



**IN THE COURT OF APPEAL**

**AT BUSIA**

**(CORAM: MUSINGA, JA. ( IN CHAMBERS))**

**CIVIL APPLICATION NO. 12 OF 2015**

**BETWEEN**

**GABRIEL OSIMBO..... APPLICANT**

**VERSUS**

**CHRISPINUS MANDARE.....RESPONDENT**

*(An application for leave to extend time within which to lodge and serve the Notice of Appeal out of time in the appeal from the judgment and decree of the High Court of Kenya at Busia (F. Tuiyot, J.) dated 4<sup>th</sup> March, 2015.*

**in**

**Busia H.C.C.A No. 3 of 2011**

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**RULING OF D.K MUSINGA, JA.**

1. This ruling is in respect of the applicant's application for extension of time to lodge and serve a notice of appeal as well as the memorandum and record of appeal. The application was brought under **rule 4** of this Court's Rules.
2. In the affidavit sworn in support of the application, the applicant deponed that the High court judgment that he intends to appeal against was delivered on 4<sup>th</sup> March, 2015 and therefore according to the Rules of this Court, the notice of appeal was supposed to be filed on or before 18<sup>th</sup> March, 2015. The notice was however filed on 2<sup>nd</sup> April, 2015. The delay is therefore of 14 days.
3. The applicant, in explaining the reasons for the delay, stated that he fell ill on 2<sup>nd</sup> March, 2015 and was attended to by one Dr. Samuel O. Juma. He annexed to his affidavit a copy of the drugs prescription issued to him by the said doctor.
4. The illness worsened and on 16<sup>th</sup> March, 2015 he was admitted at St. Luke Medical Centre where he remained until 20<sup>th</sup> March, 2015 when he was discharged. The hospital documents supporting his admission and the charges paid were annexed to the applicant's affidavit.

5. After his discharge, the applicant was too weak, even to report to work, and it was not until 2<sup>nd</sup> April, 2015 that he was able to instruct an advocate to file a notice of appeal, the applicant stated.
6. The applicant believes that he has an arguable appeal. **Mr. Moses Orengo**, the applicant's learned counsel, referred the Court to the draft memorandum of appeal that is annexed to the applicant's affidavit. The crux of the intended appeal is whether the provisions of **order 50 Rule 4** of the **Civil Procedure Rules, 2010**, which provides for the exclusion of the period between 21<sup>st</sup> December and 13<sup>th</sup> January in computation of time, applies to filing of appeals from the subordinate court to the High Court.
7. In the judgment sought to be appealed against, Tuiyott, J. held that the period for filing appeals from the subordinate Court to the High Court is prescribed by **section 79G** of the **Civil Procedure Act** and the provisions of **order 50 rule 4** of the **Civil Procedure Rules, 2010** could not be relied upon by the applicant, who was late in filing an appeal from the Principal Magistrate's Court to the High Court. The learned judge stated that subsidiary legislation cannot be construed to contradict provisions of an Act of Parliament.
8. The respondent opposed the application. He filed a preliminary objection as well as a replying affidavit. The preliminary objection was to the effect that the firm of M/S Moses J.A. Orengo & Co. Advocates was not properly on record, having failed to comply with the provisions of **order 9 rules 5 and 9(a)** of the **Civil Procedure Rules** regarding change of Advocates.
9. **Mr. Ipapu**, learned counsel holding brief for M/S Ashioya & Company, Advocates for the respondent, submitted that the applicant does not have an arguable appeal because the applicant had not complied with **section 79G** of the **Civil Procedure Act** and **order 50 rule 4** of the **Civil Procedure Rules** was of no assistance to him, as stated by the learned judge.
10. Mr. Ipapu further submitted that the respondent had deponed that the applicant was present in court on 4<sup>th</sup> March, 2015 when Tuiyott, J. delivered his judgment and he cannot therefore argue that he fell ill on 2<sup>nd</sup> March, 2015. Counsel added that even if the applicant had been admitted to a hospital until 20<sup>th</sup> March, 2015, he did not explain why he could not instruct an advocate to file a notice of appeal immediately after his discharge. He urged the Court to dismiss the application.
11. Replying to the preliminary objection, which the Court had directed that it be argued within the application, Mr Orengo stated that he had filed and served a notice of change of advocates before he filed the notice of appeal as well the application for extension of time. The notice of change of advocates was filed in the High Court file and counsel showed the Court a copy of the same. He cited this Court's decision in **RYCE MOTORS LTD V RUTO [2006] 1 KLR 46** to the effect that **rule 23** of this Court's Rules does not contain any words specifying when the change of advocate becomes effective or when the original advocate is deemed to have ceased to act.
12. Regarding the applicant's illness, Mr Orengo submitted that the applicant could have attended court on 4<sup>th</sup> March, 2015 while sick. There was however no dispute that the applicant was admitted to hospital on 16<sup>th</sup> March, 2015 and discharged on 20<sup>th</sup> March, 2015.
13. I have carefully considered the submissions made by counsel as well as the record of appeal. It is imperative that I first dispose of the single issue raised in the preliminary objection regarding appearance by Mr. Moses Orengo for the applicant. A notice of change of advocates in accordance with **order 9 rule 5** of the **Civil Procedure Rules** was filed on 2<sup>nd</sup> April, 2015. The same was served upon Ashioya & Company Advocates on the same day. When Mr. Ipapu was shown the same, his only comment thereto was that the notice of change of advocates ought to have been annexed to the replying affidavit sworn by the applicant in support of his application.
14. I am not aware of any formal requirement to that effect. Suffice it that the notice of appeal was filed by a counsel who was properly on record, an appropriate consent between M/S Otieno C.O.

