



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NUMBER 77 OF 2016

EVANS OCHIENG AMIMO.....1ST APPELLANT/RESPONDENT

CHEDU SAID.....2ND APPELLANT/RESPONDENT

VERSUS

PHILIP GATIBARU KAMAU.....RESPONDENT/APPLICANT

R U L I N G

The Respondent/applicant has moved the court by way of a Notice of Motion dated 7th day of March, 2016 brought under Sections 3A and 79G of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders: -

- a. That the appeal be struck out with costs to the Respondent/Applicant.
- b. Costs of the application be borne by the Appellant/Respondent.

The application is premised on the grounds that: -

- i. The decision appealed from was given on 26th January, 2016.
- ii. By dint of Section 79G of the Civil Procedure Act, appeal ought to have been filed within 30 days of that decision.
- iii. The appeal was filed outside the prescribed time and without the leave of the court and therefore, it is incurably defective and should be struck out with costs.

The Respondents have opposed the application vide a replying affidavit sworn on 30th May, 2016 by Joan Oburu who has described herself as the Claims Director at Direct Line Assurance Company Limited who are the insurers of motor vehicle KBC 769S and at whose instance the Civil Suit No. CMCC No. 6026 of 2013 was defended.

The deponent avers that judgment in CMCC No. 6026 of 2013 was delivered on the 25th day of January, 2016. That the Appellant being dissatisfied with the judgment, instructed his advocate the firm of M/s Kairu and Mc Court Advocates to appeal against the said judgment.

That the appeal was filed on the 26th February, 2016 a day after the statutory period for filing the appeal

had expired. According to him, the appeal is merited, arguable and it raises pertinent points of law and that it has overwhelming chances of success.

It is further averred that the Appellant is ready and willing to furnish such reasonable security as the Honourable court may deem fit and that the inadvertent delay on the part of their advocate in filing the appeal is highly regretted and the Appellants should not be penalized for the mistakes of their advocates. He avers that he has been informed by his advocate that the law requires that an appeal be filed within 30 days of the pronouncement of the judgment which time had lapsed by the time the appeal was filed. That the delay in filing the same was not inordinate and that the Appellant/Respondent will suffer prejudice and irreparable loss as there is a likelihood that they will not recover the decretal sum if the amount is paid over to the Respondent/Applicant.

Parties agreed to canvass the application by way of written submissions which the Applicant duly filed but the Respondents did not comply with the order to file submission.

I have carefully considered the application and the submissions filed by the Respondent/applicant. From the record, judgment in CMCC No. 6026 of 2013 the subject of this appeal was delivered on the 26th January, 2016. The law provides that an appeal should be filed within 30 days from the date of the judgment which period expired on the 25th February, 2016. The appeal herein was filed on the 26th February, 2016 a day after the statutory period of 30 days for filing of appeals had expired.

The Appellants/Respondents herein have admitted that the appeal was filed out of time by one day and have asked the court to excuse the delay.

I have perused the replying affidavit by the Respondents. The facts contained therein would have been better raised in an application for leave to file the appeal out of time which option they failed to exercise. As it stands now, the law is not on their side and this court cannot exercise its discretion to excuse the delay in the face of a clear legal provision which stipulates the statutory period within which to file the appeal and there is no application before me seeking leave to extend the time.

Be that as it may, I find that the application dated 7th March, 2016 has merits and it is hereby allowed as prayed.

The appeal herein is struck out with costs to the Respondent.

Dated, signed and delivered at Nairobi this 15th day of September, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... *for the Appellants/Respondents*

..... *for the Respondents/Applicant*