



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Appeal 221 of 2007

DAKIANGA DISTRIBUTORS CO. LTD APPELLANT

VERSUS

REBECCA MORAA ISOE (suing as legal representative

of the estate of STEPHEN ISOE). RESPONDENT

RULING

There are two applications that were argued on 8th April, 2008. The appellant's application was brought by way of a notice of motion under **Orders L rule 1** and **XLIX rule 5** of the **Civil Procedure Rules** and **Sections 3A, 63(c)** and **79G** of the **Civil Procedure Act**. The appellant sought enlargement of time to lodge an appeal, having filed the same two days out of time.

On the other hand, the respondent had filed an application by way of chamber summons brought under **Order VI rule 13(d)**, **order XLIX rule 3** of the **Civil Procedure Rules** and **Sections 3A** and **79G** of the **Civil Procedure Act** seeking dismissal of the appeal for having been filed outside the statutory period without leave of the court. The respondent was the first to file her application on 29th February, 2008. In her affidavit in support of the application, the respondent deposed that the judgment that was allegedly appealed against was delivered on 25th October, 2007 and since the last day for filing an appeal was 24th November 2007, which fell on a Saturday, the appeal ought to have been filed on 26th November, 2007. Instead, the appeal was filed on 28th November, 2007. The document that was filed by the appellant was headed - "**Amended Memorandum of Appeal**", whereas no memorandum of appeal had been filed in the first place and consequently, there was nothing to amend, the respondent deposed. She urged the court to strike out the purported appeal as it had been filed out of time without leave of the court.

The appellant's advocate, Mr. Ombwayo Andrew, deposed that on 20th November, 2007 he drafted a memorandum of appeal at Nairobi and dispatched it to Mr. Henry Kaburi Advocate who handles their matters in Kisii region for purposes of filing and serving upon the respondent's advocates. On 23rd November, 2007, Mr. Kaburi Advocate, having

received the memorandum of appeal, informed Mr. Ombwayo that the date of the Judgment to be appealed against was 8th February, 2007 and not 25th October, 2007. Mr. Ombwayo, thinking that Mr. Kaburi had already filed the memorandum of appeal, drafted another one with the heading, "**Amended Memorandum of Appeal**" and on 24th November, 2007 sent it for filing. Mr. Kaburi forgot to pick up the document on Monday the 26th of November 2007. He picked it up on the 27th of November 2007 and filed it on the following day.

Mr. Ombwayo urged the court not to penalize the appellant for a mistake that was not of its own making. He admitted that the delay in filing the memorandum of appeal was due to miscommunication between the advocates as explained above.

It is not in dispute the appeal herein was filed out of time by a period of two days. The delay in filing the appeal was a mistake and/or negligence on the part of the appellant's advocates in Nairobi and their counterpart at Kisii. That notwithstanding, this court has unfettered discretion to enlarge time for filing an appeal. The discretion must be exercised judiciously and not capriciously so that the ends of justice can be met. A court will not normally refuse to exercise its discretion simply because an advocate for a party has made a mistake or acted negligently in a given instance. In **BELINDA MUSA & NINE OTHERS VS AMOS WAINAINA** Civil Application No.NAI 9 of 1978, Madan J. A. stated:

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by Senior Counsel though in case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates."

In exercising its discretion in an application for extension of time, the court has to consider the reason given for the delay, the period of delay, that is, whether the delay is inordinate or not, the merits of the intended appeal, the prejudice that the parties are likely to suffer if the application is allowed or rejected and any other relevant factor.

I have already commented on the reason for the delay and the period of the delay. I have looked at the amended memorandum of appeal and all I can say is that it is not frivolous. If the application is not allowed, the appellant will for good be shut out of the appellate court in this matter.

On the other hand, the respondent will not suffer any injustice, save for some delay in finalisation of the matter. Taking all the relevant factors into consideration, I am inclined to grant the appellant's application.

Having reached the above decision, the respondent's application cannot be allowed, much as I agree that there was no memorandum of appeal that had been filed before the purported "**amended memorandum**" of appeal was filed. That misdescription of the document cannot disentitle the appellant from the benefit of this court's discretion. The appellant is ordered to file a properly headed memorandum of appeal within 15 days from the date hereof. The appellant will also bear the costs of the two applications which are assessed as Kshs.6,000/=. The same should be paid within the next 15 days from the date hereof.

DATED, SIGNED and DELIVERED at KISII this 15th day of May, 2008.

D. MUSINGA

JUDGE

Delivered in the open court in the presence of:

Mr. Kaburi HB for Mr. Omogeni for the Appellant

Mr. Otieno HB for Mr. Mudeyi for the Respondent

D. MUSINGA

JUDGE