



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL APPEAL NO. 77 OF 2013  
COAST BUS SAFARIS.....1<sup>ST</sup> APPELLANT  
COASTLINE SAFARI.....2<sup>ND</sup> APPELLANT  
COAST BUS (MOMBASA) LIMITED.....3<sup>RD</sup> APPELLANT

V E R S U S

WHYILLIS OMUSINDE OMBOYO

*(Suing as the legal representative of the Estate of the late*

*HEZRON OCHIENG OMBOYO (Deceased).....RESPONDENT*

*(Being an appeal from the judgment of the Hon. E. Onzere – RM on 18<sup>th</sup> January 2013*

*in CMCC No. 484 of 2009 at Mombasa)*

**RULING**

1. Appellant filed this appeal on 8<sup>th</sup> July 2013 against the judgment of 18<sup>th</sup> January 2013 in **Mombasa CMCC No. 484 of 2009**. Simple calculation of those dates will reveal that that appeal was filed out of time and contrary to Section 79G of the Civil Procedure Act Cap 21.

2. Appellant has moved this Court by Notice of Motion dated 5<sup>th</sup> July 2013 seeking the time to file the appeal be enlarged.

3. That Section 79G provides-

**“79 G. 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 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.”**

4. Appellant by the affidavit of its Counsel state as follows in support of its application that Applicant

instructed its Advocate by email to appeal against the judgment. It was further deponed-

- **THAT subsequent to the receipt of the said email, the administrative procedure of the firm is that the same could only have been brought to the attention of the managing partner, Ms Zehrabanu Janmohamed for further instructions to an Advocate in the firm.**
- **THAT the said Ms. Janmohamed had travelled out of the country on official duties and as such, the same was inadvertently not dealt with in accordance with the urgency of the matter, hence the delay in filing the Memorandum of Appeal.**
- **THAT from the foregoing, the Memorandum of Appeal was to be filed on or before the 18<sup>th</sup> day of February 2013.**
- **THAT as soon as the said Ms. Janmohamed returned to the country and upon perusal of her work load, she instructed me to take up the conduct of the matter and lodge the appeal, which Memorandum of Appeal I drafted and attached to my annexure of the application for stay of execution pending appeal.**

5. The application is opposed. In short the Respondent through the replying affidavit sworn on 24<sup>th</sup> July 2014 stated that the appeal herein had been filed without leave. That additionally there was no compelling reason why the appeal was not filed in time and no evidence was attached to show Zahrabanu Janmohamed had travelled.

6. I have considered the parties submissions and I am of the view that Respondent has wrongly referred to Order 50 Rule 5 as the Rule that would guide this Court on extension of time. The power to extend time is in Section 79G. See the proviso of that Section.

7. Is there sufficient explanation of the delay? I find on prima facie basis there is sufficient explanation. It matters not that Appellant has a pending application in the lower Court for stay pending appeal.

8. In my view the Appellants' appeal is not defective for having been filed out of time. This was the holding of the case **GERALD M'LIMBINE –Vs- JOSEPH KANGANGI [2009]eKLR** where it was held-

**“My understanding of the proviso to Section 79G is that an applicant seeking ‘an appeal to be admitted out to time’ must in effect file such an appeal and at the same time seek the Court’s leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the Court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the Court’s process ....”**

9. The Appellant has shown sufficient reason for this Court to grant orders sought. The Managing Partner of the firm of Advocates that represent it was out of the country. Appellant has sufficiently met the Civil burden of proof in that regard.

10. The Court grants the following orders-

**a. The Court grants extension of the time to file an appeal and to that end Appellant’s appeal filed herein on 8<sup>th</sup> July 2013 is admitted out of time.**

**b. Respondent in any case is awarded costs of Notice of Motion dated 5<sup>th</sup> July 2013.**

**DATED and DELIVERED at MOMBASA this 5<sup>TH</sup> day of MARCH, 2015.**

**MARY KASANGO**

**JUDGE**