



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 56 OF 2016**

**HUMPHREY MUKUNDI MWANGI.....CLAIMANT**

**VERSUS**

**BRADEGATE HOLDINGS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 17<sup>th</sup> November, 2017)

**RULING**

The notice of motion was filed for the respondent in the suit on 10.10.2017 through Kabira Kioni & Company Advocates. The motion was an application for extension of time to file Notice of Appeal, Memorandum of Appeal and Records of Appeal in an intended appeal from the judgment by this court delivered on 14.07.2017. The application invoked section 7 Appellate Jurisdiction Act, Cap.9, section 95 of the Civil Procedure Act, Order 50 Rule 6 of the Civil Procedure Rules, 2010, Article 159 (1) of the Constitution of Kenya, 2010. The application was supported by the attached affidavit of Rawlings Thuo Mathenge and on the following grounds:

1. The judgment in the suit was delivered on 14.07.2017 and the applicant was represented by the firm of Mwangi Wambugu & Company Advocates.
2. After delivery of the judgment the applicant instructed the advocates on record to appeal against the judgment but the advocates failed to do so.
3. The advocates failed to implement the instructions to appeal and the applicant has been unsuccessfully trying to trace the file at the registry to establish if any action was taken by the said advocates.
4. The court has discretion to extend the time limited by the court rules required for taking any action.
5. That the inadvertent mistakes of counsel should not be visited upon an innocent litigant.
6. The application had been filed without inordinate delay.

The claimant in the suit has opposed the application by filing his replying affidavit on 17.10.2017. The grounds urged to oppose the application are as follows:

1. The judgment was delivered on 14.07.2017 and the litany of blunders cannot be attributed to the claimant.

2. The delay in appealing has not been explained adequately or convincingly and the long delay is inexcusable.
3. The application was filed too late in the day meaning the applicant was not interested in appealing.
4. The claimant is still suffering in terms of pecuniary wellbeing and he was barely surviving.

The court has considered the parties' respective positions and submissions on record and makes findings as follows:

1. The judgment was delivered on 14.07.2017. The 14 days for lodging a notice of appeal under rule 74(2) of the Court of Appeal Rules lapsed on or about 28.07.2017. By the letter dated 28.08.2017 the applicant wrote to its advocates on record acknowledging receipt of the judgment as delivered at the applicant's office by the advocates on 26.08.2017 – obviously, 28.08.2017 being about 30 days from the last date the notice of appeal was expected under the rules to have been filed. What appears to be clear is that the advocates' communication of the judgment and the instructions to appeal came long after the lapsing of the time allowed for the lodging of the appeal. It is further apparent that the applicant did not contribute to the delayed communication of the judgment and therefore the belated instructions to appeal. At the same time, the court notes that it is apparent that the instructions to appeal were clearly after the time for lodging the notice of appeal had lapsed and in circumstances whereby it is not clear if the applicant was not promptly informed of the outcome as per the judgment immediately after it was delivered.
2. The application was filed on 10.10.2017. On 05.09.2017 the applicant's new advocates, Kabira Kioni & Company Advocates applied for certified copies of proceedings. It is not explained why the application to lodge the notice of appeal out of time was not filed at the same time.
3. In view of findings in 1 and 2 above, the court returns that delay of about 3 months was not fully explained by the applicant. Nevertheless, the court has considered the binding principle in Article 159 (1) of the Constitution of Kenya, 2010 that the court shall administer justice without undue regard to technicalities and returns that the delay of about 3 months in this case was not inordinate and would be excusable.
4. The court has considered the claimant's submissions and returns that there being no orders on stay of execution and the claimant being at liberty to execute the decree flowing from the judgment, there would be no substantial prejudice if the applicant is allowed to try its luck at the Court of Appeal.
5. The court takes the opinion that it has the jurisdiction to grant extension of time for filing a notice of appeal out of time or for leave to appeal or a certificate that the case is fit for appeal before or after lapsing of the time to do so and just as the High Court is empowered to do under section 7 of the Appellate Jurisdiction Act. The court is guided that under section 7(1) of the Sixth Schedule (on Transitional and Consequential Provisions) to Constitution of Kenya, 2010 it is provided that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. In that regard, the court returns that "High Court" in section 7 of the Appellate Jurisdiction Act must be construed to include superior courts whose decisions are appealable to the Court of Appeal and exercising parallel and exclusive jurisdiction to that of the High Court. Nevertheless the court further returns that the jurisdiction of the court under the section does not spread to extension or expansion of time for filing the Memorandum of Appeal and Records of Appeal at the Court of Appeal and a party desirous of extension or expansion of time in that regard must move the Court of Appeal under the relevant rules of that Court.
6. Taking into account all circumstances of the case, the applicant will pay the claimant's costs of the application.

In conclusion, the application filed on 10.10.2016 is hereby determined with orders as follows:

- a) There is hereby granted an extension of time to lodge a Notice of Appeal from the judgment herein within 14 days from today for purposes of the respondent's intended appeal against the judgment and decree by this court given on 14.07.2017.
- b) The applicant to pay the claimant's costs of the application.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 17<sup>th</sup> November, 2017**.

**BYRAM ONGAYA**

**JUDGE**