



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 85 OF 2014

BETWEEN

HERMANT KAMAL RAVAL..... APPLICANT

AND

JUBILEE JUMBO HARDWARE LTD..... RESPONDENT

(An Application for Leave to enlarge time of filing an Appeal against the judgment of the High Court of Kenya at Kisumu (Muchelule, J.)

dated 25th September, 2014

in

H.C.C.A. NO. 18 OF 2008)

RULING

1. This is an application under **Rule 4** of the Court of Appeal Rules for leave to appeal out of time against the judgment of Muchelule, J. delivered on 25th September 2014 on his behalf by Maina, J.
2. It is common ground that after hearing Kisumu HCA No.18 of 2008, Muchelule, J. deferred judgment to be delivered on notice. It is also common ground that the parties were given notice that the judgment would be delivered on 25th September 2014 by Chemitei, J. In his affidavit in support of the application Gerald Omori Kimanga, learned counsel for the applicant, claims that on that day he went to court and Justice Chemitei's Court clerk informed him that the learned Judge was not sitting on that day and that the parties would be given another notice for the delivery of judgment. On that information he went away only to stumble on the judgment in the library on 8th December 2014. He thereafter immediately made this application.
3. While conceding that indeed Justice Chemitei did not sit on 29th September 2014, Mr. Shilenje, learned counsel for the respondent, contended that the learned Judge's Court clerk informed him that the judgment had been given to Maina, J. for delivery on that day. He thereafter went before Maina, J. and counsel by the name Balusi held brief for counsel for the applicant and the judgment was accordingly delivered. He therefore doubts the truthfulness of Mr. Kimanga's claim that he was informed that the

judgment would be delivered on another date.

4. In response to the claim that one Balusi held his brief during the delivery of the judgment, Mr Kimanga said that he does not know anybody by that name and that he did not instruct anybody to hold his brief on that day.

5. I have considered the application. It is patently clear from the record that the Hon. Justice Muchelule's judgment was supposed to be delivered by the Hon. Justice Chemitei on 25th September 2014. Because Justice Chemitei was not sitting on that day, the file was passed on to the Hon. Justice Maina who delivered the judgment. It is not clear at what time the file was taken to Justice Maina. It is possible that this may have been after Mr. Kimanga had been told that the judgment would be delivered on another date. I agree with Mr. Kimanga that he could not have instructed the said Balusi or any other counsel to hold his brief when he himself had gone to court to take the judgment.

6. Mr. Shilenje himself graciously conceded that other than meeting the fellow who claimed to be a Mr. Balusi on 25th September 2014 he had not met him before and he has since never seen or heard of him. The identity of that gentleman therefore remains a mystery.

7. Taking all these factors into account, I find that Mr. Kimanga was not aware that the said judgment was delivered on 25th September 2014 hence the failure to appeal in time .Consequently I grant the applicant leave to lodge the notice and record of appeal out of time. The appellant shall lodge and serve the notice of appeal within 14 days of the date hereof and thereafter file the record of appeal within the period given in the Court of Appeal Rules. The costs of this application shall be in the appeal.

DATED and delivered at Kisumu this 19th day of March, 2015.

D.K.MARAGA

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR