

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO. 852 OF 2004

AFROFREIGHT FORWARDERS LTD APPLICANT

Versus

JAMES MWAIWA WAMBUA RESPONDENT

R U L I N G

This application brought under Section 3, 3A and 79G of the Civil Procedure Act and Order 49 Rule 5 and Order 41 Rule 4(3) of the Civil Procedure Rules seeks two main orders:-

1. Leave to appeal out of time.

2. Stay of execution of the decree in Mombasa RMCC No. 1560 of 2003 pending the hearing and final determination of the intended appeal.

The Applicant contends that its former Advocates did not advise it of the delivery of judgment hence the failure to give instructions to appeal in time. Annexed to the supporting affidavit is a copy of the draft Memorandum of Appeal in which the main ground of appeal is that the Respondent was not its employee at the time of alleged injury and was not injured at its premises. It is ready to deposit the full decretal sum pending the filing and final determination of appeal.

The application is opposed on the ground that judgment in the lower court having been delivered in the presence of the then counsel for the Applicant, this application has no merit. Counsel for the Respondent further argued that if the application is allowed then time for the filing of the appeal and making the deposit should be limited.

I have perused the application together with the supporting affidavit and the annexures thereto. It appears to me that the Applicant's appeal is arguable and cannot be described as being frivolous. The Applicant was let down by its former advocates. Counsel's mistake should not be visited upon the client unless there is good reason for doing so. There is no such reason here. As soon as the Applicant learned of the judgment in the lower court it immediately instructed counsel to file this application. It has also offered security by offering to deposit the decretal sum until the appeal is heard and determined.

In the circumstances I grant both prayers in this application upon the following circumstances.

1. That the Applicant shall file the appeal within 30 days.
2. That the Applicant shall, within 30 days, deposit the full decretal sum together with party and party costs in an interest bearing account in a reputable bank to be agreed by the parties in the joint names of the Advocates for the parties.
3. That the Applicant shall prosecute its appeal within six months.
4. The Applicant shall, within 30 days, pay to the Respondent the costs of this application to be agreed or taxed.

DATED and delivered this 15th day of December 2004.

D.K. Maraga

JUDGE