



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

**CIVIL APPEAL NO. 168 OF 2013**

DAVIS MAKAU NDUU.....1<sup>ST</sup> APPELLANT  
TITUS KITHOME MUTISO.....2<sup>ND</sup> APPELLANT  
ERNEST KIOKO KING'OLA.....3<sup>RD</sup> APPELLANT  
GRISON MASIKA KIOKO.....4<sup>TH</sup> APPELLANT  
ASUMANI KIMONDIU.....5<sup>TH</sup> APPELLANT

VERSUS

MUTUA MUANGE.....RESPONDENT

*(Being an appeal from the Judgment of the Principal Magistrate's*

*Court at Makueni by Hon. J. Karanja (PM) in*

*Civil Case No. 58 of 2009 dated 28<sup>th</sup> June 2013)*

\*\*\*\*\*

**RULING OF THE COURT**

1. The **Notice of Motion** application dated 9<sup>th</sup> May 2016 by the Applicants seeks two prayers viz that the Applicants be granted leave to appeal out of time and that the costs of this application be in the cause.
2. The application is premised on the grounds set out therein and is supported by affidavit of **Davis Makau Nduu** on his own behalf and on the behalf of the other Applicants sworn on 9<sup>th</sup> March 2016 and a further affidavit filed in court on 26<sup>th</sup> May 2016.
3. The Applicants' case is that they had appealed against the judgment of **Principal Magistrate Hon. J. Karanja** who had awarded the Respondent a sum of Kshs.700,000/=. The Appellants and the Respondent are all residents of a place called **Matiliku in Makueni County** and are also members of the same **Co-operative Society** which has a dispute over a plot in dispute at the **Co-operative Tribunal Civil Suit No. 214 of 2006** which indeed is the origin of the dispute. The Respondent is aged 90 years and an old man but worse still is that the 1<sup>st</sup> Appellant is older who is more disturbed and stressed by the case. The Appellants state that at the time of the judgment at **Machakos**, the Advocate who was requested to hold brief with instructions to apply for leave to appeal gave the brief to another Advocate

who did not at the time of delivery of the judgment request or apply for appeal.

4. At the time of delivery, the judgment was not ready and the Advocate's firm collected it on 19<sup>th</sup> April 2016 and had to discuss with the clients more substantially and sought their opinion thereof.

5. It is also alleged that the Appellants' Advocates had made serious efforts to get the judgment and to have the file mentioned before the Judge for directions on this application in which case the Advocates for the Appellants send letters to the firm of **Makundi & Co. Advocates** which letters never found their way into the court file and the evidence of this are annexures DMN/1 (a) and (b) and DMN/2 (a) and (b) which are letters and receipts for sending the said letters via courier services. It took the Appellants' Counsel more than three (3) months to realize that nothing became of those letters. However, immediately the Appellants' Advocates realized the blunder, they made an application as expeditiously as possible after consulting the clients who all along desired an appeal.

6. The application is opposed by the Respondent vide a replying affidavit sworn by himself on 18<sup>th</sup> May 2016 and a further affidavit sworn on 30<sup>th</sup> May 2016.

7. The Respondent's case is that the application is an abuse of the process of this court and that there is no Memorandum of Appeal to show whether or not the appeal has chances of success.

8. The Respondent's case is that on 9<sup>th</sup> July, 2013 a judgment was delivered in Respondent's favour in the **Civil Suit No. 58 of 2009 at Makueni Principle Magistrate's Court**, and the Appellants appealed against that judgment. The appeal by the Appellants was dismissed on 30<sup>th</sup> November 2015 for lack of merits. The Appellants did not give a reasonable and sufficient reason and/or ground as to why they never sought leave to appeal within time.

9. It was over 5 months since the judgment on the appeal herein was delivered and the Appellants did not give a reasonable and sufficient reason and/or ground as to why they never sought leave to appeal within time.

10. With the leave of court parties filed submissions which I have considered. The only issue I raise for determination is whether or not the Applicants have given sufficient reasons for leave to be granted for appeal out of time.

11. The judgment to be appealed against was delivered on 30<sup>th</sup> November 2015. The Applicants failed to ask for leave to appeal when the judgment was read on that day on the grounds that the advocate who held the brief of the Applicants' Advocates did not apply for leave. The said judgment also was not ready and was only allegedly collected by the Applicants on 19<sup>th</sup> April 2016. I have seen annexures D.M.N 1 (a) and D.M.N 1 (b) which are letters dated 1<sup>st</sup> December 2015 and 11<sup>th</sup> December 2015 both asking the Deputy Registrar for a mention of the matter before the Judge and copy of the judgment. It is clear that having failed to apply for leave to appeal on the date of the judgment, the Appellants took immediate steps on the following day to ask for a mention of the matter before the Judge. The delivery of those letters was proved vide annexures D.M.N.2 (a) and D.M.N. 2 (b). The Appellants allege that they only managed to get a copy of the judgment on 19<sup>th</sup> April 2016, and so this application was filed on 11<sup>th</sup> May 2016. The issue is whether or not there was delay between 19<sup>th</sup> April 2016 and 11<sup>th</sup> May 2016 when the matter was filed. The Applicants have explained that they required time to seek instructions from their client. It is the view of this court that the reasons given for delay are justifiable.

12. A right to appeal is one given by the **Constitution**. At this stage it is not the duty of this court to delve into the merit of the intended appeal. Such a right to appeal can only be denied in a most self evident scenario in which the Applicant for leave is clearly indolent. That is not the position in this matter. This court is satisfied that the Applicants have demonstrated that they are entitled to leave to appeal out of time. In the upshot the application is allowed with costs in the cause. The said appeal shall be filed within twenty one (21) days of the date of this ruling.

Orders accordingly.

**DATED AND DELIVERED AT MACHAKOS THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2016.**

**E. OGOLA**

**JUDGE**

**In the presence of;**

No appearance for the parties

Court Assistant – Mr. Munyao