



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL MISC. APPL. NO. 216 OF 2016
BAMBURI SPECIAL PRODUCTS LIMITEDPLAINTIFF
VERSUS
RICHARD K. SAMOEI
T/A SONDU SERVICE STATION.....DEFENDANT

RULING

1. The application dated 17th May, 2016 seeks orders that the Applicant be granted leave to file and serve a Memorandum of Appeal out of time.
2. The application is premised on the grounds stated on the face of the application and is supported by the affidavit sworn by Wambugu Gitonga, counsel for the Applicant. The delay in filing the appeal is blamed on the erroneous filing of a Notice of Appeal instead of a Memorandum of Appeal as required by the rules of procedure. It is further stated that this was a mistake by the Advocate and that the same should not be visited on the litigant. That the appeal raises triable issues and has overwhelming chance of success.
3. The application is opposed. According to the replying affidavit, judgment was entered on 11th November, 2015 and the Notice of Appeal was served on the 18th November, 2015. It is stated that the delay of about three months in filing the instant application has not been explained and that the appeal does not raise any triable issue.
4. I have considered the application and the reply to the same.
5. 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)

6. The court therefore has the discretion to extend time within which to file an appeal. As stated by the Court of Appeal in the case of **Aviation Cargo Limited v St. Mark Freight Services Limited [2014] eKLR**:

“...whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time. “

7. Turning to the case at hand, the judgment of the lower court was delivered on 11th November, 2015. The memorandum of appeal ought to have been filed on or before 10th December, 2015. The application at hand was filed on 19th May, 2016. There was a delay of slightly more than five months. The delay has been explained. The notice of appeal that was erroneously filed has been exhibited herein. The same has a court stamp which reflects that it was filed on 17th November, 2015. The explanation given is satisfactory. As stated by the Court of Appeal in the case of **Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040**:

“Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

8. With the foregoing, I allow the application with costs to the Respondent.

Dated, signed and delivered at Nairobi this 15th day of March, 2017

B.THURANIRA JADEN

JUDGE