



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 66 OF 2017**

**MASH EAST AFRICA LTD.....APPLICANT/APPELLANT**

**VERSUS**

**A.A. TRANSPORTERS.....RESPONDENT**

**RULING**

1. The application dated 15<sup>th</sup> March, 2017 has been brought under the provisions of Sections 1A, 1B, 3A and 95 of the Civil Procedure Act, and Section 42(1) of the Court of Appeal Rules (sic) and all other enabling provisions of the law. It seeks the following orders:-

(i) That this Honourable court be pleased to extend time for lodging a Notice of Appeal beyond the 30 days allowed under the Court of Appeal rules (sic);

(ii) That the time for filing an Appeal against the ruling herein dated 8<sup>th</sup> December, 2016 be enlarged;

(iii) That the costs of this application abide the results of the intended appeal.

2. The application is supported by the affidavit of S. R. Shikely Advocate sworn on 13<sup>th</sup> March, 2017 and the grounds upon which the application is anchored. The respondent filed grounds of opposition on 24<sup>th</sup> April, 2017. Counsel thereafter filed their written submissions which they highlighted.

3. Mr. Shikely, Learned Counsel for the applicant submitted that he filed the application two months after delivery of the ruling in issue. He sought leave of the court to file an appeal out of time. He urged the court to consider if the two months amount to unreasonable delay. He indicated that the ruling the subject of this application was delivered on 8<sup>th</sup> December, 2016 wherein it was held that the suit in the lower court should have been filed in Mariakani and not Mombasa law courts. He stated that both the applicant and the respondent have business interests in Mombasa.

4. Counsel submitted that in his affidavit, he explained the reason for delay in filing the appeal out of time. He relied on the case of **Wasike vs Khisa and Another**, Nairobi Court of Appeal Civil Application No. 248 of 2003 to support his application.

5. Mr. Kinyanjui, Learned Counsel for the respondent in opposing the application submitted that the delay in filing of the appeal had not been explained. He further stated that a party desirous of the orders of the court must comply with certain parameters set by precedents made by the courts. He invited the court to

peruse his written submissions and authorities in support thereof.

## **ANALYSIS AND DETERMINATION**

The issue for determination is if there has been inordinate delay in applying for leave to appeal out of time.

6. Although the ruling the subject of the present application arose from Mombasa RMCC No. 1302 of 2016, some of the provisions that have been cited in support of the application are applicable to appeals filed in the Court of Appeal. Section 42(1) of the Court of Appeal rules does not apply to the application before me. I also note that the parties in the copy of the ruling that is attached to the applicant's affidavit are **Methuselar Keyah Lubembe vs Albina Kipkemboi** and not **Mash East Africa vs A.A. Transporters Limited**. The foregoing error which was not noted by the Counsel on record could have been occasioned as at the time the said ruling was being typed.

7. The applicable law with regard to appeals from subordinate courts to the High court is Section 79G of the Civil Procedure Act, which provides that:-

***“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time that the lower court may certify as having been requisite for the preparation and delivery to the appellant a copy of the decree or order:***

***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”***

8. Counsel for the respondent in his written submissions states that there is no appeal that has been filed before this court and cited the case of **Ponderosa Logistics Ltd. Vs Ayub Wesonga** [2017] eKLR to state that an applicant who seeks leave to appeal out of time must first file a memorandum of appeal and then seek to have the same deemed as filed within time.

9. In this matter, the applicant attached to his affidavit an "intended memorandum of appeal" marked as exhibit SRS-2. The applicant did not file a memorandum of appeal before filing his application for leave to appeal out of time. In **Ponderosa Logistics Ltd** case (supra), the court held as follows:-

***"I further agree that the correct procedure to approach the court under section 79(G) of the Civil Procedure Act, is to first file the Memorandum of Appeal....then seek that the same be deemed filed within time."***

10. Mr. Shikely in his affidavit explains the reason why he failed to file the appeal within 30 days of the ruling was that the Hon. Magistrate did not deliver the ruling on 8th December, 2016 as scheduled, as when he appeared before the court, he was informed by the said Magistrate that the ruling was not ready. He further deposes that prior to closing his office on 21<sup>st</sup> December, 2016, he was not informed when the ruling would be delivered.

11. Counsel for the applicant stated that when he returned to Kenya on 16<sup>th</sup> January, 2017 from a visit overseas, he became aware that the ruling was delivered and the Hon. Magistrate had been transferred from the station. He stated that the ruling in issue bears the date of 8th December, 2016 but he categorically denied that it was read on the same day.

12. It is difficult for this court to determine:-

(i) If the ruling in issue was read on 8th December, 2016 in the presence of Counsel for the respondent but in the absence of the applicant's Counsel. This could have been established if the applicant's Counsel could have attached a copy of either typed or handwritten proceedings of the lower court for 8th December, 2017. The said proceedings would show the quorum as at the time

the ruling was read. The applicant's Counsel has however attached a one page ruling which does not show the name of the Court Assistant that was attending to the Hon. Magistrate on the said date; and

(ii) It is not clear from the applicant's deponent's affidavit when it came to his attention that the ruling was delivered on 8<sup>th</sup> December, 2016 after he returned to Kenya on 16th January, 2017 from his visit overseas. Even if this court was to presume that the ruling was brought to the attention the applicant's Counsel on 16th January, 2017, the application for leave to appeal out of time was not filed until the 16th of March, 2017. The delay of 2 months has not been satisfactorily explained.

13. In *Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & Others*, Supreme Court Application No. 16 of 2014, the Supreme Court acknowledged that extension of time is a discretionary and a very powerful tool which should be exercised with abundant caution, care and fairness. It should be used judiciously and not whimsically to ensure that the principles enshrined in the Constitution are realized. The Court proceeded to lay down the following principles to guide the courts:-

1. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
2. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
3. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
4. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time."*

14. In his written submissions, Counsel for the applicant herein states that he wrote to the Executive Officer, Mombasa law courts requesting for certified copies of proceedings and ruling on 15th February, 2017. This was however not deposed to, in his supporting affidavit and the said letter was not attached to the applicant's affidavit.

15. Having taken all the factors surrounding the present application, I find that the applicant has failed to meet the threshold for grant of the orders sought. I therefore dismiss the application. Costs are awarded to the respondent.

**DELIVERED, DATED and SIGNED at MOMBASA on this 6th day of February, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Shikely for the applicant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant