



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**MISC. APPLICATION NO. 5 OF 2013**

**TASMAC LIMITED.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**ROBERTO MARCI.....1<sup>ST</sup> DEFENDANT/ APPLICANT**

**REUGGERO SCIOMMERI.....2<sup>ND</sup> DEFENDANT/ APPLICANT**

**SHALIN CHITRANJAN GOR.....3<sup>RD</sup> DEFENDANT/ APPLICANT**

**NASSAU LIMITED.....INTENDED 4<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. On 11<sup>th</sup> April 2014, I dismissed the Defendants’/Applicants’ Application for security for costs. The Defendant/Applicants have now filed an Application dated 16<sup>th</sup> May, 2014 seeking for the following orders;-

**(a) That the intended Appellants/Applicants be granted leave to appeal out of time against the Ruling of Justice O. Angote at Malindi High Court delivered on 11th April 2014.**

**(b) That the Applicants herein be granted leave to file the Notice of Appeal and Memorandum of Appeal annexed herein out of time.**

**c. That there be a stay of proceedings pending the hearing and determination of this Application and the Intended Appeal.**

**(d) That the costs of this application be in the cause.**

2. The Application is premised on the grounds that the Intended Appellants/Applicants have an arguable appeal with good chances of success and justice will only be served if the orders prayed herein are granted, that the Applicants have not been supplied with typed proceedings and that the Applicants shall apply for a certificate of delay from the registry at the filing of the appeal.
3. According to the Defendants/Applicants, the order of this Court was manifestly unfair and that the period for filing an Appeal against the said Ruling under the Court of Appeal Rules has since lapsed and the same cannot be filed without the leave of this court.
4. The Defendants/Applicants have annexed on their Application the draft Memorandum of Appeal

- and the Notice of Appeal that was received in the registry on 19<sup>th</sup> May, 2014.
5. The Plaintiff/Respondent did not file a response to the said Application.
  6. The Defendant`s/Applicant`s counsel appeared before me on 27<sup>th</sup> May, 2014 and submitted that Section 7 of the Appellate Jurisdiction Act allows the High Court to extend time to file an appeal out of time and that delay in filing the Notice of Appeal has been explained.
  7. I have agonized on the issue as to whether this court has jurisdiction to grant a party leave to file an appeal out of time against its decision. The Defendant`s Counsel did not offer to this Court any authorities to support that position other than quoting the provisions of section 7 of the Appellate Jurisdiction Act, Cap 9, section 95 and section 3A of the Civil Procedure Act.
  8. Section 95 of the Civil Procedure Act allows this court to enlarge time where time is fixed or granted by the Court for the doing of any act prescribed or allowed by the Act.
  9. The requirement that a Notice of Appeal should be filed against the order or decree of this Court within 14 days from the date of the decree or order is not prescribed by the Court or the Civil Procedure Act or Rules. That requirement is prescribed by the provisions of Rule 75(2) of the Court of Appeal Rules, 2010.
  10. The Notice of Appeal is therefore lodged pursuant to the provisions of the Court of Appeals Rules and not the Civil Procedure Act. Section 95 of the Civil Procedure Act is therefore not applicable in this case.
  11. This court, while exercising its original and appellate jurisdiction is governed by the Civil Procedure Act and the Civil Procedure Rules, and not the Court of Appeals Rules. The requirement that a Notice of Appeal should be filed within 14 days is provided for in the court of Appeals Rules and not the Civil Procedure Act or the Civil Procedure Rules.
  12. It would appear from the reading of section 7 of the Appellant Jurisdiction Act that the Act has donated to the High Court (and this Court) the jurisdiction to extend time in certain situations. The section provides as follows;-

**“The High Court may extend the time of giving notice of intention to appeal from a judgement of the High Court or for making an application for leave to appeal or for a Certificate that the case is fit for appeal, notwithstanding that the period for giving such notice or making such appeal may have already expired.”**

