



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISC. CIVIL APPL. NO. 196 OF 2014**

**RAPID KATE SERVICES LTD ..... APPLICANT**

**V E R S U S**

**EVANS ONDARI MUGANGASIA .....RESPONDENT**

**RULING**

1. **RAPID KATE SERVICES LTD**, the Applicant has filed the Notice of Motion dated 9<sup>th</sup> June 2014 seeking two prayers-
  - **THAT this Honourable Court do hereby make an order that the Applicant be granted leave to appeal out of time against the whole judgment and decree delivered on the 4<sup>th</sup> December 2013.**
  - **THAT there be a stay of execution against judgment entered in Mombasa SRMCC No. 3683 of 2004 pending hearing and determination of this application interparties.**
2. I draw special attention to the second prayer. In that prayer Applicant seeks stay “**pending determination of the application inter partes.**” In other words Applicant seeks stay until, this Ruling is delivered. It does not seek stay beyond that period.
3. The ground upon which Applicant seeks stay is that the judgment in the lower Court case was delivered in the absence of the parties on 4<sup>th</sup> December 2013. That the Advocate for the Respondent, Evans Onyango Mugangasia, informed Applicant’s Advocate, of that judgment by letter dated 4<sup>th</sup> December 2013 but received on 25<sup>th</sup> April 2014. That is the reason Applicant gives as the ground for leave to file appeal out of time.
4. The application is opposed by Respondent on the ground that the Applicant fails to give explanation for the delay in filing the appeal. Respondent relied on the case **MOSES ODERO OWUOR –Vs- ANDRONICO OTIENO ANINDO CIVIL APPL. NO. 30 OF 2013** thus-

“.... That delay is about 3<sup>1</sup>/<sub>2</sub> months. It has not been explained at all by the Applicants. As Shah J.A (as he then was) said in Mwangi –Vs- Mwangi (supra):- ‘the burden lies on the party seeking favourable exercise of the Court’s discretion to place some material before Court upon which such discretion is exercised.’ The Applicants herein have not placed sufficient material before me which I should exercise my unfettered discretion in their favour ....”

5. The Respondent is correct in his submissions. Applicant has obligation to explain the delay from at least 25<sup>th</sup> April 2014 to 9<sup>th</sup> June 2014 when it filed its Notice of Motion. The discretion to admit an appeal out of time is found in Section 79 of the Civil Procedure Act Cap 21 which says-

**“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.”**

The proviso of that Section makes it clear that the burden is on the Applicant to satisfy the Court that the appeal ought to be admitted out of time. Applicant did not do so. The Respondent is correct to have submitted that Applicant failure to give explanation meant that the Court could not exercise its discretion. It is true, discretion is not exercised in vacuum.

6. I decline to determine whether the Applicant’s proposed appeal has merit because I do not have the lower Court’s proceedings or pleadings.

7. In the end the Notice of Motion dated 9<sup>th</sup> June 2014 fails and is dismissed with costs to the Respondent.

**DATED and DELIVERED at MOMBASA this 3<sup>RD</sup> day of MARCH, 2015.**

**MARY KASANGO**

**JUDGE**