

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 85 OF 2003

FLAMINGO BOTTLERS LTD.....1ST APPELLANT

BEATRICE BUKUNGU.....2ND APPELLANT

VERSUS

BENARD MWANGI.....RESPONDENT

RULING

This is an application under Sections 3A and 79G of the Civil Procedure Act (Cap 21), Order L Rule 12 and Order XLIX Rule 5 of the Civil Procedure Rules and all enabling provisions of the law. In it, the Appellants, who are wrongly captioned as Defendants in the application, seek in pertinent part the following order:

“2. This Honourable Court be pleased to extend the time limited for filing an appeal in Nakuru CMCC No. 1572 of 2001.”

The application was supported by the affidavit and Further Supporting Affidavit of Henry Aminga, Advocate sworn on June 20, 2003 and July 7, 2003 respectively.

It is not in dispute that the Judgment and decree sought to be appealed from was made on April 30, 2003. The appeal herein was filed on June 3, 2003. The last day for filing of the appeal was May 30, 2003 which was on a Friday. On that day, Mr. Aminga, the Advocate for the Appellants stated in his Further Supporting Affidavit that he inadvertently carried the file in respect of the Appeal with him to Naivasha where he had to conduct other cases and came back at 5.00 p.m. when the Court registry had already closed. He filed the appeal on the next working day. He blamed himself for the default in question and offered to personally pay the Respondent the costs occasioned by the delay. In the Further Replying Affidavit sworn by Mr. Fred O. Nyagaka, Advocate for the Respondent on July 14, 2003, it was sought to question the veracity of Mr. Aminga’s statements but I am not persuaded that Mr. Aminga would deliberately lie to this Court. He has accepted full responsibility. I believe Mr. Aminga’s story and find that it would be unfair to punish the Appellant for a mistake of their Advocate. I have looked at the authorities relied on by Mr. Nyagaka in opposition of the application but I do not think that they affect the decision which I have come to.

I, therefore, allow the Appellants’ application dated June 5, 2003 and order that Mr. Aminga do personally pay the Respondent’s thrown away costs.

Dated and Delivered at Nakuru this 29th day of July, 2003.

ALNASHIR VISRAM

JUDGE