



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 77 OF 2014 (UR NO. 55/2014)

BETWEEN

MOHAMMED JUMA PONDA.....1ST APPLICANT

MOHAMMED AHMED MMADI2ND APPLICANT

MUNIR OMAR SALIM..... 3RD APPLICANT

JAMIA MOSQUE COMMITTEE-BUNGOMA.....4TH APPLICANT

AND

SALIM BARASA..... 1ST RESPONDENT

ABDALLA NDALA 2ND RESPONDENT

KASSIM SIMIYU WERUNGA 3RD RESPONDENT

SHABAN BARASA 4TH RESPONDENT

ABDI SHARIFF5TH RESPONDENT

ABDULRAZAK MOHAMMED 6TH RESPONDENT

BUNGOMA MUSLIM ASSOCIATION.....7TH RESPONDENT

(An application for leave to file and serve the record of appeal out of time against the Judgment of the High Court of Kenya at Bungoma (Omollo, J) dated 13th May, 2014

in

H.C.C. NO. 23 OF 2005)

RULING

1. This is an Application for leave to file the record of appeal out of time. Basing his arguments on the averments in the affidavit in support of the application, Mr. Murunga, learned counsel for the applicant, submitted that the failure to file the record of appeal in time was due to the delay in obtaining a copy of the typed proceedings from the High Court. He said that although the applicant was supplied with a copy of the proceeding on 13th August 2014, he was only able to raise his advocate's legal fees on 8th December 2014 when this application was filed. In the interest of justice counsel therefore prayed that this application be allowed so that the intended appeal, which has overwhelming chances of success, be heard and determined on merit.

2. The application was opposed. Relying on the averments in the replying affidavit, Mr. Ocharo, learned counsel for the respondent, submitted that the applicant's counsel having failed to serve a copy of the letter bespeaking of proceedings pursuant to **Rule 82(2)** of the **Court of Appeal Rules**, the applicant cannot rely on the certificate of delay. He further submitted that as the affidavit in support of this application is silent on the delay between 13th August 2014 and 8th December 2014, no explanation has been given for that delay. He dismissed the contention that counsel for respondent had no full instructions in the matter. He said counsel is deemed to have been fully instructed before filing a notice of appeal.

3. I have considered the application and the above rival submissions by counsel for the parties. I must deprecate the casual manner in which counsel handle serious matters including appeals to this Court. In this case had counsel for the applicant been diligent and served a copy of the letter bespeaking of proceedings on the other side, this application would not have been necessary at all. That negligence should, however, not be visited upon the applicant who has an arguable appeal. As I have pointed out, the applicant himself had difficulties in raising legal fee for his counsel hence the delay between 13th August and 8th December 2014. In the circumstances I exercise my discretion in his favour and allow this application. The applicant shall file and serve the record of appeal within 15 days failing which his application shall stand dismissed with costs. If he complies with this order, the costs of this application shall be in the appeal.

DATED and delivered at Kisumu this 5th day of February, 2015

D.K.MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR