REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Civ. Case 394 of 2006

TABAKI FREIGHT SERVICES

INTERNATIONAL LIMITED……..…….. PLAINTIFF/APPLICANT

VERSUS

AOKO MIDIWO ODEMBO

T/A BINTI LEGACY BOOKSHOP…… ……. DEFENDANT/RESPONDENT

RULING

This application by way of Notice of Motion and expressed to be brought under Section 3A and 79G of the Civil Procedure Act and Order L Rule 1 of the Civil Procedure Rules seeks Orders that leave be granted for the Applicant to appeal out of time.

The application is based on the ground that the Applicant has good and sufficient cause for not filing the appeal on time in that the Applicant had applied for the material judgment to be typed to enable them to prepare the Memorandum of Appeal but did not receive the same until 3-10-05 and secondly that the Applicant has an arguable appeal.

The application is also supported by an affidavit sworn by George Muturi, the Operations Supervisor of the Applicant in which he avers that the matter was heard on 7-4-04 and Judgment was delivered on 20-5-04, dismissing the Applicant's claim; that counsel for the Applicant wrote to the Court for typed copy of the Judgment on 25-5-04; that he wrote several reminders dated 16-9-04, 21-10-04, 19-11-04, 20-1-05, 2-6-05, 12-7-05, 29-7-05 and 17-8-05 but the same did not elicit any response from the court until 3-10-05 when copy of the Judgment was received. Mr. Ngaru Counsel for the applicant submitted that the delay to file appeal on time was occasioned by the Court. The application is opposed by the Respondent who has filed grounds of objection. Mr. Odongo Counsel for the Respondent submitted that the applicant is not serious about filing the appeal and that the delay is inordinate and inexcusable. He submitted that although the initial delay was caused by the Court, the applicant did not act canditly after it had received typed copy of judgment as this application was filed about 7 months later which delay is inordinate and inexcusable. The Court is being called upon to exercise its unfettered discretion to grant leave to the applicant to appeal out of time. All that the applicant who seeks such leave is required that is to place sufficient material before the judge explaining the reason for the delay.

In the ***LEO SILA MUTISO Vs. ROSE HELLEN WANGARI MWANGI – CIVIL APPLICATION NO. NAI 251 OF 1997***, the Court stated: -

"**It is now settled hat the decision whether or not to extend the time for appending is essentially discretionary. It is also well settled that in general the matter which this Court takes into account in deciding whether to grant an extension of time are first the length of delay, Secondly the reason for the delay, thirdly (possibly) the chances of appeal succeeding if the application is granted and fourthly the degree of prejudice to the Respondent if the application is granted**."

The above passage has been quoted with approval by the Court to Appeal in ***GRINDLAYS BANK***

INTERNATIONAL (K) LTD. V. GEORGE BARBOOR – CIVIL APPLICATION NO. NAI – 251 OF 1995 and ***TRADE BANK LTD (In liquidation) V. LZ ENGINEERING CONSTRUCTION LTD AND ANOTHER – CIVIL APPLICATION NO. NAI. 282 OF 1998***. I have carefully considered the submissions of Counsel appearing for both parties and I do think that this is a proper case in which to exercise my discretion in favour of the applicant.

Accordingly, the application is allowed. The applicant to file appeal within 7 days from the date of this ruling. Costs to be costs in the appeal.

DATED at Nairobi, this 11th day of December, 2006.

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J.L.A. OSIEMO

JUDGE