



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO.64 OF 2011**

**JOHN WAGURA IKIKI**

**T/A KENYA MOTOR GARAGE.....APPELLANT**

**VERSUS**

**KENYA POWER & LIGHTING CO.LTD & ANO.....1<sup>ST</sup> RESPONDENT**

**KENYA AFRICA OTHAYA BUS UNION.....2<sup>ND</sup> RESPONDENT**

***(Being an appeal against the Judgment and decree of Hon. Nyakundi (S.R.M) in Civil Case No. 48 of 2002 at Nyeri Court delivered on 5<sup>th</sup> May 2011)***

**RULING**

The application before me is the Notice of Motion dated 29<sup>th</sup> August 2016 brought under S.79 G of the CPA seeking orders: -

- a) *That the court to extend time for filing of the appeal.*
- b) *That Appeal No.64 be deemed to have been properly filed.*
- c) *That costs of this application be in the appeal.*

The grounds are set on the face of the application and in the annexed affidavit of John Wagura Ikiki:-That

1. The applicant applied for copy of judgment and proceedings on time and the same were received when the time to appeal had run out.
2. Delay not intentional.
3. Appeal is already filed out of time
4. That though judgment in CMCC48/2002 was delivered on 5<sup>th</sup> May 2011 and a stay of 30 days granted to file appeal- the proceedings and judgment were only certified on 25<sup>th</sup> April 2013 and collected on 29<sup>th</sup> April 2013- certificate of delay dated 20<sup>th</sup> June 2013 but memo of appeal was filed on 10<sup>th</sup> June 2011.
5. That his counsel never informed him of the necessity to file the appeal out of time

The respondents opposed the application vide Grounds of Opposition dated 22<sup>nd</sup> September 2016, filed on 3<sup>rd</sup> October 2016 that the same was misconceived, incompetent, bad in law, gross abuse of the process of court, untenable, fatally and incurably defective, frivolous, vexatious, without merit and only amenable for dismissal.

Mr. Waweru Macharia submitted that the delay was only 5 days – that judgment was delivered on 5<sup>th</sup> May 2011, and they filed Memorandum of Appeal on 10<sup>th</sup> June 2011. That there was delay in the receiving of the proceedings and judgment. That applicant had since filed record of appeal, supplementary record of appeal. That the court should allow the application in the interests of justice and hear the appeal on its merits.

In opposing the appeal counsel for respondent argued that the applicant had not explained the delay of 5 days –that it was not caused by the delay in receiving the proceedings and judgment. That applicant was being untruthful.

In his rejoinder counsel for applicant pointed out that no replying affidavit had been filed by the respondent – that respondent was raising technical issues frowned upon by Article 159 of the Constitution, and that Section 79 G excluded the 30 days for filing an appeal.

Section 79 G of the Civil Procedure Act states: -

*“Every appeal from a subordinate court to the High court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding 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 the 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” (emphasis mine)*

The applicant must demonstrate good and sufficient cause.

a) The period of 30 days is mandatory. It says the appeal **shall** be filed.

b) The excluded period is not for obtaining copies of proceedings and judgment but the decree or order appealed from. The applicant herein is speaking of proceedings and judgment. He was required to demonstrate that the court had delayed in supplying him with the decree or order appealed from. There is no evidence that he applied for a copy of the decree/order in time within the 30 days he had stay of execution.

Even when he filed the memorandum of appeal on 10<sup>th</sup> June 2011 he did not have the proceedings/ judgment hence the explanation given is inconsistent with the application. There is no explanation for the delay/ why the applicant failed to file the appeal out of time as envisaged by s. 79G and the proviso thereto.

The court’s discretion according to the proviso is to be exercised upon the ‘sufficient good cause’ being established. None has been established. Having filed the record of appeal or supplementary record- all these are not the requirements set out under Section 79 G.

I have to find that the application is without merit and dismiss it accordingly.

**Dated, delivered and signed at Nyeri this 31st day of January 2019.**

**Mumbua T. Matheka**

**Judge**

In the presence of:

Ms.Jerusha- Court Assistant

Ms.Wangeci holding brief for Wahome Gikonyo for 1<sup>st</sup> Respondent

Waweru Macharia for Applicant.

**Mumbua T. Matheka**

**Judge**

**31/1/19**