



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc. Appli. 341 of 2008**

**BOOTH EXTRUSIONS LIMITED.....APPLICANT**

**VERSUS**

**OKUMU DUNCAN OGAL.....**  
**.....RESPONDENT**

**R U L I N G**

1. By its application dated May 28, 2008, brought by way of Notice of Motion, the applicant seeks the following Orders:-

1. *THAT the Applicant be granted leave to appeal against the Judgment delivered on 13<sup>th</sup> December 2007 in respect of Case No. Gatundu SRMCC No. 464 of 2006.*
2. *THAT the time for filing the appeal be extended in that the same may commence running from the date of this order.*
3. *THAT the draft memorandum of appeal be deemed to be filed upon payment of requisite fees.*
4. *THAT such further or other orders made as may be just and equitable.*
5. *THAT the costs of and incidental to the Application be provided for.*

which application is premised on the grounds that:-

(a) *Judgment was delivered on 13<sup>th</sup> December, 2007 but the Defendant's Counsel was not aware of the same as no notice was issued to the Defendant's Counsel and therefore the Defendant's Counsel only became aware of the judgment when notified by the Plaintiff's Counsel.*

(b) *In the interest of justice, the Applicant humbly seeks leave of this Honourable Court to file out of time.*

2. The affidavit in support, dated May 28, 2008 was sworn by Joash Momanyi, Advocate who averred that the applicant and/or its advocates were not served with a Notice of Judgment indicating when judgment would be delivered and therefore that they were not aware of the judgment in RMCC 464 of 2006 which was delivered on December 13, 2007; and that it was not until the letter of March 3, 2008 was received that the applicant's advocate learnt of the judgment in the said suit. The deponent has

annexed to the affidavit copies of letters written by the applicants' counsel checking about the judgment. The deponent further says that contrary to the provisions of Order 20 Rule 1 of the Civil Procedure Rules, judgment sought to be appealed against was not delivered within forty two days. Order 20 Rule 1 of the Civil Procedure Rules provides as follows:-

*“In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within 42 days from the conclusion of the trial of which due notice shall be given to the parties or their advocates.”*

3. Mr. Momanyi for the applicant urges the court to allow the application for the reasons outlined above. The respondents did not file any Replying papers though they were duly served with the application. The question to ask is whether the applicant deserves the orders sought.

4. Section 79G, under which the application is brought provides that appeals from a subordinate court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order. The position in the instant case is that the applicant did not even have a chance of knowing when the judgment would be or was delivered until they were advised by the letter dated December 13, 2007 from the respondent's counsel that judgment had infact already been given against the applicants. In my view, the applicants have demonstrated that they deserve the order sought. It is my further view that it would be in the interests of justice to allow this application so that the applicants can exercise their inalienable right of appeal. I have also looked at the Draft Memorandum of Appeal and formed the opinion that the intended appeal is not frivolous.

5. Accordingly I make the following orders:-

(a) *that the applicant be and is hereby granted leave to against the judgment delivered on 13<sup>th</sup> December 2007 in respect of Case No. Gatundu SRMCC No. 4649 of 2006.*

(b) *That the time for filing the appeal be extended for a period of thirty (30) days from the date of this Order.*

(c) *That the draft Memorandum of Appeal be deemed to be duly filed upon payment of the requisite filing fees.*

(d) *That the costs of and incidental to this application be costs in the cause.*

It is so ordered.

Dated and delivered at Nairobi this 12<sup>th</sup> day of June 2008.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-