



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: SICHALE, (IN CHAMBERS) J.J.A)

CIVIL APPLICATION NO. NYR. 71 OF 2017 (UR 51/2017)

IN THE MATTER OF AN INTENDED APPEAL

EVERLYN ADHIAMBO KONGORO

LEAH AKUMU KONGORO AND

JOSEPH NAHASHON (suing as co-administrators of the estate of

GRACE LIMIMBA ONGONGE (DECEASED)..... APPLICANT

AND

TRANSEAST LIMITED1ST RESPONDENT

STEPHEN MBUVI MUTHUI.....2ND RESPONDENT

(Being an application for extension of time to file Notice of Appeal in an intended Appeal from the Ruling of the High Court of Kenya at Nakuru (Mulwa, J.) dated 27th April, 2017 in

HCCA No. 320 of 2010)

RULING

The applicants **EVERLYN ADHIAMBO KONGORO, LEAH AKUMU KONGORO** and **JOSEPH NAHASHON** (suing as co-administrators of the estate of **GRACE LIMIMBA ONGONGE** (deceased) filed a Notice of Motion dated 8th June, 2017 and sought the following orders:-

- “1. That time for lodging an appeal from the ruling of Hon. Lady Justice Mulwa delivered on 27th day of April, 2017 in HCCA No. 320 of 2010 (“the Ruling”) be extended.**
- 2. That the notice of appeal dated 15th May, 2017 be deemed as properly filed.**
- 3. That the costs of this application be provided for.”**

In the motion, **TRANSEAST LIMITED** and **STEPHEN MBUVI MUTHUI** were named as the 1st and 2nd respondent respectively. The motion was supported by the affidavit of **GEORGE BRIAN AKELLO** who deponed that whereas the firm he works for namely **OKOTH & KIPLAGAT Advocates** was aware that the ruling in HCCA No. 320 of 2017 was to be delivered on 27th April, 2017, they made arrangements for the ruling to be taken by one Ms Kiberenge on their behalf. Unfortunately Ms Kiberenge was unreachable on the material day; that they then requested one Mr. Ochiel to ascertain the outcome of the ruling of HCCA No. 320 of 2017; that it was not until 10th May, 2017 that Mr. Ochiel got hold of the file and informed them of the outcome; that they sought leave to appeal which leave was granted and thereafter filed a Notice of Appeal on 24th May, 2017, although this was already after the expiry of 14 days allowed by the rules.

In opposition to the motion, Mr. D.P. Mahida swore an affidavit dated 6th July, 2017 and averred that the applicant has not provided evidence in support of his averments in his affidavit and that the applicants have failed to explain the delay.

The motion came before me for hearing on 12th July, 2017. Mr. Okello appeared for the applicant whilst Mr. Mahida appeared for the respondent. The two counsel reiterated the averments on their respective affidavits.

Whether or not to grant an extension of time is a discretionary matter. However, in exercise of that discretion a court must do so judiciously (see **FAKIR MOHAMMED VS JOSEPH MUGAMBI & 2 OTHERS, CA NO. NAI 332/2014**). Besides, sections **3A & 3B** of the Appellate Jurisdiction Act decrees that the overriding objective in civil litigation is to facilitate the just, expeditious proportionate and affordable resolution of disputes before the court. In **EDITH GICHUGU KOINE V. STEPHEN NJAGI THOITHI [2010] Eklr** Odek, JA. held as follows:

“There is also a duty now imposed on the Court under sections 3A and 3B of the Appellate Jurisdiction Act to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just expeditious, proportionate and affordable resolution of disputes before the Court.”.

I take it that we do not live in an ideal world and sometimes even with the best of intentions, we end up not achieving what we desired to achieve. The applicant owns up to the fact that they were aware that the ruling in HCCA No. 320 of 2010 was to be delivered on 27th April, 2017. However, since the applicant’s counsel is based in Nairobi, arrangements were made to have Ms. Kiberenge take the ruling on their behalf in Nakuru. However, that was not to be and after seeking the services of one Fredrick Ochiel for the perusal of the file, they got to know on 10th May, 2017 that the ruling was not in their favour. They thereafter sought leave to file an appeal which leave was granted on 24th May, 2017, the 14 days of filing the Notice of Appeal having expired.

In my view the delay was not inordinate and it is also my considered position that the delay has been explained. The delay not being inordinate, I do not see how the respondent will be greatly prejudiced. In view of the totality of my above findings I am inclined to grant the prayers in the motion dated 8th June, 2017. Accordingly the Notice of Appeal dated 15th May, 2012 is deemed to have been properly filed.

Costs shall however, abide the outcome of the intended appeal.

Dated and delivered at Nakuru this 27th day of September, 2017.

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR