



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HC. MISCELLANEOUS CIVIL APPLICATION NO. E15 OF 2020**

**DANIEL MUTINDA MUTISYA.....APPLICANT**

**-VERSUS-**

**PATRICK M. MASILA.....RESPONDENT**

**RULING**

1. Before me is an application brought by way of Notice of Motion dated 23/11/2020 filed by Daniel Mutinda Mutisya through counsel M/s O.N Makau & Mulei.

2. The application has been brought under section 1A, 1B, and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules 2010 and seeks several orders, some of which have been spent as follows –

**1) (spent)**

**2) O.N Makau & Mulei advocates be deemed to be on record as representing the applicant.**

**3) That the proposed appellant be granted leave to appeal out of time against the whole judgment of Hon. Senior Resident Magistrate Mutegi delivered at Tawa on 27/2/2020.**

**4) That the memorandum of appeal annexed hereto be deemed as duly filed and served upon payment of requisite fees.**

**5) That this honourable court be pleased to grant an order of setting aside of the judgment in the suit herein delivered on 27/2/2020 and the decree subsequent thereto pending hearing and determination of this application.**

**6) That this honourable court be pleased to grant an order of setting aside the judgment in the suit herein delivered on 27/2/2020 and the decree subsequent thereto pending the hearing and determination of this appeal herein.**

**7) That the costs of this application be provided for.**

3. The application has grounds on the face of the Notice of Motion and was filed with a supporting affidavit sworn by Daniel Mutinda Mutisya on 23<sup>rd</sup> November 2020 amplifying the grounds of the application.

4. The application has been opposed through a replying affidavit sworn on 27<sup>th</sup> January 2021 by Alphonse Muema Mbindyo advocate in which it is deposed that no leave to change advocate was sought, and that the application for leave to appeal out of time was filed late in the day, and further that some of the prayers in the application sought to determine the intended appeal through a preliminary application.

5. The application proceeded by way of filing written submissions, and I have perused and considered the submissions of both O.N Makau & Mulei advocates for the applicant and A.M Mbindyo advocates for the respondents.

6. I will start by addressing the issue of the request for a new advocate to come on record for the applicant, the intended appellant. In this regard, the Constitution of Kenya 2010 under Article 50 confers a right on parties in litigation to be represented by an advocate of their choice. I find no reason to allow the applicant that constitutional right. I thus allow the request for the applicant to be represented by another advocate. He will of course have to pay fees due to the previous advocate, if he has not done so.

7. I will now turn to prayer 5 and 6 of the application seeking setting aside the judgment of the trial court. Such prayers cannot be granted at

this stage of application for leave to appeal out of time. They will have to await determination of the appeal.

8. I note that in written submissions, the applicant's counsel has alluded to stay of execution, which he has not sought in the application and relied on the case of **Butt –vs- Rent Restriction Tribunal (1982) KLR 412**.

9. In my view, even if such prayer was sought, the justice of the case will not require that I stay execution of judgment or decree, as I have not been told that the applicant or intended applicant was ordered by the trial court to do any substantive thing.

10. Coming now to the leave to appeal out of time, I have been referred inter alia, to **Kiambu High Court Misc. Application No. 108 of 2017 – Samuel Mwanja Muthumbi –vs Josephine Wanjiru Ngugi & Josephine Karani**, in which the court applied the reasoning of the Court of Appeal in the case of **Mwangi –vs- Kenya Airways Ltd (2003) KLR**, in which the Court of Appeal stated that the considerations by a court in such a request are inter alia –

*a) The period of delay.*

*b) The reason for delay.*

*c) Arguability of the appeal*

*d) Degree of prejudice which could be suffered by the respondent if the extension is granted.*

*e) The importance of compliance with time limits to the particular litigation or issue,*

*f) The effect if any on the administration of justice or public interest if any is involved.*

11. I note that the judgment herein was delivered on 27<sup>th</sup> February 2020 and this application filed on 24<sup>th</sup> November 2020 a period of 10 months. To explain the delay the applicant stated that he initially asked Kiptoo & Associates advocates to act for him, and on default appointed O.N Makau advocate.

12. Having seen a letter dated 3<sup>rd</sup> March 2020 “DMM2” from Kiptoo & Company advocate seeking copy of typed proceedings and judgment to enable them appeal, in my view, the delay has been sufficiently explained.

13. Considering the draft memorandum of appeal herein, in my view, the appeal is an arguable appeal, and I don't see any prejudice that will be suffered by the respondent if the applicant is allowed to appeal out of time.

14. I will thus allow the application for leave to appeal out of time.

15. Consequently, and for the above reasons, I order as follows –

*i. Leave to change advocate is hereby granted and O.N Makau & Mulei advocates deemed as properly on record representing the applicant.*

*ii. Prayer 3 and 4 of the application are granted.*

*iii. Prayers 5 and 6 of the application are disallowed and dismissed.*

*iv. I award costs of the application to the respondent.*

**Delivered, signed & dated this 9<sup>th</sup> day of November, 2021, in open court at Makueni.**

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**George Dulu**

**Judge**