



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 49 OF 2014 (UR NO. 33/2014)

BETWEEN

ELDORET EXPRESS CO. LTD 1ST APPLICANT

ENOCK KIPTOO 2ND APPLICANT

AND

SILVANCE OJWANG ODERORESPONDENT

(Being an Application for leave to Appeal from the Judgment of the High Court of

Kenya at Kitale (Karanja, J.) dated 17th June, 2014

in

H.C.C.A. NO. 59 OF 2011)

RULING

The record before me shows that Karanja, J. delivered judgment in Kitale HCCC No. 59 of 2011 on 17th June, 2014. The applicants, Eldoret Express Co. Ltd and Enock Kiptoo felt aggrieved by that judgment and intend to appeal against it. They however did not file Notice of Appeal as is required vide Rule 75 of this Court's Rules within fourteen (14) days of the date of the delivery of judgment. This was, according to the affidavit of Erastus Mwaniki annexed to this Notice of Motion dated 4th July, 2014, because, the applicants' advocate handling the matter inadvertently filed the advocates' file away. They thereafter filed this Notice of Motion seeking among others an order:-

“That this Honourable Court be pleased to extend time and grant the applicants leave to lodge Notice of Appeal and Memorandum of Appeal out of time against the judgment and decree entered against the Applicants by the Honourable Justice J R Karanja at the High Court of Kenya at Kitale on the 17th day of June 2014.”

As indicated herein above, the application is supported by an affidavit sworn by Erastus Mwaniki. A draft Memorandum of Appeal is also annexed.

The delay period is three days ie from 1st July, 2014 when the Notice of Appeal should have been filed to

4th July, 2014 when this application was filed. The explanation for that delay is as stated above that through inadvertent action of the appellants' advocates, the relevant advocates' file was filed away and thus no action could be taken on the matter in time.

I am satisfied that though such actions by advocates should be discouraged, yet they can happen. I therefore accept the explanation given for the delay of three days in filing the Notice of Appeal. I have also seen and perused the annexed draft Memorandum of Appeal and I am persuaded that matters raised therein are arguable.

The respondent, though served with the hearing notice, is absent and he did not file any replying affidavit to the allegations in the application. In that event, I see no prejudice that the respondent will suffer by my granting the orders sought herein.

In the result, as the applicants have demonstrated all matters required to be taken into account when considering an application such as this brought pursuant to rule 4 of this Court's Rules, I do exercise my unfettered discretion in their favour. The application is granted. Applicants have **Ten (10)** days of the date hereof to file Notice of Appeal and thereafter **sixty (60)** days from the date of filing the Notice of Appeal to file record of Appeal. I make no order as to costs of the Notice of Motion.

Dated and Delivered at Kisumu this 23rd day of July, 2014.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR