



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.72 OF 2017**

**DAVID ADANJE.....APPLICANT**

**-VERSUS**

**NAKURU WATER AND SANITATION**

**SERVICES COMPANY (NAWASSCO).....RESPONDENT**

**RULING**

1. The application before me dated 9<sup>th</sup> November has been filed by the appellant. He seeks orders that the memorandum of appeal and record of appeal be admitted out of time. It is stated to be brought under Rules 3A and 3B of the Appellant Jurisdiction Act and Rule 4 and 82 of the court of Appeal Rules. I must observe at the outset that the cited provisions of the law do not apply to appeals in the High Court.
2. The applicant has set out the grounds that judgment in favour of the respondent was delivered on 18<sup>th</sup> January, 2017 in **Nakuru CMCC 359 of 2012**. The appellant was not informed of the judgment date and only learnt about it 7 months later. Other grounds are that the applicant was dissatisfied with the judgment of the Court and has lodged the present appeal; that the balance of convenience favours the granting of the orders sought, and; further that the respondent shall suffer no prejudice if the application is allowed.
3. The supporting affidavit was sworn by the applicant. The affidavit amplifies the grounds upon which the application is brought. Of particular note is paragraph 6 in which the applicant states “that we only realized on 10<sup>th</sup> July, 2017 that the judgment was read on 18<sup>th</sup> January, 2017 without our notice and I pray that this appeal be admitted out of time as the grounds raised are sufficient.
4. The application is opposed by the respondents. In grounds of opposition dated 30<sup>th</sup> November 2017, they state that the application was utterly defective ad an abuse of the process of court; that the application is not soundly grounded in law and should be struck out for being a nullity; that the delay in bringing the application was inordinate and; that the no plausible reasons have been offered to explain the delay.
5. The applicant submits that the judgment was delivered without notice to the parties and that he only discovered seven months later that judgment had been delivered on 18<sup>th</sup> January 2017 in the absence of the parties. He submits that his advocate had tried to trace the file in the registry without success.
6. The respondents on the other hand submit that the application was defective and should be struck out. That the provisions of the law cited ousts the jurisdiction of the Court. They submit that the applicant has not sufficiently explained the delay of 5 months after filing of the memorandum of appeal. They contend that the appeal has no chance of succeeding particularly because the suit was dismissed for having been filed out of time and without leave of court. They further submit that they will suffer prejudice as the cause of action arose in 2007 and the matter was filed in 2012.
7. In response to the respondents’ submissions, the applicant submits that delay in filing the appeal was occasioned by change of firm of advocates who previously acted for the appellant. They also submit that the appeal was likely to succeed as the judgment of the trial court was set aside. They pray that the memorandum of appeal be allowed out of time.
8. I have looked at the provisions of law under which the application has been brought. Those provisions relate to appeals before the Court of appeal and do not apply to the present application. I shall however not accede to the respondent’s prayer to strike out the application and shall proceed to consider it on merit in consideration of **Article 159 (2) (d) of the Constitution**.
9. There is ample precedent on the guiding principles against which an application for extension of time for filing an appeal is considered. The proviso to **section 79 G of the Civil Procedure Act** empowers the Court to extend time. Such power is discretionary and the applicant

must show that the application has been brought timeously and further that any delay must be explained to the satisfaction of the Court. In addition, the court must consider any likely prejudice to be suffered by the respondent. See **Stanley Kahoro Mwangi & 2 others Vs. Wanyamas Trading Co. Ltd, [2015] eKLR**. See also **Mursal & 2 others vs Daniel Kioko Musau [2016] eKLR**.

10. In the present case, the record shows judgment was delivered on 11/1/2017 (and not 18/1/2017 as stated by the applicant) in absence of both parties. The applicant has averred and submitted that he was not notified of the judgment date and did not get to know about its delivery until seven months later. From my perusal of the record, the proceedings show that the case was mentioned on 23<sup>rd</sup> November 2016 to confirm submissions. Counsel present in court were Obue for the defendant (wrongly stated as accused) and Otieno for the plaintiff. The Court gave a judgment date for 11<sup>th</sup> January 2017. The record further shows that judgment was indeed delivered on 11<sup>th</sup> January 2017. Therefore the complaint by the applicant that judgment was delivered without notice is incorrect. There was no need for the court to issue notice of delivery of judgment since the parties were in court when the date was given. Having failed to attend, the applicant ought to have been diligent to know whether or not the judgment was delivered.

11. The applicant avers that he discovered that judgment had been delivered some 7 months later. This was around July, 2017. The memorandum of appeal that is part of the record of appeal is dated 9<sup>th</sup> June 2017 and from the court stamp was filed on the same date. There is also a certificate of delay issued by the Deputy Registrar of the court purportedly under Rule 81 of the Court of Appeal Rules. The certificate aids the applicant in explaining the delay in the preparation of the record of appeal. It does not however aid in explaining why the present application was brought six months later. Going by the applicant's own submissions he discovered that judgment had been rendered way after the appeal period had elapsed. Why then did he not make the present application immediately? He has not offered any explanation in the application and through submissions by counsel. The delay has not been explained at all.

12. The applicant has submitted that the respondent will suffer no prejudice if the application was allowed. In considering the degree of prejudice, I have looked at the proceedings. The suit in this case was filed on 13<sup>th</sup> April 2012. Neither the plaintiff nor the plaintiff witness statements indicate when the cause of action arose. The plaintiff however testified that the respondent broke down his door on 22<sup>nd</sup> January 2008 and carted away his household goods. I can therefore safely conclude that the cause of action arose in 2008 and as submitted by the respondent, it appears that it took the applicant 4 years before filing suit, and that it took five years before the case was concluded and judgment rendered. While it is not necessary for the court to look into the reasons for the delay, the court considers the total litigation period so far which runs close to 10 years to be unduly long. It is indeed prejudicial to the respondent to allow further delay.

13. Having found the delay unexplained satisfactorily and that the respondent shall suffer prejudice if the application is allowed, I do not find it necessary to go into the chances of the appeal succeeding. In the final analysis, I do not find the application merited. It is dismissed.

14. The circumstances of this case (as borne in the proceedings) militate against the award of costs to the respondent. Each party shall therefore bear their costs in this application.

Orders accordingly.

***Ruling signed at Garsen on.....day of June 2018.***

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**R. LAGAT KORIR**

**JUDGE**

***Ruling delivered dated and Counter signed at Nakuru this 21<sup>st</sup> day of June, 2018.***

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**JANET MULWA**

**JUDGE**

**In the presence of**

.....CA

.....for applicant

.....for respondent