



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISCELLANEOUS CIVIL APPLICATION NO. 113 OF 2020

BETWEEN

PURITY MUTHONI KIBIRU.....APPLICANT

VERSUS

SELECTA KENYA GMBH & CO. KG.....RESPONDENT

RULING

1. The applicant seeks by Notice of Motion dated 14th July, 2020 for leave to file an appeal out of time from the judgment delivered by Thika Chief Magistrate's court on 3rd October, 2019, in **Civil Case No. 1128 of 2017**.
2. In the affidavit in support of that application, the applicant stated that she could not file the appeal in time because the Thika Chief Magistrate's Court file was reported as missing, following the delivery of the judgment, and that although a letter was written by her advocate, dated 7th October, 2019, requesting for copy of the judgment and proceedings the same could not be filed because the file was not traced at the court registry.
3. The respondent by a replying affidavit sworn by *Beatrice Muriithi* dated 3rd June, 2021 and opposed the application. The respondent deponed that its advocate was able to file a letter at Thika Chief Magistrate's court on 11th October, 2019 whereupon the proceeding of the trial court were requested. That the applicant's advocate inquired from the respondent's advocate the amount of the judgment and on that being communicated the applicant settled the entire judgment amount. The respondent therefore termed the present application as an afterthought. The respondent deponed that if the order sought was allowed, it would be prejudicial to have to deal with an appeal two years after the judgment of Thika Chief Magistrate's Court.
4. The applicant denied paying the judgment amount to the respondent.
5. **Section 79G** of the Civil Procedure Act requires appeal from subordinate court's decision to be filed within 30 days from the date of the decision. That Section provides as follows:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.” (underlining mine)

6. The applicant deponed that the trial court's file was missing from the registry from 3rd October, 2019, upto 26th November, 2019. On the day the file was found the applicant's advocate sought a copy of the judgments and proceedings. Without saying more, the applicant deponed:-

“I therefore seek leave of this Honourable Court to appeal out of time.”

7. **Section 79G** above, is clear that if the delay in filing an appeal is due to the trial court's failure to supply the decree and order the trial court shall give a certificate to that effect.

8. The applicant did not seek such a certificate.

9. Further, if the delay in filing an appeal is due to other factors that Section, under the proviso, requires an applicant to satisfy the court that he has a good and sufficient cause for not filing the appeal in time.

10. The allegations of the applicant that the file was not traced until 26th November, 2019 was disproved by the respondent when the respondent showed, by a filed copy, that it filed its letter seeking copy of the judgments on 11th October, 2019. Further, the respondent inquired from it the amount awarded in that judgment and thereafter proceeded to settle the entire judgment amount.

11. It is not clear what the applicant intends to achieve by denying it paid to the respondent the entire judgment amount whereas such payment is in its favour.

12. On the whole, having considered the application I find the applicant has failed to show a good cause for failing to file an appeal out of time. See the case **DILPACK KENYA LIMITED VS. WILLIAM MUTHAMA KITONYI (2018) eKLR**, as follows: -

*“27. Therefore, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in **FEROZ BEGUM QURESHI AND ANOTHER VS. MAGANBHAI PATEL AND OTHERS [1964] EA 633**, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in **DAPHNE PARRY VS. MURRAY ALEXANDER CARSON [1963] EA 546** that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.*

*28. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **FIRST AMERICAN BANK OF KENYA LTD VS. GULAB P SHAH & 2 OTHERS NAIROBI (MILIMANI) HCCC NO. 2255 OF 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.”*

13. The notice of motion dated 14th July, 2020 is devoid of merit. It is dismissed with costs.

14. I order this file be closed.

RULING DATED AND DELIVERED AT KIAMBU THIS 24TH DAY OF MARCH, 2022.

MARY KASANGO

JUDGE

CORAM:

COURT ASSISTANT : MOURICE

FOR APPLICANT: MISS WANJERA H/B FOR MR. GACHAU

FOR RESPONDENT : NO APPEARANCE

COURT

RULING DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE