



**REPUBLIC OF KENYA**

**Court of Appeal at Kisumu**

**Civil Application 16 of 2011**

**JAMES TWARA MUSIORI T/A PREMIUM SERVICE COMPANY.....APPLICANT**

**AND**

**ELPHAS ODIWUOR OMONDI.....RESPONDENT**

*(An application for leave to file and serve a notice of appeal and a record of appeal out of time against the decision of the High Court of Kenya at Kisumu (Hon. Lady Justice R. Nambuye) dated 8<sup>th</sup> July, 2011*

*in*

*H.C.C.A. NO. 45 OF 2007)*

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**RULING**

1. By a notice of motion dated 14<sup>th</sup> December, 2011 **James Twara Musiori** trading as **Premium Service Company**, hereinafter referred to as the applicant seeks to have time extended for him to file and serve a notice of appeal and a record of appeal. The applicant who was the appellant in the High Court, explains that he is based in the United States of America, and that judgment in his appeal in the High Court was delivered on 8<sup>th</sup> July 2011 without notice, and that he only came to learn of the judgment three days before the expiry of time to file a notice of appeal. He indicated his wish to pursue an appeal against the judgment of the High Court to his advocate. However, due to the time taken in obtaining a copy of the High Court judgment, and communication between the applicant and his advocate, the applicant was not able to file his appeal within time. Learned Counsel **Mr. Momanyi** who appeared for the applicant contends that the applicant's intended appeal raises arguable issues and therefore, it is in the interest of justice that he be allowed to canvass it. The applicant has already filed a notice of appeal and he therefore prays that the same be deemed as properly filed and that time be extended for him to file a record of appeal.

2. In response to the application, **Patrick J. Otieno** an advocate who appeared for the respondent in the Subordinate Court and the High Court has filed a replying affidavit. He explains that the judgment was delivered on the 8<sup>th</sup> July, 2011, and that he informed the applicant's advocate of the outcome of the judgment, and forwarded a copy of the judgment to him on 13<sup>th</sup> July, 2011. He further contends that the period between 25<sup>th</sup> July, 2011 and 8<sup>th</sup> August, 2011 when the notice of appeal was filed has not been explained. In addition the applicant has not explained the inordinate delay of five months taken to bring his application for extension of time. He therefore urges the court to dismiss the application. Learned counsel **Belice Achieng'** who appeared for the respondent argued the issues being raised in the intended appeal were raised and adjudicated upon in the High Court and that there was therefore no arguable

appeal.

3. I have given due consideration to this application. It is common ground that the judgment of the High Court against which the applicant intends to appeal, was delivered on 8<sup>th</sup> July, 2011. Therefore, under **Rule 75(2)** of the Court of Appeal Rules, the applicant ought to have filed a notice of appeal within fourteen days from the date of the High Court decision. A notice of appeal has been exhibited which shows that the notice was lodged in the High Court registry at Kisumu on 10<sup>th</sup> August, 2011. There is also a court stamp on the face of the notice which reads 8<sup>th</sup> August, 2011. In his affidavit sworn in support of the application, the applicant has stated that he received a copy of the judgment on 20<sup>th</sup> July 2011. On his part, counsel for the respondent swore that he forwarded a copy of the judgment to the applicant's advocate on 13<sup>th</sup> July, 2011.

4. Thus, even if I was to accept the explanation given by the applicant, he took about twenty days after getting a copy of the High Court judgment, before lodging the notice of appeal. The explanation that he was still consulting with his advocate cannot hold for this delay. All that was required was notice. The details of the appeal could be worked out later. Further, the applicant has exhibited a persistent lackluster attitude. Having lodged the notice of appeal late, the applicant did not move with speed, but again only filed the current application on 20<sup>th</sup> December, 2011, which was more than four months later. The attempt to explain the inordinate delay as due to the applicant's residence in the United States of America is not plausible. Given the modern technology in communication, the applicant could have easily communicated with his advocate and filed the appropriate documents within a reasonable time. I find that the applicant has not exhibited any seriousness in pursuing the intended appeal, nor has he demonstrated either in the supporting affidavit or by a draft memorandum of appeal, that he has any arguable appeal to justify the exercise of this court's discretion in his favour.

Accordingly, I dismiss the application dated 14<sup>th</sup> December, 2011 with costs.

***Dated and delivered at Kisumu on this 10<sup>th</sup> day of October, 2012.***

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**