



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

MISC. CIVIL APPLICATION NO. 385 OF 2010

**SHIN-ACE GARMENTS (EPZ) KENYA
LTD.....APPELLANT/APPLICANT**

-VERSUS-

ABUBAKAR MOHAMED.....RESPONDENT

RULING

The appellant moved the Court by Notice of Motion dated and filed on **12th October, 2010**, brought under ss.79G and 1A of the Civil Procedure Act (Cap.21, Laws of Kenya) and Order XLIX, Rule 5 of the earlier edition of the Civil Procedure Rules.

The application had one substantive prayer: ***“that time be extended for filing an appeal by the applicant against the decision of the learned Magistrate made on 10th August, 2010, and the draft memorandum of appeal be deemed as duly filed, upon payment of the requisite fees.”***

The grounds stated in support of the application are as follows:

(i) the applicant has instructed the firm of M/s. Mutisya Bosire & Co. Advocates in place of M/s. Kinyua Karigithu & Co. Advocates to enable them to file an appeal against the judgment;

(ii) the appellant is dissatisfied with the said judgment, and seeks to appeal;

(iii) the application has been made within reasonable time;

(iv) the appeal is not frivolous or an afterthought, and is not a waste of the Court’s time;

(v) *it will be fair and just that the application be allowed, for justice to prevail.*

Evidence to support the application is contained in the affidavit of **Cherry Chen**, sworn on **12th October, 2010**.

In the submissions, counsel for the applicant urged that important issues arise which should be resolved within the framework of the application, namely:

(i) *whether the application is merited, in the circumstances;*

(ii) *whether the applicant has delayed in seeking extension of time to file an appeal;*

(iii) *whether the mistake of counsel should be visited upon the applicant.*

Counsel submitted that the applicant, following the delivery of the Judgment on **18th August, 2010**, instructed his previous Advocates to file an appeal in the High Court, but this did not happen, following which new Advocates were appointed; the new Advocates applied for certified copies of judgment and decree which, however, have not been supplied. On account of such delay on the part of the Court itself, counsel submitted that there was an excusable belatedness on the part of his client, which should be accommodated within the terms of s.79G of the Civil Procedure Act. Counsel also urged that there had been delay on the part of his client's former Advocates, and that, in principle, the penal consequences of such delay should not be visited upon the client.

Counsel submitted that his client had acted with prudence and promptness, after noting that her first Advocate had not taken action; but that the progress of the new Advocate's action depended on leave being granted, to file the appeal: "***The applicant submits that she has sought equity timeously and prays to be given her day in Court.***"

Learned counsel submitted that the draft memorandum of appeal raises "***very good grounds...which have the highest chances of success.***" He states that his client is ready and willing to abide by any condition such as the Court may prescribe, as a basis for grant of leave.

Several case authorities are cited, in support of the application: ***Chesumot Ltd. V. Richard Kipkurui Maritim***, Kericho H.C. Misc. Civ. Appl. No. 26 of 2004, [2006] eKLR (***Kimaru, J***); ***Stephen Ndichu v. Monty's Wines and Spirits Ltd.***, Nairobi MCC Civ. Case No. 149 of 2002 [2006] eKLR (***Azangalala, J.***) ***George Chege Kamau v. Esther Wanjira Kamau***, Civil Appl. No. 6 of 2006 (***O'Kubasu, J.A.***).

The respondent swore a replying affidavit dated **17th February, 2011** contesting the instant application, and beginning from the following baseline of facts: he sued the applicant in RMCC No. 4090 of 2006, winning judgment on **10th August, 2010**; the trial Court did grant stay of execution for 45 days; on **12th October, 2010** the applicant filed an application for stay of execution – and the same was granted by the Court of first instance, even though there was no appeal on record as at that date.

The deponent avers that the applicant's application for stay before the trial Court had been in bad faith, as there was no appeal already lodged.

Counsel for the respondent, in his submissions, urges that even though this Court has unfettered discretion to extend time to file an appeal out of time, the applicant does not merit the exercise of such discretion because of: delay in making the instant application; inadequate explanation for the delay; arguability of the intended appeal is in question; the prejudice is likely to be occasioned to the respondent. Counsel, in support of his contention, invokes **Article 159 of the Constitution**, urging that justice shall be done to all; justice shall not be delayed; the scope for alternative modes of dispute settlement may be

considered; justice shall be done without undue regard to technicalities; the principles and purposes of the Constitution shall be protected.

Counsel also invoked case-authority as a basis for contesting the merits of the intended appeal: ***African Airlines International Ltd. v. Eastern & Southern African Trade & Development Bank (PTA Bank)*** [2003] KLR 140 in which the Court of Appeal thus stated (at p.141):

“In some cases it may be material to have regard to the merits of the appeal because it may be wrong, and indeed an unkindness to the appellant himself, to extend his time for appealing to enable him to pursue a hopeless appeal.”

Counsel also relied on the Court of Appeal decision in ***Kiragu v. Kiragu*** [1990] KLR 323 in which it was held that:

“...[F]ailure by an applicant to explain away the delay in prosecuting his appeal may lead to the extension [of time] being refused.”

I have taken into account the facts of this case, and considered the merits of the argument raised by counsel on each side. I find to be of relevance the following basic facts:

- (i) the Judgment of the Court of first instance was delivered on 10th August, 2010;***
- (ii) on that very occasion of delivery, the ground was set for an appeal, as stay of execution of decree was granted on the spot;***
- (iii) subsequently, a request was granted for further extension of time for lodgment of an appeal;***
- (iv) the applicant has had a change of Advocates, and this has occasioned some delay in lodging the appeal;***
- (v) the Court itself did occasion some delay, through delayed production of certified copies of Judgment and decree;***
- (vi) the instant application for extension of time was filed on 12th October, 2010 and it has a draft memorandum of appeal as an annexure.***

I take note of the delays occasioned both by the Court, and by the need to make a change of counsel: for these two causes of delay, I consider it not right, in the circumstances of this case, to attribute blame to the applicant herein.

It is exactly 62 days from the date of Judgment to the date of filing the application; and part of this is accounted for by the first 45 days of extension of time which the trial Court had granted.

Prima facie, is the appeal a meritorious one? This Court ought not to probe in specific detail ***the weight of the intended appeal case***; for the relevant jurisdiction for that role is realized only during the hearing of the appeal itself.

In the draft memorandum of appeal, it is contended that the trial Court had assessed the evidence erroneously, and misapplied the law; that the Court, *suo motu*, introduced new facts into case; that there was a non-compliance with the requirements of the Evidence Act (Cap. 80, Laws of Kenya); that the trial Court erroneously excluded evidence adduced by the defendant.

The merits of those contentions may not be obvious at this stage; but their cast clearly signals litigious questions which properly belong to a Court of law, the relevant forum being the *appellate Court*.

Therefore, the applicant has made a meritorious case for being accorded an opportunity to canvas an appeal, before the High Court.

Taking into account the facts forming the context of this application, I will exercise the Court's discretion to grant leave, for the belated filing of an appeal, on the basis of the draft memorandum of appeal.

I will make orders as follows:

- (1) I hereby extend time for the filing of an appeal, as prayed by the applicant.**
- (2) The annexed memorandum of appeal is hereby adopted as the basis of the appeal, subject to payment, within seven days of the date hereof, of the requisite registry fees.**
- (3) The Court shall give further directions regarding the hearing of the appeal.**
- (4) The costs of this application shall be in the cause.**

SIGNED:

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 13th day of September, 2011.

**H. M. OKWENGU
JUDGE**