



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 223 OF 2010**

JOHNSON MUSENGI.....APPELLANT

VERSUS

JOSEPH MWANGI NDIRANGU.....DEFENDANT

**R U L I N G**

1. Section 95 of the Civil Procedure Act provides for enlargement of time as follows:

***“95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”***

That provision gives unfettered discretion to the court to enlarge time. Order 50 Rule 5 of the Civil Procedure Rules 2010 which also deals with the power to enlarge time also gives unfettered power to the court ***“to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.....”***

2. Johnson Musengi the appellant intends to appeal against a ruling delivered on 8<sup>th</sup> April, 2010. His appeal ought to have been filed within 30 days. A memorandum of appeal was however not filed until 14<sup>th</sup> October, 2010. The explanation that has been given for this delay as contained in the supporting affidavit is firstly the delay in obtaining the certified copies of the proceedings, ruling and order extracted and secondly, the delay arising from communication between the appellant’s counsel who are based in Nairobi and the advocates in Mombasa whom they entrusted to pursue the matter on their behalf.

3. There is no doubt that the delay is substantial. However, an explanation has been given. The explanation is not unreasonable. The explanation also shows that the delay is not attributable to the appellant, but has been caused by counsel. In my view the appellant appears to have given appropriate instructions but was let down by his counsel. I do not think it would be fair or just to shut out the appellant because of the mistake of counsel.

4. The appellant has filed a memorandum of appeal which on the face of it appears arguable. I think it is only proper that the appellant be given a chance to be heard on merit. I do therefore allow the application and issue orders in terms of prayer 2 and 3 of the notice of motion dated 22<sup>nd</sup> March, 2011. The appellant

shall pay costs of the application to the respondent.

Orders accordingly.

**Dated, signed and delivered this 21<sup>st</sup> day of November, 2011.**

**H. M. OKWENGU**

**JUDGE**

In the presence of:

Koech H/B for Ramta for the Appellant

Kinyanjui for the Respondent

Kiponda Court Clerk