



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**MISC. APPLICATION NO. 415 OF 2011**

**GEORGE MORARA MASITA .....**

**APPLICANT**

**VERSUS**

**TEXPLAST INDUSTRIES LTD ..... RESPONDENT**

***(Being an appeal from the Judgment and decree of the Hon. C A Otieno Esq,  
Resident Magistrate delivered on 10<sup>th</sup> December 2010 at Kikuyu)***

**RULING**

***Leave to File Appeal out of Time***  
***Application 27<sup>th</sup> September 2011***

**I. BACKGROUND**

1. The applicant had filed a suit against his employer on 12<sup>th</sup> March 2010. He had sued for breach of statutory duty due to the unsafe working environment. The employee alleges to have sustained work related ailment.

2. His employer failed to enter appearance and file defence. Interlocutory judgment against them was entered on 26<sup>th</sup> April 2010. The matter then proceeded for formal proof as required by law. The Hon. Trial Magistrate upon hearing evidence reserved judgment for

12<sup>th</sup> November 2010, which was actually delivered on the

10<sup>th</sup> December 2010.

3. The applicant applied for typed copies of the judgment and proceedings whilst awaiting for these proceedings, the time to appeal from the subordinate court to the High Court lapsed.

4. The applicant being aggrieved with the subordinate court judgment then applied for leave to file appeal out of time.

## **II APPLICATION 27<sup>TH</sup> SEPTEMBER 2011**

### **FOR LEAVE TO FILE APPEAL OUT OF TIME**

5. The applicant served the application upon a gatekeeper who is alleged to have had instructions from the manager to receive the same. The proper procedure is to serve documents upon a director of a company, not a manager or gate keeper. The affidavit of the process server describes how he was not permitted to enter the premises. The documents were received but not signed for.

6. Whereas service was said to have been made on 4<sup>th</sup> October 2011, the respondent appears to have filed a replying affidavit to the applicant on 18<sup>th</sup> October 2011. This was on the day the matter was coming up for hearing.

7. The said affidavit was most certainly filed out of time. Three clear days were required to have been given upon the filing of the affidavit. The normal procedure would be, where respondent delays in filing their reply is to file a notice of motion seeking leave to file the replying affidavit out of time. The application should be supported by an affidavit disclosing reasons why the affidavit was so delayed and filed out of time. The proposed replying affidavit would be an annexure. The application, notice of motion would seek leave to have the replying affidavit be deemed as duly filed.

8. Once the court considers the reasons of the late service, by its discretion, the court may permit the admission of the replying affidavit.

9. In this case, service was done 14 clear days from the date of hearing.

10. I also noted that there being an interlocutory judgment entered in the subordinate courts, then the respondent was never represented at all. The replying affidavit was filed by an advocate. I do not see a notice of appointment on this file and therefore one may only conclude that the replying affidavit was filed without locus.

11. If per chance, there was locus to file the affidavit, the same was filed without leave of the court.

12. Turning to the application before court, the trial magistrate delivered her judgment on 10<sup>th</sup> December 2010. The law provides under Section 79 (g) of the Civil Procedure Act, 30 days right of appeal. This would have expired in February 2011 due to the public holidays.

13. The subordinate court provided a certificate of delay between

15<sup>th</sup> February to 28<sup>th</sup> July 2011, the period taken to type the proceedings.

14. This court was informed that the proceedings were actually sought for on 10<sup>th</sup> December 2010. There appears to be a discrepancy with the certificate of delay stating the time to be the 15<sup>th</sup> February 2011.

15. I would give the applicant the benefit of a doubt.

16. The application 27<sup>th</sup> September 2011 be and is hereby granted. Leave to file an appeal out of time is granted. The appellant is to file and serve their appeal within 14 days of this ruling.

17. There will be costs in the intended appeal.

**DATED THIS 19<sup>TH</sup> DAY OF OCTOBER 2011 AT NAIROBI**

**M.A. ANG'AWA**

## **JUDGE**

*Advocates :*

iii) *N.A Owino instructed by M/s N.Owino & Co advocates for the appellant*

iv) *L G Thuraira instructed by Albert Kamunde & Co Advocates for the Respondent/original applicant*