REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAKURU

Before the court can exercise its unfettered discretion to extend time in favour of the applicant, the applicant is required to satisfy the court, inter alia, that:-

(a) There is merit in the appeal

(b) That the extension of time will not cause undue prejudice to the respondent

(c) The delay has not been inordinate.

(See ***WASIKE V. SWARA*** [1984] **KLR.591 , LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI** – **Civil Application Nai.255 of 1997** (unreported).

The application is supported by two affidavits – One sworn by David Majanja, Advocate, and the second one by Geoffrey Imende, a pupil in the firm of M/s Mohammed Muigai Advocates, the applicants advocates. The affidavits show that the applicant has taken only two steps to lodge a competent appeal since the judgment was delivered.

The first action is when Geoffrey Imende travelled to Nakuru on *24th July, 2005* (Mr. Majanja refers to 25th July, 2003), to file a notice of appeal but he did not succeed because the judgment was read in Nairobi and the file was still in Nairobi. The second action is when the applicant filed an application in the superior court under *section 7* of the Appellate Jurisdiction Act. (Cap. 9) for the extension of time for lodging a Notice of appeal; that the application is not annexed but an order made by Kimaru, J. by consent on 25th March, 2004, is annexed. It reads:-

> **"2. THAT the applicant to lodge an application in the Court of Appeal for extension of time to file the appeal out of time within forty five (45) days from today's date."**

The applicant's counsel deposes that the present application was filed within the 45 days.

The application is opposed. The respondent's counsel deposes inter alia that the applicant did not attempt to file the notice of appeal in Nairobi or to have the file returned to High Court Nakuru for lodging the Notice of Appeal; that, the application for the extension of time for filing the Notice of Appeal was filed in the High Court 151 days from the date of judgment and was prompted by a threat of execution; that no reason has been given for the delay of the 151 days which delay is inordinate and that the present application was filed 40 days after the consent order of the High Court dated *23rd March, 2004.*

I have considered the perspective affidavits and oral submissions.

The judgment (award) that the applicant intends to appeal against was given on *11th July 2003 .* The 14 days prescribed for filing a Notice of Appeal expired on *25th July 2003.* Even if an abortive attempt was made on *24th July 2003* to file a Notice of Appeal in Nairobi the applicant was taking action when the time limited for the filing of the notice of appeal was expiring or about to expire.

There was no attempt made to file the Notice of Appeal in Nairobi. Thereafter, the applicant did not file an application for extension of time to file the Notice of Appeal until on *10th December 2003* when the application was filed in the superior court. That was five (5) months from the date the judgment was given. The applicant has made no effort to explain that delay of 5 months. In the absence of any explanation, it cannot be said that the delay is excusable.

The application which was filed in the superior court for extension of time for the lodging of the notice of Appeal has not been annexed. It seems that the application was filed in the suit because the order extracted bears the suit number.

The order which was made by consent extending the time for filing an application for extension of time to lodge a notice of Appeal in this court was made within jurisdiction and is no consequence. I say so because section 7 of the Appellate jurisdiction Act gives the High Court power to extend the time for giving notice of intention to appeal from the judgment of the High Court or for making an application from leave to appeal or for a certificate that the case is fit for appeal. Thus the High Court had power to extend time for giving the Notice of Appeal. The High Court did not extend time for giving the Notice of Appeal but instead extended time for the filing of an application in this court to lodge a Notice of Appeal. The High Court has no such power.

The applicant did not require leave to appeal from the judgment of the superior court given on *11th July 2003 .* It cannot be said, therefore, that by making the order, the superior court was giving leave to appeal. The present application was filed on *3rd May 2004* - almost 10 months from the date of the judgment. In the circumstances, I am not satisfied that the applicant has demonstrated that there is a serious intention to appeal against the award. Further, I am satisfied that there has been an inordinate and inexcusable delay in filing this application.

On the question of the merits of the intended appeal, Mr. Majanja merely deposes in paragraph 14 of his affidavit that he verily believes that the applicant has an appeal which raises triable issues. He did not identify the trial issues which should be ventilated in the appeal.

The applicant intends to appeal against the award of damages by the superior court. It is trite law that the assessment of damages by a trial court is an exercise of discretion and that the appellate court will not normally interfere with such exercise of discretion unless the Judge has either acted on wrong principles or awarded so excessive or so inordinarily low damages or has taken into consideration irrelevant matters or failed to take into consideration relevant matters and in the result arrived at the wrong decision ***(see BUTLER V. BUTLER [1984] KLR 225.***

The applicant does not say why it is aggrieved by the award or attempt to show that there are grounds on which the appellate court can interfere with the award. Indeed, the applicant did not even file a draft memorandum of appeal. Thus, the applicant has not shown that the intended appeal is not frivolous.

Lastly, the applicant has not shown that the respondent will not be unduly prejudiced if the application is allowed. The respondent contended that he will be prejudiced if the application is allowed because the decretal sum has already been paid to the respondent. I agree For those reasons, the application has no merit. It is dismissed with costs to the respondent.

Dated and delivered at Nakuru this 25 th **day of February, 2005.**

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR