



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 171 OF 2018**

**CLIFFORD OMONDI OOKO.....APPLICANT**

**-VERSUS-**

**JOSPHAT NDWIGA.....RESPONDENT**

**RULING**

1. This is a ruling on application dated **6<sup>th</sup> November 2017**. It seeks leave to file appeal out of time.
2. Grounds on the face of the application are that judgment in Nakuru CMCC No.1412 of 2015 was not delivered on **5<sup>th</sup> September 2017** as scheduled; that the court delivered judgment on **14<sup>th</sup> November 2017** without notice.
3. That **Ms.Kibagendi** who was in court for other matters took terms of the judgment after being told that the applicant was represented by the firm of Gekonga & Company Advocates but inadvertently failed to forward details of judgment for further action; and upon follow up of the matter by the applicant the file could not be traced in the registry.
4. The application is supported by application sworn by the applicant on 28<sup>th</sup> June 2018. He restated grounds on the face of the application.
5. Applicant further averred that the court file was found on 22<sup>nd</sup> August 2018 that is when he was immediately advised of the terms of the judgment.
6. Applicant averred that he is willing to abide by conditions given by the court and sought opportunity to be allowed to appeal out of time.
7. In support of this application further, **Cyrus Sagana** a clerk with the firm of Gekonga and Company Advocates swore affidavit dated 28<sup>th</sup> June 2018.
8. He averred that when he went to chief magistrate's registry the court file could not be traced and on 22<sup>nd</sup> May 2018, he was informed by the registry that the file was found inside a closed file; and upon retrieval of the file, he perused it and found that judgment has been delivered. Advocate **Violet Kibagendi** also swore an affidavit dated 28<sup>th</sup> June 2018.
9. In response the respondent filed ground of opposition dated 27<sup>th</sup> July 2018. Respondent stated that the applicant was duly represented during delivery of judgment and has no excuse for not filing memorandum of appeal; further that there is inordinate delay in filing this application even after the alleged trace of the court file on 22<sup>nd</sup> May 2018 which has not been explained; and proposed draft does not disclose arguable grounds thus application is an abuse of the court process.

**ANALYSIS AND DETERMINATION**

10. From judgment attached to the application, I note that judgment in Nakuru CMCC No.1412 of 2015 was delivered on 14<sup>th</sup> November 2017.
11. From her affidavit, Kibagendi Advocate works with the firm of Gekonga which represented the applicant in the lower court matter. She was present when judgment was delivered. Even if notice of delivery was not issued plaintiff was represented and cannot say he was not aware of delivery of judgment.
12. On the issue of missing file, there is no correspondence to confirm that the court file was missing or the applicant's Advocate made efforts to trace the file.

13. It was the responsibility of the applicant to follow up his matter through his advocate to know the position and if his efforts were frustrated in any way, that should have been demonstrated. I have not seen sufficient explanation for delay for a period of one year.

14. I have also perused and considered the draft memorandum of appeal and in my view, the applicant does not clearly bring out issues he intends to raise in the appeal which may persuade the court to interfere with the lower court finding.

15. From the foregoing, I see no merit in this application.

16. **FINAL ORDERS**

**1. Application dated 28<sup>th</sup> June 2018 is dismissed.**

**2. Costs to the respondent.**

**Ruling dated, signed and delivered at Nakuru this 28<sup>th</sup> day of November, 2019.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Court Assistants – Schola and Jeniffer

Cheruto holding brief for Gekonga Counsel for Applicant

No appearance for Counsel for respondent