

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Misc Appli 153 of 2005

LLOYD MASIKA LTD.....1ST APPLICANT

LIMA LIMITED.....2ND APPLICANT

VERSUS

KIKIKI LIMITED.....RESPONDENT

RULING

This is an application by the applicants, Lloyd Masika Ltd and Lima Ltd, made under the provisions of **Order XLIX Rule 5 of the Civil Procedure Rules**. They have sought the orders of this court to grant them leave to appeal out of time from the judgment delivered on the 21st of February 2005 by the Principal Magistrate Nyahururu in Nyahururu PMCCC No. 198 of 2003. The applicants have further prayed that they be granted temporary stay of execution of the said judgment pending the hearing and determination of this application. The application is supported by the annexed affidavit of David Wambua Masika, a director of the 1st applicant and the grounds stated on the face of the application. The application is opposed. John Maina Kingundu, a director of the respondent filed a replying affidavit opposing the application. He also filed a reply to the further affidavit filed by Evelyn Koki Mbulu, Counsel for the applicants.

During the hearing of the application, I heard the able submissions made by Miss Mbulu Learned Counsel for the applicants and Mr Kamanga Learned Counsel for the respondent. I have carefully considered the said submissions made. I have also read the pleadings filed in this court by the parties to this suit. The applicants are essentially craving for this court to exercise its discretion and grant them leave to appeal out of time. Miss Mbulu argued that she could not file the appeal in time because immediately after the delivery of the said judgment she fell ill and had to be admitted in hospital. She underwent an operation. She submitted that the proposed appeal had a high chance of success due to the fact that the trial before the principal magistrate had been conducted in the absence of the court file which had been sent to Nakuru when the applicants filed an appeal in respect of an interlocutory application before the trial magistrate which had been disallowed. The applicants further submitted that they would raise issues related the apparent bias of the trial magistrate in the conducting the case. Learned counsel submitted that she filed the application immediately after she had recovered from her illness. She urged the court to exercise its discretion and allow the application to extend time to file appeal.

Mr Kimanga, Learned Counsel for the respondent opposed the application. He submitted that the application had been made after undue delay. Learned Counsel did not accept that the reasons advanced by the applicants for the delay in filing the appeal were valid or sufficiently explained. He submitted that the fact that there could have existed out of court negotiations did not mean that the applicants were exempted from being vigilant in the pursuit of their case. He urged the court to ignore the exhibits annexed to the applicants' application as they had been written on "without prejudice basis". He however conceded that the proceedings at the principal magistrate's court had been taken in a skeleton file which had been reconstructed. He urged the court to dismiss the application with costs.

Having considered the rival arguments by the applicants and the respondent, it is my finding that it is not disputed that the counsel for the applicants fell sick and had to be hospitalised during the crucial period that the appeal should have been filed. It is further not disputed that the trial conducted by the trial magistrate that resulted in the said judgment was irregularly conducted. The respondent knew that the court file in respect of the case was in Nakuru having been requested by the Deputy Registrar of this court for appeal purposes on a previous appeal by the applicants on an interlocutory matter. The respondent had

a skeleton file constituted from the copies of the pleadings that were in its possession. No application to reconstitute the skeleton file was ever made.

Personally I do not see the reason the respondent was in a hurry to have the case heard whilst it knew very well that the court file was in Nakuru, pending the hearing and determination of the appeal filed by the applicants. For this reason alone I find that the appeal to be filed by the applicants will not be frivolous. Justice demands that where there appears to be flagrant abuse of the rules of procedure, an aggrieved party should be given a chance to ventilate his case on appeal. I will therefore exercise my discretion and allow the application by the applicants to file appeal out of time. I will not address the other issue raised as regards whether or not the trial magistrate was biased. Those are issues which will be properly dealt with on appeal.

The applicants are therefore granted leave to file their appeal out of time from the decision of the trial magistrate. The said appeal shall be filed within fourteen (14) days of the date of delivery of this ruling. To prevent mischief, I will extend the temporary stay of execution granted by this court when this application was filed to the time the applicants will file the appeal. Thereafter they shall be at liberty to seek further orders of stay of execution in the appeal to be filed.

The applicants shall have the costs of this application.

DATED at NAKURU this 27th day of May 2005.

L. KIMARU

JUDGE