

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL APPEAL NO. 11 OF 2018

TIMAU FLOUR LIMITED.....APPELLANT

VERSUS

ELIJAH NDUNGU KAMAU.....RESPONDENT

(Appeal from Original Decree passed on 03/09/2018 in Nanyuki CM Civil Case No 77 of 2013 – W J Gichimu, PM)

RULING

1. The appeal herein challenges the decree of the lower court passed on 3rd September 2018. The memorandum of appeal was filed on 5th November, 2018, which was about 32 days out of time (see **section 79G** of the *Civil Procedure Act, Cap 21*).

2. Together with the memorandum of appeal the Appellant filed an application by **notice of motion dated 2nd November 2018**. Prayer 3 of that application seeks, in effect, an order to regularise the appeal (it having been filed out of time as already seen).

3. The **proviso** to section 79G aforesaid gives the court the necessary power to admit an appeal out of time...

“...if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time”.

4. The application has been opposed by the Respondent. I have read the affidavits sworn in support of and in opposition to the application. I have also considered the submissions of the learned counsels appearing, including the authorities cited.

5. The record of the court reflects the fact that the entire decretal sum was deposited in the lower court by consent of the parties recorded in this appeal. It is also common ground that the costs awarded to the Respondent in the lower court were assessed and have already been paid. Finally, it is common ground that the delay in filing the appeal, as already seen, was about one month.

6. The right of appeal is an important process in the administration of justice that will not be denied lightly, particularly where that right has already been exercised, albeit belatedly, as in this case.

7. The explanation for the delay in filing the appeal as offered by the Appellant, is two-fold. One, that the judgment was delivered in the absence of the Appellant’s counsel, and, secondly, that some time was taken up in seeking and obtaining instructions to appeal, the instructing client being the Appellant’s insurers exercising their derivative right.

8. It is a contested issue whether or not the Appellant had been duly served with notice for delivery of judgment. I consider that issue not worth the court’s time in the circumstances of this case. But I do note that the judgement was delivered on the date originally set by the court in the presence of the parties.

9. In the present case, having considered all due matters placed before the court, I am satisfied that the Appellant had good and sufficient cause for not filing the appeal in time. I will therefore allow prayer 3 of the notice of motion dated 2nd November, 2018 and admit the appeal herein out of time. It is so ordered. Costs of the application shall be in the appeal.

DATED AND SIGNED AT NANYUKI THIS 7TH DAY OF MARCH 2019

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 7TH DAY OF MARCH 2019