

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

Misc Civ Appli 26 of 2004

CHESUMOT LIMITED.....APPLICANT

VERSUS

RICHARD KIPKURUI MARITIM.....RESPONDENT

RULING

The applicant, Chesumot Limited has made an application to be granted extension of time to file appeal to this court out of time. The application is stated to be brought under **Section 3A of the Civil Procedure Act**. The applicant however ought to have made the application under **Order XLIX Rule 5 of the Civil Procedure Rules**. No matter. The grounds in support of the application are stated on the face of the application and are supported by the annexed affidavit of Kirui Lenny Kipyegon, the advocate for the applicant. The main reasons advanced why the applicant failed to file the appeal in time is that there was a delay between the time judgments was delivered on the 14th of February, 2006 and the 21st of March 2006 when the applicant instructed its advocate to file an appeal. The applicant stated that the delay was caused by inadvertence and they should not be punished for the delay which in its view was not inordinate. The applicant urged this court to grant it leave to appeal out of time against the judgment of the lower court. The applicant is of the view that its appeal is meritorious and it is willing to put a security so as to secure the grant of the said extension of time to appeal out of time.

The application is opposed. Kenneth Obae, the advocate for the respondent has sworn a replying affidavit in opposition to the said application. He has deponed that the applicant has not advanced any grounds to enable this court excise its discretion in its favour. He further deponed that the applicant had been indolent in filing the appeal in time and in any event the intended appeal to be filed did not have any merit. It would be futile therefore to grant leave for the applicant to file an appeal. He deponed that the grounds advanced in support of the application are meant to mislead this court into granting the said order sought so as to frustrate the respondent from enjoying the fruits of his judgment. He urged this court to disallow the application.

At the hearing of the application, I heard the submissions made by Mrs. Bett, learned counsel for the applicant and by Mr. Onyango, learned counsel for the respondent. The issue for determination by this court is whether the applicant has established sufficient grounds to enable this court grant the extension of time to file appeal out of time sought. The principles to be considered by this court in considering whether or not to grant the application sought by the applicant are that this court must be satisfied that the ends of justice would be met by the said extension of time being granted. This court has unfettered discretion to allow an application for extension of time. However, the court must be satisfied that the applicant was not indolent when it failed to file the appeal in time. The court will also consider the length of the delay and also the reasons for the delay. Finally the court will consider whether the intended appeal to be filed is arguable.

In the instant application, the applicant has submitted that it was unable to file the appeal in time due to the breakdown of communication between itself and its advocate from the time the judgment was delivered on the 14th of February, 2006 to the 21st of March, 2006 when it instructed its advocate to file the appeal. However by that time, the time in which to file the appeal had expired by about a week. The application for extension of time was filed on the 31st March 2006, some sixteen days after the time in which to file the appeal had expired.

I have considered the reasons advanced by the applicant why it failed to file the appeal in time. Although the respondent has vehemently opposed the application, in my opinion this is one of those cases where this court is enjoined to exercise its discretion in favour of the applicant. The delay of sixteen days in filing an appeal is not such that this court can say that the applicant was indolent. Notwithstanding the reasons that caused the applicant to delay in filing its appeal, once it made the decision to file the appeal, the applicant timeously moved to court and sought extension of time to file appeal out of time. I have looked at the draft memorandum of appeal annexed with the application. The applicant is aggrieved by the decision of the trial magistrate in finding against it both on liability and on quantum. The said intended appeal cannot be said to be frivolous. It raises weighty issues which ought to be determined on merit by allowing the applicant to exercise its constitutional right to file an appeal. In the circumstances of this case, any inconveniences caused to the respondent can be adequately compensated by an award of costs.

The application for extension of time is therefore allowed. The applicant is hereby ordered to file and serve the appeal within fourteen (14) days of the delivery of this ruling. The applicant shall however pay the cost of the application to the respondent which I assess at Ksh.3000/=. The said amount shall be paid to the respondent within fourteen days of today's date or in default thereof the respondent shall be at liberty to execute against the applicant.

DATED at KERICHO this 2nd day of November 2006

L. KIMARU

JUDGE