



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 101 OF 2011

MODERN COAST COURIERS LIMITED APPELLANT

VERSUS

GEOFREY CHEBII KIPCHUMBA RESPONDENT

(Being an appeal from the Judgment/decision in Eldoret Chief Magistrate's Court Civil Case No. 427 of 2010

delivered on 18th March 2011 by Hon. J. A. Owiti (Resident Magistrate)

RULING

By a Notice of Motion dated 8th July 2011, the applicant seeks a substantial order that time be enlarged for lodging an appeal arising from Judgment delivered on 18th March 2011 in Eldoret CMCC No. 427 of 2010 and that pursuant to such enlargement, the appeal lodged out of time be admitted and be deemed as duly filed and served.

There are nine grounds for the application. These are reflected in the body of the Notice of Motion and supported by the facts contained in the supporting affidavit deponed by the applicant's Eldoret Branch Manager, **JULIUS KYALO NZIU**.

The respondent opposes the application on the basis of the facts contained in a replying affidavit dated 19th July 2011 deponed by himself.

The facts in support of the application and those in opposition thereto were argued and highlighted respectively by Counsel representing the applicant, **MR. NABASENGE** and Counsel representing the respondent, **MR. LIMO**. Upon due consideration of the submissions made by both sides and regard being given to the principles applicable for the exercise of discretion in such application, it is apparent to this Court that the applicant failed to adhere to the requirement that an appeal should be lodged within thirty

(30) days from the date of the delivery of a Judgment.

Herein, the disputed Judgment was delivered on the 18th March 2011 but the appeal was lodged out of time and without leave of the Court on the 25th May 2011 (See, the Memorandum of Appeal dated and filed on 25th May 2011).

Ground one of the application erroneously indicates that the appeal was lodged on 21st June 2011.

Be that as it may, there was a delay of about two (2) months in having the appeal lodged. In the circumstances, the applicant ought not have belatedly lodged the appeal without prerequisite leave from the Court.

However, acknowledging the lapse aforementioned, the applicant filed the present application in order to have the appeal validated and be deemed to have been properly filed and served. An enlargement of time within which to file the appeal would achieve the purpose.

But such enlargement must be based on good and sufficient grounds explaining the reasons for the delay and the level of prejudice which might otherwise be occasioned on the respondent. With regard to the reasons for the delay, the applicant attributes the same to the absence of its Managing Director who was abroad at the time the disputed Judgment was delivered. The applicant contends that due to a breakdown in communication the instructions to appeal were communicated belatedly by the Managing Director thereby causing the appeal to be filed out of time.

This reason appears to be the only and main reason why the intended appeal was lodged out of time. In this Court's opinion, the reason is rather flimsy and unconvincing. This is because the applicant is a limited liability Company comprising of other Directors and Chief Officers capable of issuing necessary instructions in the absence of the Managing Director. The absence of the Managing Director would not put the operations of the Company into a stand still. It seems to this Court that there was no seriousness in pursuing the matter after the delivery of the Judgment in the lower Court and the belated instructions to the applicant's Counsel to lodge an appeal came as an afterthought.

In a nutshell, the applicant has not given good and satisfactory reason for the delay in filing the appeal within time. The applicant had all the opportunity to file the appeal within time or move the Court for leave to file appeal out of time. It failed without good cause to utilize either opportunity. It cannot now be heard to request for more opportunity. It cannot also be heard to request for the validation of an appeal lodged out of time without leave of the Court. Validation would invariably be prejudicial to the respondent in terms of costs and deprivation of the fruits of his Judgment.

For all the foregoing reasons, this Court is disinclined to exercise discretion in favour of the applicant.

In the end result, the application is dismissed with costs.

J. R. KARANJA
JUDGE

[Read and signed this 21st day of September 2011]

[In the presence of Mr. Nabasenge and Mr. Mutai for applicant and respondent respectively]

