



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 241 OF 2019 (UR 220/2019)**

**BETWEEN**

**GLORY AUTO SERVICES LIMITED.....APPLICANT**

**AND**

**FORMAX INSURANCE BROKERS LIMITED.....RESPONDENT**

***(Being an application for extension of time to file and serve a notice of appeal and record of appeal against the Judgment of the High Court of Kenya at Nairobi (J. K. Sergon, J.) delivered on 2nd May, 2019***

***in***

***H.C.C.A. No. 91 of 2017)***

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**RULING**

[1] By a notice of motion dated and filed on 26th July, 2019 the applicant herein, Glory Auto Services Limited seeks to have time extended to enable it lodge a notice of appeal and record of appeal against the judgment of the High Court (**Sergon, J**) delivered on 2nd May, 2019 in **Nairobi HCCA No. 91 of 2017**. The applicant also seeks to have a notice of appeal that it had lodged on 22nd July, 2019 deemed to have been filed within time.

[2] The application is anchored on grounds stated on the motion and a supporting affidavit sworn by **Johnson Matara**, who is the applicant's administration manager. In short the applicant contends that they were not aware of the delivery of the judgment and only came to know of it on 16th July, 2019, when they were served with a decree by the respondent's advocates, by which time, the time within which it should have filed a notice of appeal had elapsed. The applicant maintains that the failure to file the notice of appeal in time was not intentional. It maintains that it has an arguable appeal that has high chances of success. A copy of the draft memorandum of appeal has been duly annexed.

[3] The application is opposed through a replying affidavit sworn by **Titus Nzuki Wambua (Wambua)**, who is a technical manager of the respondent's company, Formax Insurance Brokers Limited. Wambua swears that the learned Judge of the High Court directed in the presence of the parties advocates, that judgment would be delivered on 29th March, 2019 and that on 28th March, 2019 the High Court at Milimani released a cause list for 29th March, 2019 in which they gave notice that judgments which were scheduled before Sergon J. on 29th March, 2019 would be deferred to 30th April, 2019. On 30th April, 2019, the High Court released a cause list for 2nd May, 2019 wherein it was indicated that the judgment in regard to the parties' case would be delivered on 2nd May, 2019 before Sergon, J. The judgment was accordingly delivered on 2nd May, 2019. Wambua deponed that the applicant had neither applied for certified copies of the proceedings and judgment nor had they served the respondent with any notice of appeal by the time the current application was served on the respondent. The respondent further argued that the intended appeal has very little chance of success.

[4] During the hearing of the motion, the applicant was represented by **Mr. Ondima** while the respondent was represented by **Ms. Gichumbi**.

Each urged the Court to find in favour of its client.

[5] I have considered the motion before me. Under Rule 4 of the Court Rules, I have discretion to grant extension of time to enable the applicant file the appeal. However, that discretion must be exercised judicially and the applicant must therefore satisfy the Court that he is deserving of the exercise of such discretion.

[6] The applicant has explained the reason why it did not file the notice of appeal in time. The explanation is that the applicant was not aware of the delivery of the judgment. The replying affidavit sworn by Wambua gives a good explanation as to why the applicant was not aware of the delivery of the judgment. Although the court had initially given the dates to the parties in court, this date was changed twice and communication was only made to the parties through the cause list.

There is no indication that any attempt was made to serve the parties with notice of date for delivery of judgment.

[7] In the circumstances, the explanation given is plausible as it was possible for the applicant not to be aware of the cause list. It is evident that the applicant took action immediately it was made aware of the judgment by filing the notice of appeal on 22nd July, 2019 and the current application on 26th July, 2019.

[8] The applicant has filed a draft memorandum of appeal which appears to be arguable. In the circumstances, it is only fair and just that I exercise my discretion in the applicant's favour so as to give him an opportunity of being heard on merit. Accordingly, I allow the application and extend time for the applicant to file its appeal and deem the notice of appeal lodged on 22nd July, 2019 filed within time. The applicant shall file a record of appeal within 30 days from today. The applicant shall pay costs of this application to the respondent.

**Dated and delivered at Nairobi this 19th day of June, 2020.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**