

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

MISC CIVIL APPLICATION NO 9 OF 2019

BRADSHAW OF MT. KENYA LTD.....APPLICANT

VERSUS

MICHAEL MACHARIA NJARARA.....RESPONDENT

R U L I N G

1. The Applicant has applied by **notice of motion dated 10/06/2019** for leave to appeal out of time against the judgment (and decree) of the lower court passed on 10/12/2018. There is also a prayer for stay of execution of decree pending disposal of the appeal (if leave to appeal out of time is granted). There is in place an interim stay of execution which the court granted upon certain conditions on 19/06/2019. The entire application is opposed by the Respondent.

2. I have read the affidavits sworn in support of and in opposition to the application. I have also considered the submissions of the learned counsels appearing. No authorities were cited.

3. Under the *proviso* to **section 76G** of the *Civil Procedure Act Cap 21* (the Act), 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**”.

4. The decree sought to be appealed against having been passed on 10/12/2018, the Applicant should have filed its appeal on or before 09/01/2019. See section 79G of the Act. The present application was filed on 10/06/2019. So, we are looking at a delay of some five (5) months.

5. How is that delay explained? The Applicant says that its then advocate never informed it of the judgment date and did not attend delivery of judgment, and that the advocate finally communicated in March 2019. That communication must surely have been that judgment was delivered on 10/12/2018 and what the judgment was.... Why then did it take another three (3) months before the present application was filed?

6. The Applicant states that it instructed its new advocates on 14/03/2019 to apply for copies of the proceedings and judgment, which they did, but that up to the time of filing the application the same had not been supplied by the court. That may be so, but what prevented the new advocates, who practice in Nanyuki Town, walking to the court registry in the same town, and peruse the judgment? That surely would have been sufficient to enable the filing of a memorandum of appeal without further delay! This is what a keen litigant would have demanded that his new advocates do.

7. I am not satisfied at all that there was any good and sufficient cause for the further delay of nearly three months from March to June, 2019. It is also to be noted that no draft memorandum of appeal has been annexed to the application to enable the court to assess the seriousness of the intended appeal.

8. It appears from what the learned counsels stated at the hearing of the application that the Applicant never attended the hearing of the suit before the trial court. This court has not been told of any application before the trial court to set aside the judgment that appears to have been *ex parte* for non-attendance at the hearing of the defendant. It is also to be noted that the Applicant was prompted into action only after execution of decree proceedings ensued.

9. The decree sought to be appealed against is a money decree. In the circumstances of this case the Applicant is not deserving of the discretion of the court. The application is refused and dismissed with costs. The interim stay of execution is hereby lifted. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 25TH DAY OF SEPTEMBER 2019

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 26TH DAY OF SEPTEMBER 2019