



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 406 OF 2012**

**PAUL MWANGI GICHUKI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**NAHASHON KANYI THEURI.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is the outcome of two motions. The first motion is dated 2<sup>nd</sup> August 2018 and amended on 17.10.2018, taken out by the plaintiff/applicant. In the aforesaid motion the plaintiff/applicant is basically seeking for the extension of time to file a notice of appeal. The second motion is dated 4<sup>th</sup> April 2019 taken out by the defendant/ respondent whereof he sought for an order directing the release of the entire sum of money deposited with Britam Unit Trust in account no. BA034022 and in the joint names of learned advocates appearing in this matter to the firm of B. G. Wainaina & Co. Advocates.

2. In the amended motion dated 17<sup>th</sup> October 2018, the plaintiff/applicant urged this court to grant him leave of 7 days to file a notice of appeal out of time. It is the submission of the plaintiff that the ruling of this court was delivered on 6/7/2018 in the absence of the applicants and that the file was taken to the judge's chambers for proof reading and was only released to the registry after the lapse of 17 days and after the period fixed for filing a notice of appeal had lapsed.

3. In response to the aforesaid motion, the 1<sup>st</sup> defendant/ respondent filed the replying affidavit of Benjamin G. Wainaina to oppose the application. It is argued that the plaintiff/ applicant has offered no sufficient reasons for the delay to file the notice of appeal within the time fixed by law. It is further argued that the file did not go missing as alleged by the plaintiff.

4. I have considered the grounds stated on the face of the amended motion and the facts deponed in the affidavits filed in support and against the motion. I have also taken into account the rival oral submissions. The main ground advanced by the plaintiff in support of the amended motion is that the court file was retained in the judge's chambers for proofreading from 6<sup>th</sup> July 2018 until 25.7.2018 when it was released to the registry by which time the period to lodge a notice of appeal had lapsed.

5. This assertion is not controverted by the 1<sup>st</sup> defendant/ respondent. I am convinced that the plaintiff/applicant has given sufficient reason to justify his failure to lodge a notice of appeal within the requisite period. Consequently, I grant the plaintiff/applicant to file and serve a notice of appeal within 7 days from the date of this ruling.

6. In the motion dated 4<sup>th</sup> April 2019, the 1<sup>st</sup> defendant/ respondent sought for the sum of ksh.899,113/11 deposited with Britam Unit Trust in account no. A034022 to be released to the firm of B. G. Wainaina & Co. Advocates. The respondent/ applicant argued that the aforesaid amount was deposited in the aforesaid account in the joint names of the advocates as security for the due performance of the decree pending appeal. It is pointed out that the appeal was dismissed on 14.7.2017 and that the appellant has never filed an appeal to challenge the dismissal order.

7. In response to the motion dated 4/4/2019, the appellant/ respondent filed the replying affidavit of Dominic Njuguna Mbigi to oppose the motion. The learned advocate pointed out that the motion dated 2/8/2018 which was amended on 17.10.2018 was pending hence the current application is pre-mature.

8. Having considered the rival submissions, it is clear that despite the fact that the appeal was dismissed, the appellant sought for an extension of time to file a notice of appeal. The amended motion dated 17.10.2018 has now been determined in favour of the appellant/applicant and in view of the aforesaid, I agree with the appellant/applicant that the motion is premature. Consequently, the same is ordered struck out with no order as to costs.

9. In the end, the amended motion dated 17.10.2018 is allowed as prayed save that each party shall bear its own costs. The motion dated 4.4.2019 is dismissed with no order as to costs.

**Dated, Signed and Delivered at Nairobi this 18<sup>th</sup> day of July, 2019.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Respondent