Ayayo, the applicant's former advocates and Mr Moses J.A. Orengo, the applicant's current advocate, having been executed and filed in Court. I find that Mr Orengo is properly on record and reject the preliminary objection.

15. Turning to the substantive aspects of the applicant's application, under **rule 4**, this Court, in the exercise of its discretion, its primary concern is to do justice to the parties. In an application for extension of time, the Court has to consider, among other things, the length of the delay in lodging the notice of appeal, the reasons for the delay, whether the intended appeal is arguable and the prejudice that the respondent may suffer if the application is granted. See **GITHIAKA V NDURIRI [2004] 2 KLR 67.**

16. The length of the delay in this application is 14 days. In the circumstances of this application, I do not consider that delay inordinate. The applicant has demonstrated that since 2<sup>nd</sup> March, 2015 he was unwell. He may have attended court on 4<sup>th</sup> March, 2015 when he was unwell. There is however uncontroverted evidence that he was admitted at St. Luke Medical Centre, Kisumu, from 16<sup>th</sup> to 20<sup>th</sup> March, 2015 when he was discharged. After his discharge he was still weak and was unable to go to his advocate's chambers to instruct him regarding the intended appeal. In my view, the reason given for the delay is satisfactory.

17. As to whether the intended appeal is arguable or not, the gravamen of the intended appeal is that the provisions of **order 50 rule 4** of the Civil Procedure Rules are applicable with regard to computation of time for purposes of filing appeals from the Subordinate Court to the High Court. The respondent does not agree and believes that the intended appeal is a non-starter.

In **DENNIS MOGAMBI MONG'ARE V ATTORNEY GENERAL & 3 OTHERS, [2012] eKLR**, this Court stated that:

**“An arguable appeal is not one that must necessarily succeed; it is simply one that is deserving of the Court's consideration.”**

18. Without saying much, lest I pre-empt the intended appeal, I find and hold that the intended appeal is arguable.

19. The respondent did not argue that he will suffer any prejudice if this application is allowed. All I wish to state is that whatever prejudice that the respondent may suffer, if at all, can be compensated by an award of costs.

20. Having taken all the relevant factors into consideration, I am of the firm view that the interest of justice would be well served by granting the applicant an opportunity to pursue his right of appeal. Consequently, I allow the applicant's application dated 13<sup>th</sup> April, 2013. The notice of appeal on record is deemed as duly filed and served in time. The applicant shall however bear the costs of the application.

**Dated and delivered at Busia this 29<sup>th</sup> day of July, 2015.**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original

**DEPUTY REGISTRAR**