



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1680 OF 2002

GEORGE B.M. KARIUKI.....PLAINTIFF/RESPONDENT

-VERSUS-

ANASTACIA WINNIE WAINAINA....1ST DEFENDANT/APPLICANT

DANIEL NJUGUNA.....2ND DEFENDANT

PETER NJOROGE.....3RD DEFENDANT/APPLICANT

RULING

1. This ruling is precipitated by the Notice of Motion dated 30th July, 2019 filed by the 1st and 3rd defendants/applicants and supported by the grounds set out on its face and the facts deponed in the affidavit sworn by the 1st defendant/applicant. The applicants are seeking the substantive order for leave to appeal out of time, plus costs of the application.
2. The plaintiff/respondent has filed both the replying affidavit sworn on 2nd September, 2019 and Grounds of Opposition to oppose.
3. Pursuant to the orders made by this court on 17th September, 2019 the parties filed and exchanged written submissions on the application. The applicants first submitted that whether or not to extend the time for filing an appeal lies purely with the courts' discretion, quoting the case of **Annah Mwiaki Wairuru v Hannah Wanja Wairuru [2017] eKLR** where the Court of Appeal lay emphasis on the discretion of the courts in deciding whether to extend the time required for appealing and went ahead to state the factors to be considered in making its determination, these being: **the length of delay; the reason behind the delay; whether the appeal is arguable; and the degree of prejudice that will befall the respondent should the application be granted.**
4. The applicants contend that despite the fact that they came to learn of the delivery of the judgment which they intend to appeal against after the prescribed period for filing a notice of appeal in the Court of Appeal had lapsed, they filed their application without inordinate delay.
5. The applicants also contend that the respondent does not stand to suffer any prejudice if the application is allowed since he is yet to commence the execution process.
6. It is the applicants' submission that their current firm of advocates is properly on record by virtue of the fact that a notice of change of advocates has been filed with the consent of the erstwhile firm of advocates having been obtained. The applicants went on to argue that in any case, the respondent will not suffer any prejudice as a result of the change in representation.
7. The respondent argued that the applicants have not complied with the provisions of Order 9, Rule 9 of the Civil Procedure Rules requiring them to obtain leave from the court prior to filing a notice of change of advocates.
8. The respondent is of the submission that there has been an inordinate and unexplained delay in bringing the current application.
9. The respondent further argued that the applicants' intended appeal is not arguable hence the order should not be granted.
10. I have considered the grounds presented on the face of the Motion; the facts deponed in the respective affidavits supporting and opposing

it; the Grounds of Opposition and the rival submissions together with the authorities.

11. Before I consider the merits of the Motion, I wish to first address the issue of competency of the said Motion raised by the respondents in line with the provision encapsulated under **Order 9, Rule 9** of the **Civil Procedure Rules**. The provision stipulates that in the event of a change of advocates after the delivery of judgment, the relevant party shall either lodge an application to that effect with notice to all parties or file in court a consent between the outgoing and incoming advocates.

12. I have perused the record and I have ascertained that the notice of change of advocates dated 22nd July, 2019 was filed and signed by the applicants' current advocates and that the same included a clause that the same has been filed with the consent of the former advocates, whose signature was equally appended on the notice.

13. I am therefore satisfied that the applicants' current firm of advocates, having complied with the above-cited provision, is properly on record and consequently, the application is competently before this court.

14. Turning to the merits of the Motion, it is not in dispute that on 31st May, 2019 this court entered judgment in favour of the respondent against the applicants.

15. The applicants are now before this court seeking for leave to appeal against this court's decision out of time. Under **Section 7** of the **Appellate Jurisdiction Act** the High Court is given the discretion to extend the time required to either give notice of intention to appeal to the Court of Appeal or to grant leave to appeal out of time.

16. The question as to whether there was inordinate delay in filing the application can be answered by looking at the record. It is apparent that this court entered judgment on 31st May, 2019 while the instant application was filed on 31st July, 2019. In my view, I think the delay cannot be said to be inordinate.

17. The applicants stated that they only came to learn of the entry of judgment on 21st June, 2019 and opted to engage the services of the current firm of advocates to lodge an appeal against the same on their behalf. The record shows that at the time of delivery of the judgment, none of the parties were in attendance. It is therefore possible that the applicants were not made aware of the judgment until much later. I find the explanation given by the applicants to be plausible.

18. The question as to whether the appeal is arguable cannot be determined by this court since it is the preserve of the Court of Appeal.

19. In the end, the Motion is found to be meritorious. The applicants are granted leave of 10 days to lodge the notice of appeal.

20. In the circumstances of this case, each party should bear its own costs.

Dated, signed and delivered at Nairobi this 13th day of November, 2019

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J.K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the 1st and 3rd Defendants/Applicants

..... for the 2nd Defendant