



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 57 OF 2017**

**PETER ODUOR SHIKUKU.....APPLICANT**

**VERSUS**

**MAGNUM ENGINEERING &**

**GENERAL CONTRACTORS LTD.....1<sup>ST</sup> RESPONDENT**

**EAST AFRICAN BREWERIES LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 13<sup>th</sup> March, 2017 seeks orders that leave be granted to the Applicant to file a memorandum of Appeal out of time.
2. The application is predicated on the grounds stated therein and is supported by the affidavit sworn by the Appellant, Peter Oduor Shikuku. It is averred that the judgment of the lower court was delivered on 11<sup>th</sup> November, 2016 without any notice to the Applicant. That thereafter efforts to trace the court file were fruitless. That the Applicant had lost his telephone set and his advocates could not trace him to inform him of the outcome. The Applicant is aggrieved by the judgment of the lower court and is desirous of filing an appeal.
3. The application is opposed. It is stated in the replying affidavit by the 1<sup>st</sup> Respondent that the notice of judgment was put up at the trial magistrate chamber's door. That following communication between the parties, the 1<sup>st</sup> Respondent settled it's part of the judgment and that the issue of filing an appeal is an afterthought.
4. The 2<sup>nd</sup> Respondent stated in it's replying affidavit that the 1<sup>st</sup> Respondent had paid the Appellant the sum of Ksh.718,343/= and the Respondent cannot now turn around after the decree has been satisfied.
5. The application was canvassed by way of written submissions.
6. I have considered the application, the responses to the same and the submissions made.
7. Section 79G of the Civil Procedure Act provides that:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of 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.”**

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

8. The judgment of the lower court was delivered on 11<sup>th</sup> November, 2016. The application at hand was filed on 14<sup>th</sup> March, 2018, about three months out of time. Although the Applicant states that the judgment was delivered without notice, it is also clear from his averments that they received the letter dated 24<sup>th</sup> November, 2016 from the 1<sup>st</sup> Respondent which was stamped as received on 28<sup>th</sup> November, 2017. The said letter informed the Applicant of the delivery of the Judgment. The Applicant therefore became aware of delivery of judgment in the month of November, 2017. No letter has been exhibited herein requesting for the proceedings of the lower court to be supplied. There were

also demands for payment from the 2<sup>nd</sup> Respondent as at 8<sup>th</sup> December, 2016.

9. However, the delay was not inordinate. This court is prepared to accept the explanation that there was lack of communication between the Applicant and his counsel.

10. It has been argued that the intended appeal is arguable with overwhelming chances of success and that no prejudice will be occasioned to the Respondents. The appeal is arguable. There is also no evidence that the 2<sup>nd</sup> Respondent has settled the remainder of the claim. There is only part payment by the 1<sup>st</sup> Respondent. There is therefore no prejudice that can be occasioned to the Respondent that cannot be compensated by way of costs. This court is inclined to give the intended appeal a chance to be heard on merits.

11. With the foregoing, I allow the application with costs to the Respondent. The intended appeal to be filed and served within seven (7) days hereof.

**Date, signed and delivered at Nairobi this 15<sup>th</sup> day of Nov., 2018**

**B. THURANIRA JADEN**

**JUDGE**