



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 239 OF 2019

ELIJAH MURIITHI.....1ST APPELLANT/APPLICANT

IBRAHIM MWANGI NJENGA.....2ND APPELLANT/APPLICANT

VERSUS

PETER CHRISTOPHER KAHORO MBOGO.....RESPONDENT

RULING

1. The appellants/applicants have taken out a Notice of Motion dated 2nd March, 2019 and the same stands supported by the grounds set out on its face and the affidavit of *Kelvin Ngure*. The applicants are seeking leave of this court to file an appeal out of time against the judgment delivered by Honourable D.W. Mburu (Mr.) (Principal Magistrate) on 18th January, 2019 in CMCC NO. 4176 OF 2017, in addition to a stay of execution pending the hearing and determination of the appeal.

2. The parties recorded a consent on the stay of execution before me on 28th March, 2019 to the effect that half the decretal sum be paid to the plaintiff's advocate while the other half be deposited in a joint interest earning account within 30 days from the said date. It is important to mention that the consent is subject to my determination on the prayer 1 for leave sought. It is similarly noteworthy that the respondent's counsel indicated that he is not opposed to the application.

3. The abovementioned *Kelvin Ngure* deponed that upon entry of judgment by the trial court in favour of the respondent, the applicants found themselves aggrieved by the same and are desirous of filing an appeal, which he added has high chances of success and that the respondent will not be prejudiced in the process.

4. I have considered the facts stated in the Motion and its supporting affidavit. Under *Section 79G* of the *Civil Procedure Act*, leave to appeal out of time can only be granted where sufficient cause has been shown.

5. The Court of Appeal in *Thuita Mwangi v Kenya Airways Limited [2003] eKLR* illustrated the principles to be considered by the court in determining whether or not to grant a party leave to file an appeal out of time.

6. The first principle concerns the length of the delay. The applicant stated that judgment was delivered on 18th January, 2019 while the application was filed on 11th March, 2019. A span of not more than two (2) months has lapsed. In my humble view, while there has been a delay, I do not find the same to be inordinate or otherwise unreasonable.

7. This brings me to the second principle on the reason for the delay. Upon perusing the supporting affidavit, I found no explanation given for the delay in lodging the appeal. Nevertheless, the grounds as set out in the Motion illustrated that the delay was occasioned by the time taken in obtaining instructions from the applicants to appeal. From the foregoing, I am of the view that the explanation given is reasonable.

8. In respect to the principle on the prejudice that the respondent stands to suffer, I am alive to the fact that the respondent through his advocate is not opposed to the application. I therefore have no reason to find that the respondent will be prejudiced and in any case, the parties entered into a consent on the provision of security in terms of the decretal amount.

9. The upshot is that the prayer on leave to appeal out of time is hereby allowed and the following orders made:

a) The applicants shall file and serve their intended appeal within 60 days from today.

b) Costs to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 4th day of April, 2019.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellants/Applicants

..... for the Respondent