



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 734 OF 2016

SIMON MURIITHI MUTAHL. 1ST APPELLANT

ULTRA VENTURES LTD. 2ND APPELLANT

VERSUS

MARY OCHIENG' OYATH (*Suing as the legal representative of the*

***estate of the late Henry Oyath*). RESPONDENT**

RULING

This is an application by way of Notice of Motion under Sections 95, 1A, 1B, 3A and 79G of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules seeking an order that, the notice of appeal dated 30th May, 2019 and filed on 3rd June, 2019 be deemed as duly filed within time.

The application is supported by grounds set out on the face of the application and an affidavit sworn by the advocate for the applicant. The respondent has opposed the application and there is a replying affidavit to that effect sworn by the advocate for the respondent.

There are some authorities that have been filed by counsel for the applicant. Both counsel were allowed to address the court briefly on the issues raised.

The notice of appeal which is subject of this application was filed two days late and that is why there is an order sought to have the same deemed duly filed.

I have looked at the calendar and noted, in between the dates of the said notice and the filing thereof, there was a weekend. Counsel has explained to the satisfaction of the court that the delay is not inordinate and seeks the discretion of the court to have it admitted.

On the other hand, the respondent submits that the discretion should be exercised judiciously and in any case the said notice of appeal is invalid as it has not been endorsed by the Deputy Registrar as required under Rule 10 of the Court of Appeal Rules. Further that, the validity of notice of appeal can only be determined by a full bench.

By any standard the delay cannot be said to be inordinate, especially when there is evidence of a weekend in between when the registries are not opened.

In the case, **Imperial Bank Limited (Under-receivership) & another Vs Alnashir Popat & Others** of the court had the following to say: -

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In Athuman Nusura Juma v. Afwa Mohamed Ramadhan, CA No 227 of 2015, this Court stated thus, on that issue:

“ This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is

exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

The above catalogue of considerations is not closed and it possibly cannot be, because exercise of discretion also depends on the circumstances of each case, which human experience tells us differ from case to case. A closed catalogue of considerations would in any event be the very antithesis of unfettered discretion. (See Mongira & Another v Makori & Another [2005] 2 KLR).”

I have considered the principles enunciated in the above case and believe that no prejudice shall be visited upon the respondent if this application is allowed. Accordingly, the notice of appeal lodged in court on 3rd June, 2019 is hereby deemed as filed.

The costs of this application shall abide by the decision of the appeal.

Dated, signed and delivered at Nairobi this 7th day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE