

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1319 OF 2016

BAPA INVESTMENT LIMITED.....PLAINTIFF

VERSUS

NAIROBI CRANKSHAFT CENTRE LIMITED....DEFENDANT

RULING

Through the application dated 28/03/2019, the Defendant seeks leave to have M/s Atuti & Associates Advocates come on record on its behalf and for the enlargement of the time within which it was to file an appeal. The application was based on ground that the Defendant is dissatisfied with the judgement delivered in this suit on 11/10/2018 in its absence or of its advocate.

The application was supported by the affidavit of the Defendant's director, Gurjit Singh Nandhra sworn on 28/03/2019. He deponed that the matter was being handled by the firm of Gichuki Kingara & Co. Advocates who did not inform the Defendant of the outcome of the matter. He deponed that after not being updated on the status of the matter, it instructed its current advocates who learnt that judgement had been entered in the Plaintiff's favour. The Defendant wishes to appeal but can only do so if time to file an appeal is enlarged, the time within which it was to file an appeal having elapsed. He deponed that the delay was an omission on the part of their counsel which should not be visited on the Defendant.

The Defendant's application was opposed by the Plaintiff's replying affidavit sworn on 24/09/2019 by Indravadan Patel, a director of the Plaintiff. He deponed that prior to the delivery of judgement in this matter on 11/10/2018, the Defendant's advocate was in court on 12/07/2018 when the matter came up to confirm whether parties had filed their submissions and that the Defendant deliberately failed to file its submissions. The court gave the judgement date, hence the Defendant and its lawyers were aware of the judgement date. He also deponed that pursuant to the terms of the judgement and decree, the Plaintiff sent the Defendant's then counsel a cheque in the name of the Defendant, for the sum of Kshs. 169,050/= being its share of the outstanding rates and other outgoings charged on the suit property, and that its advocates acknowledged receipt of the cheque which has never been returned. He annexed a copy of the cheque and the forwarding letter. He further averred that the Defendant did not tender any evidence to show its efforts to follow up on the progress of the case. He also deponed that the Plaintiff did not in the least attach a draft memorandum of appeal to the application as they are well aware that it is not arguable. He urged the court to dismiss the application.

The court has considered the application, the response and the submissions made by parties. The Defendant's prayer for change of advocates under Order 9 is granted. The court has discretion to enlarge time within which an appeal can be filed. However, it ought to take into account several factors as observed by Odek, J.J.A in **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**, including the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance.

Judgment in this case was delivered on 11/10/2018 in the presence of counsel for the Plaintiff and in the absence of the Defendant's advocate. This application was filed on 28/03/2019, five months after judgment was entered. There is evidence that the Defendant's previous advocate received the cheque dated 1/11/2018 under cover of the letter dated 05/11/2018. There is no evidence that that cheque was forwarded to the Defendant or that it was banked by the Defendant. This goes to show that communication between the Defendant and its then counsel had broken down. The court is persuaded that the Defendant's advocate did not update it on the status of the suit to enable it lodge an appeal on time. The Plaintiff did not demonstrate that it would suffer prejudice if the orders sought are granted.

The Defendant is granted leave to exercise its right of appeal out of time. The application dated 28/03/2019 is allowed. The Defendant will file the appeal within 14 days. Costs shall be in the cause.

Dated and delivered at Nairobi this 18th day of November 2019

K.BOR

JUDGE

In the presence of: -

Ms. P. Wambugu for the Plaintiff

Mr. J. Thiga holding brief for Mr. Nyangoro for the Defendant

Mr. V. Owuor- Court Assistant