



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

MISCELLANEOUS CIVIL CASE NO 14 OF 2019

MOHAMED ALI GUTALE.....APPLICANT

VERSUS

KENNEDY GUANTAI MUTHIORA.....RESPONDENT

R U L I N G

1. The Applicant herein, **MOHAMED ALI GUTALE**, sought by notice of motion dated 31/07/2019 extension of time to appeal against an order of the lower court passed on 18/06/2018 in *Nanyuki CMCC No 46 of 2012*. By that order the court dismissed the Applicant's application for review of a judgment passed in his own favour after a full hearing *inter partes*. He was the plaintiff. By that judgment the court ordered release of a motor vehicle to him by the defendant (Respondent herein). When he moved to execute the decree he discovered that the motor vehicle was not in the condition it had been when he gave it to the defendant. That is why he applied for a review of the decree.

2. The application is stated to be brought under Rule 4 of the *Court of Appeal Rules, 2010*. This is of course erroneous. The *Court of Appeal Rules* have no application in the *High Court*. Order 43, Rule 1 of the *Civil Procedure Rules, 2010* is also cited. The purport of citing that rule is to show that the Applicant has a right of appeal against orders made in applications for review under Order 45 of the Civil Procedure Rules.

3. Essentially, the application is made under **section 79G** of the *Civil Procedure Act, Cap 21* which makes provision for time for filing appeals from subordinate courts. In the interests of justice this court will proceed upon that basis.

4. The application is supported by an affidavit annexed thereto sworn by the Applicant. The delay in appealing is explained in paragraphs 5, 6, 7 and 8 of that affidavit.

5. The Respondent has opposed the application by a replying affidavit sworn on 07/09/2019. The main ground for opposing is that the delay is inordinate and unexplained. I have considered the submissions of the learned counsels for the parties.

6. Under section 79G aforesaid an 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 anytime which the lower court may certify as having been requisite for the preparation and delivery to the appellant 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.”

7. The order sought to be appealed against having been passed on 18/06/2018, the Applicant had until 18/07/2018 to lodge his appeal. As the present application was filed on 06/08/2019, the delay is thus one (1) year and 16 days.

8. Part of this delay is explained in paragraph 7 of the supporting affidavit, that though the necessary memorandum of appeal was prepared immediately after the Applicant gave instructions to appeal on 27/06/2018, his advocates were unable to lodge the appeal timeously because the formal order was not issued until 02/08/2018.

9. If the application for extension of time of appeal had then been filed soon after 02/08/2018, the delay would have been less than a month! The application was not filed until 06/08/2019, a further delay of over a year! How is this further delay explained?

10. In paragraph 8 of the supporting affidavit this further and inordinate delay is explained thus –

“...the delay to file memorandum of appeal since 2nd August 2018 was inadvertent and a mistake by one of (my advocates’ clerks) who has since left the office...”

The clerk allegedly at fault is not named; nor is it explained how exactly the inadvertence arose.

11. The Applicant had a legal duty to demonstrate on balance a good and sufficient cause for not filing his appeal in time. I am not satisfied that he has discharged this burden.

12. In the circumstances I find no merit in the notice of motion dated 31/07/2019. The same is hereby dismissed with costs. It is so ordered.

13. There has been considerable delay in the preparation and delivery of this ruling, caused by the atmosphere of fear and uncertainty fomented by the **Covid-19** pandemic. The delay is regretted.

DATED AND SIGNED AT NANYUKI THIS 19TH DAY OF AUGUST 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 21ST DAY OF OCTOBER 2021