the case of ***RATMAN -VRS- CUMARASY [1964] 3 ALL ER 993*** where it was observed.

***"The rules of this court must "prima facie" be obeyed, and in order to justify a court in extending time during which 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 liable for the conduct of litigation."***

In the application before me, I find that the Applicants failed to comply with the rules, they are also guilty of laches and that the consent judgment they seek to reinstate was denied by the Defendants. It has also been observed that for these reasons, the appeal has no chances of success. This application was filed on 01/12/2006 and has not been prosecuted for over four years. To allow extension of time will serve no useful purpose given the facts of this matter as explained in this ruling. The Applicants in my opinion do not deserve the exercise of this court's discretion.

The application has no merit and I dismiss it with costs.

**F. N. MUCHEMI**

**JUDGE**

Ruling dated and delivered this 11th day of May 2011 in the presence of Mr. Juma for Menezes for the Respondent.

**F. N. MUCHEMI**
**JUDGE**