



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**(Coram: Ojwang, J.)**

**MISC. CIVIL APPLICATION NO. 326 OF 2010**

**SHABIR JANOO ..... APPLICANT**

**VERSUS**

**MARGARET AGNETA OBOTE.....RESPONDENT**

**RULING**

The applicant, through the firm of M/s. Kenga & Co. Advocates filed his Notice of Motion of 23<sup>rd</sup> August, 2010 on 24<sup>th</sup> August, 2010, making one substantive prayer:

***“THAT this Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time in respect of the judgment and/or decree made on 12<sup>th</sup> January, 2010 and 20<sup>th</sup> July, 2010 respectively in CMCC No. 4688/2001 (Msa), Margaret Agneta Obote v. Shabir Janoo & 3 Others.”***

The application is founded on grounds set out as follows:

- (i) the respondent filed suit against the applicant and three others in 2001, in CMCC No. 4688 of 2001 – seeking special and general damages under the Law Reform Act and the Fatal Accidents Act;***
- (ii) the suit was heard, and judgment delivered on 12<sup>th</sup> January, 2010: it being held that the applicant and one Mumtaz Used Cars (2<sup>nd</sup> defendant therein) were jointly and severally liable for the payment of Kshs. 353,088/= as special and general damages with costs and interests in CMCC No. 3688 of 2001 (Msa);***
- (iii) when the Judgment of the lower Court was pronounced on 12<sup>th</sup> January, 2010 the applicant was not present in Court, and his advocates did not inform him of the outcome of the lower Court case in CMCC No. 4688 of 2001 until July, 2010; and he only learned that Judgment had been pronounced and warrants of attachment issued, following the decree issued on 20<sup>th</sup> July, 2010;***
- (iv) the applicant is aggrieved by the lower Court decision in CMCC No. 4688 of 2001 and intends to appeal against the same;***
- (v) the delay in preferring an appeal against the said judgment and/or decree is not deliberate – but results from the omission or mistake of his -then Advocates;***
- (vi) the intended appeal has very high chances of success.***
- (vii) If time to file an appeal is not enlarged, the applicant would suffer irreparable loss and damage, as the respondent may execute the decree made on 20<sup>th</sup> July, 2010;***
- (viii) the applicant is ready and/or willing to abide by any reasonable conditions or terms which the Court may impose, in granting the prayer;***

**(ix) the respondent will suffer no prejudice if the orders sought are granted.**

**Shabir Janoo**, the applicant, swore an affidavit on **23<sup>rd</sup> August, 2010**, in support of the application herein. In response, the respondent, through M/s. Obara & Obara, Advocates filed grounds of opposition on **3<sup>rd</sup> September, 2010** contending as follows:

- (a) the application is “bad in law, vexatious and an abuse of the process of the Court”;
- (b) the Judgment of **12<sup>th</sup> January, 2010** was “regular and properly issued”;
- (c) the delay in preferring an appeal was a deliberate scheme to delay execution;
- (d) no proper reason had been given to warrant the orders sought;
- (e) “the grounds and issues raised in the ....application for appealing out of time are premature and predicated on the wrong premise”.

On the occasion of hearing this matter, on **20<sup>th</sup> September, 2010** learned counsel **Mr. Kenga** represented the applicant, while learned counsel, **Mr. Obara** represented the respondent.

**Mr. Kenga** submitted that the judgment complained about had been given on **12<sup>th</sup> January, 2010** and the decree was extracted on **20<sup>th</sup> July, 2010**: but that the judgment had not yet been served upon his client. Counsel stated that he had not been informed of the Judgment date; and only later did he realize that judgment had been delivered, and a decree extracted. Counsel submitted that the respondent would not be prejudiced by an enlargement of time, to enable his client to lodge an appeal.

Learned counsel, **Mr. Obara** contested the application, on the basis that an appeal would stand contrary to a regular judgment; for the applicant had been represented by an Advocate during the trial before the lower Court. Counsel urged that it was eight months since judgment had been delivered, and the applicant, for being guilty of **laches**, should not be accorded an opportunity to lodge an appeal out of time. But counsel urged that if the application is allowed, then the applicant should be required to deposit the decretal sum in Court.

Although changes to counsel-representation have taken place in relation to the matter before the Court, it remains an uncontroverted fact that as much as eight months passed, between the date of Judgment, and the date of the instant application for enlargement of time for lodging an appeal. That is a substantial period which lacks excuse, in the light of the evidence on record.

In principle, however, a party aggrieved by a particular judgment, and being desirous of appealing, should not be clogged by technicalities.

On those principles, I will make orders as follows:

- (1) The time for lodging an appeal is hereby enlarged; the applicant shall file and serve his appeal within 21 days of the date hereof, on the condition contained in the second order herein.**
- (2) Within 21 days of the date hereof, the applicant shall deposit in Court the entire decretal sum arising from the Judgment of the lower Court.**
- (3) If the applicant shall fail to comply with Order No. 2 herein, then the leave granted in Order No. 1 shall automatically lapse, and any appeal filed shall become a nullity; and if an appeal shall not have been filed by the due date, then it shall not be filed at all.**
- (4) The applicant shall bear the costs of this application.**

Orders accordingly.

**DATED and DELIVERED at MOMBASA this 17<sup>th</sup> day of June, 2011.**

.....  
**J. B. OJWANG**  
**JUDGE**

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Applicant: *Mr. Kenga*

For the Respondent: *Mr. Obara*