13. In my view, Section 7 of the Appellate Jurisdiction Act is only applicable in circumstances where a party requires, in civil cases, the leave of the High Court to appeal, or, in criminal cases, a certificate that the case is fit for appeal. That section, in my view, gives the High Court the discretion to allow an application for leave to file an appeal or to give a certificate that a case is fit for appeal notwithstanding the fact that the period for filing an appeal has lapsed. The Applicant would then have to move the Court of Appeal to allow him to file his Notice of Appeal out of time,
14. Order 43 of the Civil Procedure Rules have provided a list of the Orders and Rules in which appeals shall lie as of right. If the court makes an order pursuant to the “Orders” and “Rules” listed under Order 43 Rule (1) (1), then a party has the right to file a Notice of Appeal without the leave of the court that made the order. However, Order 43(1) (2) of the Civil Procedure Rules provides that the leave of the Court is required before an appeal can be lodged from any other “Order” or “Rule” other than those stated under Order 43 Rule (1) (1).
15. Order 43 Rule (1) (3) of the Civil Procedure Rules provides that an application for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from, either orally or within 14 days from the date of such order. In view of the provisions of section 7 of the Appellate Jurisdiction Act, such an Application may be allowed notwithstanding that the period within which to file an appeal has lapsed.
16. The Application that this court dismissed on 11<sup>th</sup> April, 2014 was filed pursuant to the provisions of Order 26 rules 1 and 5 (2) (security for costs). An appeal under that order lies as a matter of right. One does not require the leave of the Court.
17. Even in situations where the leave of the trial court is required for one to appeal, I hold the view that if the Notice of Appeal is not filed within 14 days from the date of the order or the decree, it is only the Court of Appeal which can give a party leave to file it out of time and not the trial court.

18. I say so because a “court” in the Rules has been defined to mean the “Court of Appeal” and not any other Court. Anything done pursuant to the Rules, including the filing of the Notice of Appeal and the extension of time for filing such a Notice of Appeal can only be done by the Court of Appeal.
19. Where a Notice of Appeal is not lodged with the Registrar of the Superior Court within 14 days of the date of the decision appealed from, the aggrieved party may file an application with the Court of Appeal for the extension of time.
20. Rule 4 of the Court of Appeal Rules gives the Court of Appeal the exclusive jurisdiction to extend time limited by the Rules for the doing of any act required by the Rules, including filing a Notice of Appeal out of time. The power to enlarge time for the doing of any act limited by the Rules has not been donated to this Court either by the Appellate Jurisdiction Act, the Court of Appeal Rules or the Civil Procedure Act.
21. This is the same position that Kimaru J took in the case of **Simon Towett Martim Vs Jotham Muiruri Kibaru, Nakuru Misc. Civil Application No. 172 of 2004** where he held as follows:

**“Rule 41 (of the Court of Appeal Rules) was amended to provide that the Court of Appeal may entertain an application for extension of time notwithstanding that an application had not been made in the first instance to the High Court. The plain reading of the above quoted sections of the Appellate Jurisdiction Act and the Rules made thereunder clearly show that the provisions of section 7 of the Appellate Jurisdiction Act has been rendered practically useless and legally.”**

22. I agree with the position taken by the Judge save to say that the section is applicable in so as a party is applying for leave to file an appeal, where leave is required and the time for filing the notice of appeal has lapsed. Such leave should not be denied by the superior court just because the applicant has not filed an appeal within time.
23. For the reasons I have given above, I find and hold that this Court does not have Jurisdiction to extend the time within which the Defendants/Applicants should file their Notice of Appeal.
24. Having found and held that I do not have jurisdiction to extend the time within which the Applicants can file the Notice of Appeal, the prayer seeking for a stay of these proceedings cannot be granted. A stay of proceedings can only be granted once a party has filed a valid Notice of Appeal and satisfied the court that in the interests of justice, the proceedings must be stayed pending the hearing of the appeal. That has not happened in this case.
25. In the circumstances, the Application dated 16<sup>th</sup> May, 2014 is dismissed with no order as to costs.

Dated and delivered in Malindi this 20<sup>th</sup> day of June, 2014.

**O. A. Angote**

**Judge**