



**IN THE COURT OF APPEAL OF KENYA**

**AT NAKURU**

**Civil Application 112 of 2008 (NAK 5/2008)**

**EASE MOVE LOGISTICS COMPANY LIMITED .....1<sup>ST</sup> APPLICANT**

**DANIEL MORONGE RURII ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOSHUA OTIENO SIRARE (Suing as the personal Representative of the estate of**

**AUGUSTINE YALLA SIRARE – deceased) ..... RESPONDENT**

***Application for extension of time to file and serve notice of appeal and record of appeal out of time in an intended appeal from the judgment and decree of the High Court of Kenya at Kericho (Koome, J) dated 21<sup>st</sup> February, 2008***

**In**

**H.C.C.C. No. 54 of 2006)**

**\*\*\*\*\***

**RULING**

The two applicants seek an order under **rule 4** of the Court of Appeal Rules (Rules) for extension of time within which to file and serve the notice of appeal and the record of appeal which were not lodged and served within the time prescribed by the Rules.

The judgment the subject matter of the intended appeal was delivered by Koome , J at Kericho on 21<sup>st</sup> February, 2008. It is the applicants’ averment in the submission made before me by their counsel, Mr. Nyagaka and in the affidavit in support of the application that judgment was delivered in the absence of their counsel who had not been served with the notice of delivery of the judgment and were not aware of the same. They further assert that they only came to learn of the said judgment when they were served with the party and party bill of costs.

Mr. Nyagaka further stated that he came to learn of the judgment on 15<sup>th</sup> April, 2008 and that his first reaction was not to lodge an appeal but was prevailed upon to do so by the instructing insurance company. Nevertheless, he contends that he has an arguable appeal to prefer since the quantum made by the learned Judge in the road traffic accident was to say the least, outrageous.

Mr. Meroka for the respondent opposes the application for extension of time. He stated that the applicants were represented in court during the delivery of judgment and counsel for the applicant had in fact participated in the proceedings all the way up to the taxation of the bill of costs and even agreed on stay orders awaiting payment of the decretal sum.

In **Wasike v. Swala [1984], KLR 67** this Court sitting as a full Court held that in exercising its unfettered discretion to extend time under **rule 4**, the applicant must show, in descending scale of importance, that there is merit in the appeal; that the extension of time will not cause undue prejudice to the respondent and that the delay has not been inordinate.

This Court has held on previous occasions, that those factors are not exhaustive and that a single Judge is free to consider any other relevant circumstance in exercising his discretion. In **Gatu v. Muriuki [1986] KLR 211**, this Court (Apaloo, JA) held, among other things, that the court ought to be inclined to exercise its discretion to enlarge time to appeal where the applicant has shown prima facie that he has an arguable case for consideration by the court.

I will dispose of the issue relating to whether judgment of the superior court was delivered in the absence of the applicants' counsel. During the course of the proceedings I directed the parties to lodge further proceedings and annexures to show the coram of the superior court at Kericho on 21<sup>st</sup> February, 2008. This was done. The coram sheet plainly shows that on the material day one, Mr. Nyangiri, held brief for Mr. Nyachiro for the defendants when judgment was being delivered by Koome, J. I dismiss the submission that judgment the subject matter of the intended appeal was delivered in the absence of counsel for the applicants. I also reject the contention that they were unaware of the date of the delivery of judgment.

This being the position, I hold that the applicants' counsel ought to have known that judgment was delivered on 21<sup>st</sup> February, 2008 and must be deemed to have known of it. This being the view I hold, there is now no reason for the said counsel not to have filed notice of appeal and record of appeal within the time allowed by the Rules. The omission has not been explained.

Further, it is noted that this application was filed on 30<sup>th</sup> April, 2008. A period of about 68 days after judgment was delivered. The delay is indeed inordinate and has not been explained at all.

Prima facie merits of the intended appeal is one of the important considerations in the exercise of discretion to extend time and failure by the applicant to show that the intended appeal is indeed frivolous may result in the dismissal of the application. In the instant case a degree of liability was accepted. What is only in issue in the intended appeal is quantum and I am informed that half of the decretal sum has been paid. I have looked at the judgment of the superior court. However, I do not share the views that the awards she made were outrageous.

The respondent takes care of the wife and young children of the deceased who perished in the accident which gave rise to the suit before the superior court. Any further proceedings to stall the recovery of the decretal sum is quite prejudicial to the respondent and would perpetrate injustice.

In the result, I refuse to exercise my discretion in favour of the applicants. I decline to grant the application and I order that it be dismissed with costs to the respondent.

Dated and delivered at Nakuru this 2<sup>nd</sup> day of October, 2009.

**P.K. TUNOI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**