



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 183 OF 2019

BETWEEN

PYRAMID HAULIERS LIMITED.....APPLICANT

AND

JAMES OMINGO NYAANGA.....1<sup>ST</sup> RESPONDENT

VINCENT KINYUA.....2<sup>ND</sup> RESPONDENT

GEORGE OLANDO.....3<sup>RD</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

*(An application for extension of time within which to file a Notice of Appeal*

*and a Record of Appeal out of time against the Judgment of the High*

*Court at Kajiado (R. Nyakundi, J) dated 30<sup>th</sup> January, 2019 in H.C.C.A No. 2 of 2016)*

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RULING (IN CHAMBERS)

The applicant seeks, in this application brought under **Rule 4** of this Court's Rules, leave to file and serve both the notice and record of appeal out of time.

The brief background is that, following a complaint by the applicant, the 1<sup>st</sup> respondent was arrested and prosecuted for the offence of theft of motor vehicle parts in **Criminal Case No. 36 of 2005** filed at the Senior Resident Magistrates' Court at Kajiado. The trial court in its ruling found that the 1<sup>st</sup> respondent had no case to answer and acquitted him holding that the prosecution had failed to establish a *prima facie* case. Consequently, and on the basis of this outcome, the 1<sup>st</sup> respondent filed **Civil Suit No. 11 of 2007** in the Senior Resident Magistrate's Court at Kajiado against the applicant, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents seeking damages for malicious prosecution. The 1<sup>st</sup> respondent's action succeeded in the trial court and judgment entered against the applicant, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's jointly and severally on liability and was awarded Kshs. 500,000 in damages. Aggrieved by this decision, the appellant proffered its appeal to the High Court, which found no merit in it and also dismissed it. Once again, the applicant is aggrieved and wishes to challenge that decision in a second appeal to this Court. The notice and record of appeal were however not filed within the prescribed time, hence the instant application.

Mr. Peter Njenga, the manager of the applicant, submitted that the period of delay was 3 months and 3 days and explained that between January and May 2019, the matter was being handled by his advocate Mr. Chigiti; that it was the applicant's belief that all along the advocate had filed the appeal; that later he learnt that the appeal had in fact not been filed when the auctioneers came to proclaim the applicant's goods; and that the following week he applied for an order of stay of execution before the High Court at Kajiado which was denied.

In this Court, the applicant has attributed the delay to his Advocate's mistake. He has urged me to consider that in the absence of any orders

of stay, execution will go ahead and the intended appeal will be rendered nugatory, yet, in his view, the intended appeal will raise weighty issues with high chances of success; that the 1<sup>st</sup> respondent acquittal was because of the failure of the investigating officer to testify which omission could not be attributed to the applicant; and that he should not be punished for merely and lawfully reporting a crime committed against its properties. Lastly, it was contended that no prejudice would be occasioned to the 1<sup>st</sup> respondent as the decretal sum of Kshs. 500,000/- is held in a joint account of both counsel for the parties.

Mr. Musyoki, learned counsel for the 1<sup>st</sup> respondent opposed the motion stating that the delay was inordinate; that the security of Kshs. 500,000 was on 22<sup>nd</sup> February, 2019 released by the bank under the instructions of Mr. Chigiti; that in releasing the funds the bank could only have acted upon instructions of the parties and not on its own motion; that for 3 months and 3 days, parties have exchanged correspondence and that Mr. Chigiti acted within the instructions of the applicant whilst releasing the funds.

On the chances of success, it was contended that the main ground of appeal is that certain matters were not canvassed; that issues of evidence cannot be before this Court; that the matters to be introduced in the intended appeal ought to have been introduced in **Criminal Case No. 36 of 2005** not even in **Civil Case No. 11 of 2007**. Further, it was submitted, on the strength of **Donald Raballa V. Judicial Service Commission** (2018) eKLR, that the advocate in an affidavit must support his mistake. Lastly, it was submitted that the applicant has not been diligent as similar trend was evident even in the High Court.

In a brief rejoinder, Mr. Njenga stated that it is the applicant's position that it is not clear how the funds were released; that Mr. Chigiti denied knowledge of the same.

There was no appearance by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who were represented by the office of the Attorney General despite being served with the hearing notice on 26<sup>th</sup> September, 2019.

It is settled that whether or not to extend time for filing a notice of appeal or lodging the appeal itself is discretionary and will depend on the length of the delay; the reason for the delay; the degree of prejudice to the respondents if the application is granted; and (possibly) the chances of the appeal succeeding if the application is granted. See **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** Civil Appeal No. 255 of 1997.

It is conceded that the length of delay is 3 months and 3 days for which the applicant blames his erstwhile advocate Mr. Chigiti. It does not attribute the reason for delay to itself at all. However, Mr. Chigiti did not represent the applicant before this Court in the instant motion. Although it has commonly been stated that the mistake of counsel should not be visited upon an innocent litigant, this statement is not a blanket protection to clients who have failed to comply with procedural requirements; that clients will not always be protected merely by blaming their counsel; that a client cannot continue to hide behind the failure of their advocates to perform certain required actions on their part; that the mere citing of inadvertence or mistake on the part of the advocate is not sufficient excuse for the failure; that, in appropriate situations, the litigants must bear the brunt for mistakes made by their advocates; and that the clients would be at liberty to pursue their advocates individually for such mistakes. See **Gerald Mwithia V. Meru College of Technology & Another** (2018) eKLR. See also **Kenya Industrial Estates Limited V. Samuel Sand & Another** (2008) eKLR; and **Lingam Enterprises Limited & Others vs Radio Africa Limited**, Civil Application No. Nai. 175 of 2014.

Mr. Njenga deposed in his affidavit that the applicant had given its advocate instructions to file the appeal which instructions were not executed. Mr. Chigiti has not filed an affidavit explaining the circumstances that prevented him from filing both the notice and record of appeal. This Court explained as follows in the case of **Donald O. Raballa V. Judicial Service Commission & another** (2018) eKLR what should happen when there is no explanation from counsel for his failure.

**“In the absence of any affidavit from the applicant's erstwhile advocates to explain their failure to file the appeal for a lengthy period, it can only be surmised that they were guilty of inaction. The learned Judge was vilified for questioning why the applicant himself, who, having been a Resident Magistrate and was knowledgeable in court procedures, did not make personal follow-up to mitigate his advocates' inaction. But this was a relevant factor to consider as stated in Habo Agencies Limited vs Wilfred Odhiambo Musingo (2015) eKLR, thus:**

**“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”** (Emphasis supplied)

In view of the foregoing, if the former advocate was indeed guilty of inaction, it is clear that the applicant also had a responsibility to show interest and follow up its case.

A perusal of the supporting affidavit deposed by Mr. Peter Njenga reveals that besides faulting the learned Judge's decision and blaming his former advocate for his inaction of failing to file the appeal, he does not demonstrate the steps taken by the applicant in pursuing the appeal. Additionally, on record, there is no request for proceedings and no certificate of delay to prove that the applicant has been diligent in following up on the typing of proceedings. The reasons for delay are not plausible and as such, they do not form the basis upon which the court can exercise its discretion in favour of the applicant.

Though the circumstances under which Kshs. 500,000/- was disbursed are disputed and unclear, the fact remains that the money was indeed disbursed to the 1<sup>st</sup> respondent. If this application were to be granted, it would be prejudicial to the 1<sup>st</sup> respondent.

For all the foregoing reasons, this application lacks merit and is accordingly dismissed with costs.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of February, 2020.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**