



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 210 OF 2010
MILLY CLASSWORKS LIMITED
.....APPELLANT
VERSUS
MASIEMO GEORGE ONYARI
.....RESPONDENT

R U L I N G

This is an application for leave to file an appeal out of time. Judgment was delivered on 25.08.2010 by the Principal Magistrate in favour of the Respondent. The Court awarded general damages of Kshs.624,000/- and Special Damages of Shs.1,500/- and costs. Contribution had been agreed at 30%.

The Applicant in an affidavit sworn by its Human Resources/Claims Manager on 5th October 2010 depones that it was not aware of the delivery of the judgment. That it learnt of the said fact on 8.09.2010 when the Respondent's advocates notified the Applicant's advocates of the delivery of the judgment. That once it knew of the judgment, it communicated the matter with its insurers when it instructed them to file the appeal upon consideration.

That the applicant applied for stay of execution before the trial court which was granted on 29.09.2010. The question of stay will ultimately depend on whether there is an appeal or not.

The Respondent filed a replying affidavit in which he says that the application lacks merits as the Applicant knew the date of delivery of judgment was 25th August 2010 and intentionally choose not to attend court.

I have carefully considered that application and the affidavits. In such an application in order for the court to exercise its discretion under order 49, Rule 5, all circumstances ought to be taken into account. The Applicant has a right of appeal against the judgment. The time to file an appeal is 30 days from the date of judgment. The delay herein was for a period of less than 10 days i.e. the appellant filed the application about 10 days after expiry of the period.

The Applicant however does not give the reasons why its own advocates were not in court to take the delivery of the judgment. It leaves the court to imagine what happened, this is not proper. There must be full disclosure and candour. Why is there silence? Is the Applicant blaming its advocates or the court? The record shows that the same advocates were on record.

Why should this court try to fill gaps or imagine what happened? The court frowns on this non-disclosure. Be that as it may, I still would exercise the court's discretion because of the short delay which has not caused much prejudice, if any.

I allow the application. The appeal shall be filed within 14 days. The Applicant shall pay the costs of the application to the Respondent.

Dated and delivered at Mombasa this 24th day of November 2010.

**M. K. IBRAHIM
J U D G E**

Coram:

Mr. Ibrahim, J
Mr. Wachira h/b for Mr. Omondi for the Applicant
No Appearance for the Respondent.
Ruling delivered in their presence.

Ibrahim, J