



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**MISC. APPLICATION NO. 510 OF 2004**

**MORRIS OTIENO OLOO**

**MOSES ASITIBA NANJERO.....APPLICANTS**

**VERSUS**

**CATHERINE REBA MUYUNZU.....RESPONDENT**

**RULING**

The Applicants, Morris Otieno Oloo and Moses Asitiba Nanjero have moved this court by Notice of Motion under the provisions of **Section 3A and 79 of the Civil Procedure Act and Order XLIX Rule 5 and Order L Rule 1 of the Civil Procedure** Rules seeking the orders of this court to be granted leave to appeal out of time from the decision of the Principal Magistrate, Nakuru delivered on the 9th of March 2004 in *Nakuru Chief Magistrate's Court Civil Case No. 640 "B" of 2001*. The grounds in support of the said application are that the Applicants were prevented from filing the Appeal in time due to the fact that instructions to Appeal were issued after the expiry of the thirty days statutory period which the Appeal was required to have been filed.

The Applicants contended that the award given by the lower court was excessive putting into consideration the injuries that the Respondent had sustained. The Applicants further contended that their intended appeal had a good chance of success and the delay in filing the said appeal was not inordinate in the circumstances. The application is supported by the annexed affidavit of Lilian Amere Machio and that of Maurice Ambuchi. In the said affidavits, the Applicants are in essence deponing that the delaying in filing the Appeal was caused by two factors; namely the fact that the firm of Ndeke Gatumu Advocates who were formerly on record on behalf of the Applicants had not filed the Appeal when they were instructed to by the insurers of the Applicants motor vehicle.

The other reason is that due to the fact that the Respondent had commenced execution process, the Applicants had first to apply for stay of execution before filing the current application for extension of time. The Application is opposed. The Respondent has filed grounds of opposition and a replying affidavit in opposition to the Applicant's application. In summary, the Respondent is contending that the Applicants have filed the Application for extension of time in a bid to frustrate the Respondent from enjoying the fruits of her judgment.

The Respondent further contended that the Applicants have been indolent in that they had taken an inordinately long period of time before they filed the Application for extension of time to file Appeal out of time. The Respondent has further alleged that the Applicants are both deceased and therefore no Appeal can be filed in their names without letters of administration first being procured. The Respondent was of the view that the Applicants' application was thus incompetent and ought to be dismissed.

At the hearing of the Application, Miss Machio for the Applicants argued forcefully in support of the Applicants' application by basically reiterating the grounds put forward in the application and the annexed affidavits. Mr Oloo, Learned Counsel for the Respondent opposed the Application by relying on the grounds stated in the grounds of opposition and the replying affidavit.

The issue for determination by this court is whether on the reasons advanced by the Applicants', their application to file appeal out of time ought to be allowed. I have read the entire pleadings filed by the parties to this application. I have also considered the rival arguments made by Learned Counsels. This

Application has been filed by Blueshield Insurance Company Limited on behalf of the Applicants who are their insured. The Application has thus been filed by the said Insurance Company on behalf of the Applicants pursuant to the provisions of **The Insurance (Motor Vehicles Third Party Risks) Act (Cap 405 of the Laws of Kenya)**. The Respondent has submitted that the Applicants, Morris Otieno Oloo and Moses Asitiba Nanjero, on whose behalf the said Insurance Company had made the application, are both deceased. This submission has not been controverted by the Counsel for the Applicants.

If indeed it is true that the Applicants are both deceased, the Insurance Company could not have made this application before obtaining letters of administration for the said deceased persons estate as was held in the case of **Trouistik Union International & Anor –versus- Mrs Jane Mbeyu & Anor C.A. Civil Appeal No. 145 of 1990 (Nairobi) (unreported)**. I have read the affidavits filed on behalf of the Applicants in support of this Application. No where is it contended that the Applicants, on whose behalf the Application has been brought, are alive. In the absence of any evidence to the contrary, I do hold that the Applicants, being deceased persons, cannot competently make an application for extension of time to file Appeal out of time in the absence of letters of administration being obtained for the administration of their estates.

Further, from my evaluation of the affidavit evidence put before me, it appears that the Insurance Company has been engaged in a course of action whose ultimate aim is to frustrate the Respondent from enjoying the fruits of her judgment. No cogent reason has been put forward to explain why the Application for extension of time was not filed in June 2004 when the said Insurance Company learnt that its instructions given to the firm of Ndeke Gatumu & Company Advocates to file an Appeal against the decision of the lower court had not been given effect to. Instead of the said application being filed, the said Insurance Company engaged in a frolic whose aim seemed geared towards delaying the payment of the award given by the lower court to the Respondent.

The said Insurance Company further expended its energy to frustrate the declaratory suit which had been filed by the Respondent instead of following the proper legal procedure to have its dissatisfaction with the decision of the Principal Magistrate ventilated before the proper forum. The submission by the Respondent that this Application was filed to forestal the outcome of the declaratory suit is therefore not without merit.

In the circumstances of this case, I find that the application for extension of time to appeal out of time, having been filed without legal authority and with ulterior motives i.e. to frustrate the Respondent from enjoying the fruits of her judgment, lacks merit. The same is dismissed with costs to the Respondent.

**DATED at NAKURU this 21st day of January 2005.**

**L. KIMARU**

**JUDGE**