



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL CASE NO 75 OF 2008**

KIHARA MUTTUU.....PLAINTIFF

VERSUS

M'MUGAMBI M'MBOGORI .....DEFENDANT

**RULING**

This application is dated 22nd day of April, 2015 and seeks orders that:-

1. ***This application be certified urgent and be heard ex-parte in the first instance.***
2. ***The time for filing an appeal against the judgment and Orders issued by the Court be extended.***
3. ***The Judgment delivered on 1st July, 2014 and the Orders be set aside pending the outcome of the intended appeal.***
4. ***The costs of this application be in the cause; and***
5. ***Such other orders as the Court shall deem fit to grant in addition.***

The application is supported by the affidavit of MWORIA M.MBOGORI, the widow and personal representative of M' MUGAMBI M' MBOGORI, deceased, the 1st defendant.

The application is buttressed by the following grounds:-

1. ***THAT the Registrar delayed in preparing and releasing typed copies of proceedings, Judgment and the Order.***
2. ***THAT the 1st Defendant applied for certified copies of the proceedings, Judgment and Order and filed the Notice of Appeal within the prescribed time.***
3. ***THAT the time prescribed for filing an appeal against the said Judgment and Order has now lapsed as a result of the reasons in paragraph 1 above.***
4. ***THAT if the Defendant is not allowed to file an appeal outside the stipulated time it will occasion an injustice; and***
5. ***THAT there will be no injustice occasioned on the Plaintiff/ prospective Respondent if the***

***above prayers are granted.***

The defendant's Advocate has, *inter alia*, submitted that he has explained to the satisfaction of the Court the cause of the delay in the filing of the appeal against Judgement in this case. He proffers that there was delay in the preparation and releasing of copies of the typed proceedings. He also says that he has filed a Certificate of delay. He also opines that Article 159(d) of the Constitution requires Courts to serve justice without undue regard to procedural technicalities, and also proffers that Sections 1A, 1B and 3A of the Civil Procedure Act give effect to Article 159 (1) d of the Constitution.

He cites the case of Githera Versus Kimungu (1976-1985) EA 101 for his assertion that procedural technicalities can not be promoted to the detriment of substantive justice. He has also tendered the case of Kenya Commercial Bank Limited Versus Kenya Planters Co-operative Union, 2010 eKLR where the Court allowed the filing of an application which was otherwise time barred. He has submitted that the case of M'Arimba Versus Joseph Kajuki (HCCA No. 31/99, Meru) supports his case as he is seeking to have an *ex parte* Judgment set aside.

The defendant has also presented the case of Martin Mutisya Kii & Another Versus Benson Mwenda Kasyali, Machakos, High Court, Misc. Application No. 107 of 2013 to support his assertion that an appeal can be filed by an Advocate without filing an application to come on record. I, however, note that this authority concerns a situation where an appeal has already been filed. To further support this assertion, the defendant has cited the cases of Magereza Savings and Credit Co-operative Society Limited Versus Samuel Gachini Wahiu and 881 others (2014) eKLR and Florence Hare Mkaha Versus Pwani Takawal Mini Coach and Mohamed Athman (HCC No. 85 of 2010, Mombasa).

The defendant has further submitted that this application can not be dismissed on the sole ground that he did not file his Submissions on time. Regarding extension of time the defendant has proffered the case of Kenya Commercial Bank Ltd Versus Kenya Planters Co-operative Union (Supra) which quoted the case of Leo Sila Mutiso Versus Rose (Nairobi C.A No. 255 of 1997 as stating as follows:-

***"It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of***

***the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted".***

The defendant returns to the issue of delay. He submits that the delay was occasioned by the registrar's delay to avail the proceedings coupled with the administrative tasks involved in the change of Advocates by the applicant. The plaintiff cites the case of Philip Chemwolo & Another Versus Augustine Kubende (1982-88) KAR 103 where the Judge stated as follows:-

***"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 purposes of deciding the rights of the parties and not for the purpose of imposing discipline".***

The defendant says that his intended appeal has high chances of succeeding. He prays that he be given a chance to exercise his Constitutional right of Appeal.

