



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: GITHINJI, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO. 56 OF 2016**

**BETWEEN**

**PELEZIA BAKARI SALIM ..... APPLICANT**

**AND**

**SOMOIRE KEEN .....1<sup>ST</sup> RESPONDENT**

**J. KEEN INVESTMENTS LTD .....2<sup>ND</sup> RESPONDENT**

*(An Application for enlargement of time for filing and service of the Notice of Appeal dated 1<sup>st</sup> August 2016 being Notice of an intended appeal from the decision of the High Court of Kenya at Busia, (Tuiyot, J.) dated 14<sup>th</sup> July, 2016*

**in**

**HCCA NO. 6 OF 2016)**

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**RULING**

[1] This is an application under **Rule 4** of the Court of Appeal Rules seeking two orders firstly, that the time for lodging and serving the Notice of Appeal be enlarged and secondly, that the Notice of Appeal dated 1<sup>st</sup> August, 2016, be deemed duly lodged and served within time.

[2] The Applicant was the Plaintiff in **Busia Chief Magistrate's Civil Case No. 89 of 2013**. She claimed general and special damages for the multiple injuries she suffered as a result of a road traffic accident. The injuries included a traumatic amputation of right upper limb with complete loss of the shoulder joint. The suit was tried by a Resident Magistrate. At the hearing of the suit, liability was apportioned by consent at 80% against the Respondent and 20% against the Applicant. After the trial, the Resident Magistrate awarded a total of Shs. 11,485,336/= comprising of sum 9,360,000/= for loss of future earnings, Shs. 2,000,000/= as general damages and Shs.125, 336/= as special damages.

[3] The Respondents appealed to the High Court at Busia. The appeal was mainly based on two grounds - that the trial court lacked jurisdiction to hear the matter and that the award of damages was erroneous and excessive. The High Court made a finding that the monetary jurisdiction of the Resident Magistrate was limited to Shs.2,000,000/=, that the judgment was a nullity for want of jurisdiction and that the applicant

had not proved loss of earnings. As a consequence, the High Court set aside the award and in lieu thereof awarded the Applicant a total of Shs.2,000,000/=.

[4] The Applicant being aggrieved by the judgment lodged a Notice of Appeal at Busia High Court Registry on 2<sup>nd</sup> August, 2016, and the present application on 4<sup>th</sup> August, 2017.

[5] The application is supported by the grounds on the body of the application; the Applicant's supporting affidavit sworn on 3<sup>rd</sup> August, 2016, and by the supplementary affidavit sworn by **Bruce O. Odeny**, the Applicant's counsel. The application is opposed on the grounds contained in the replying affidavit of **Mitchell Menezes**, the Respondent's counsel.

[6] The time for lodging a Notice of Appeal is limited by **Rule 75(2)** of the Court of Appeal Rules to 14 days from the date of the decision. However, it is trite law that Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to extend time which discretion has to be exercised judicially. The factors to be considered before exercising discretion include delay, merits of the intended appeal or appeal and whether the extension of time will cause undue hardship to the Respondent (**see Wasike v. Swala [1984] KLR 591**). Those factors are not exhaustive and the Court is free to consider any relevant factor. (**Mohammed v. Mungambi & 2 Others, [2005] 1KLR 773**).

In addition, the Court in considering an application for extension of time should be guided by the relevant principles in the administration of justice such that overriding objective principle and the constitutional principle in **Article 159(2) (d)** that justice should be administered without undue regard to technicalities of procedure.

[7] I have considered the respective affidavits and oral submissions. In this case the Applicant lodged a Notice of Appeal on 2<sup>nd</sup> August, 2016 which was less than seven days outside the stipulated 14 days. An explanation for delay has been given that the judgment was read without notice and in the absence of the applicant's counsel. This fact is verified by the record of the proceeding annexed to the supplementary affidavit. The present application was also filed within less than seven days from the expiry of the stipulated 14 days. Thus, the Notice of Appeal and the application for extension of time were filed without unreasonable delay.

It is true that the Applicant has neither filed a draft memorandum of appeal nor specified the grounds of the intended appeal. However, it is apparent from the judgment of the High Court that the intended appeal would be based on the issues of jurisdiction and the appropriate quantum of damages.

The Appellant having sustained serious injuries; liability having been apportioned by consent coupled with the fact that the case was filed in the Chief Magistrates Court which had jurisdiction and having regard to the fact that the High Court had been asked to order a retrial, I find that the intended appeal is not frivolous.

The Respondents have not claimed that the extension of time would cause undue prejudice and I cannot see any.

[8] In the premises, I allow the application. The time for lodging and service of the Notice of Appeal is enlarged as prayed and the Notice of Appeal already lodged is deemed to have been lodged and served within time.

Although the Applicant has offered to pay the costs of this application, it is just in the circumstances of this case that the costs should abide the result of the intended appeal and I so order.

**Dated and Delivered at Kisumu this 28<sup>th</sup> day of September, 2017.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**