The plaintiff has objected to the application and, *inter alia*, submitted that the defendants should have applied to have the order striking out the defence set aside and then appeal from the ruling resulting therefrom. The Plaintiff has tendered the case of **Kirema M' Arimba Versus Joseph Kanjuki (H.C.C.A 31 of 1999)** as an authority for this assertion. The plaintiff says that Hon. Justice J.A. Makau, Judge, in the case of Kirema M'Arimba (Supra at Paragraph 9 of page 5 of his judgment opined as follows:-

**“It should be noted that after a party has had his application to set aside ex- parte judgment is heard and determined, that is when a party has right of appeal; otherwise before then a party who is aggrieved by an exparte judgment has no right of Appeal”.**

The plaintiff also proffers that the Learned Judge buttressed his ruling by quoting Order 43 Rule (1) which provides:-

**1. (1) An appeal shall lie as of right from the following orders and rules under**

**the provisions of section 75 (1) h of the Act:- (h) Order 12, rule 7 (setting aside Judgment or dismissal for non attendance”.**

The plaintiff has submitted that the order dated 22/7/2007 is a form of *ex-parte* judgment which must be challenged and an appeal would then accrue from the ruling. He concludes this assertion by saying that no appeal can be filed from the judgment dated 1/7/2014.

The plaintiff further submits that in accordance with the provisions of Order 9 (Rule 9) of the Civil Procedure Rules, a change of Advocate requires to be sanctioned by the Court upon notice to all parties or by a Consent between the outgoing and the proposed incoming Advocate. The plaintiff opines that Order 9 rule 9 is in mandatory terms and that the current advocate for the defendants had a duty to comply with its requirements. The Plaintiff argues that there is no application worthy of consideration as the Notice of Motion dated 22/4/2015 is signed by an unauthorized person and is therefore a nullity *ab initio*.

The Plaintiff has trashed the filing of a Certificate of Delay as being unnecessary as Under Rule 82(1) of the Court of Appeal Rules, an appeal is filable within 60 days from lodgement of a notice of appeal or from 60 days from the date of the Certificate of Delay. It is argued that this application which was filed on 22/4/2015 was absolutely unnecessary as the time for filing of the appeal had not expired.

The plaintiff further, *inter alia*, submits that under Rule 4 of the Court of Appeal Rules an application of this nature can only be entertained by the Court of Appeal and not the High Court. Whereas I agree with the defendants that they may be excused from the provisions of Order 9 Rule 9 of the Civil procedure Rules, when there is already an appeal, in this case no appeal has been filed in the Court of Appeal.

I do not wish to delve into the issue of the intended appeal having high chances of success. This is because, in my view, the applicant has not impeached the applicability of Order 43 Rule 1 of the Civil Procedure Rules. Before seeking to appeal out of time, the applicant should have applied to set aside the order striking out the defence and then should have appealed from the ruling arising therefrom. As the matter stands now, there is absolutely no defence in this suit. The defence was struck out by the Hon. Lady Justice Angawa, Judge, as she then was, way back on 22/02/2007, over eight and a half years ago. I also note that the allocation of the suitland to the original defendants was quashed in Judicial Review Application No. 555 of 1996, at Nairobi, which decision was not appealed against.

I do find that the judgment of this Court dated 01/07/2014 was a form of *exparte* judgment. The defendants did not take part in the proceedings. Again there was no defence. There was no right of appeal as envisaged by Order 43 of the Civil Procedure Rules.

I have carefully considered the respective Submissions tendered by the parties. I have also carefully examined the authorities the parties have proffered in support of their submissions. I do rule that express provisions of the law such as the different provisions of the Civil Procedure Rules, 2010, are legal requirements and not mere procedural technicalities. Finding otherwise would spawn veritable confusion in the judicial handling of procedural matters.

In the circumstances, I find that this application is not meritorious. It is dismissed. Costs are awarded to the plaintiff.

It is so ordered.

*Delivered in open Court at Meru this 5th day of November, 2015 in the presence of:-*

Cc. Danie/Lilian

B. G. Kariuki for Plaintiff

**P. M. NJOROGE**

**JUDGE**