



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC APPL NO. 141 OF 2017

BONIFACE ATSIIVALA CHAHARE APPLICANT

VERSUS

PAUL MUNGAI NJOROGE 1ST RESPONDENT

SETH ORIGEN 2ND RESPONDENT

RULING

1. The Applicant took out the Notice of Motion dated 3rd April, 2017 in which he sought for the following orders *inter alia*: -

a. That the proposed Appellants be granted leave to appeal out of time against the whole ruling of the Senior Principal Magistrate Mrs. M. Obura in Milimani CMCC 14133 of 2006.

b. That the Memorandum of Appeal annexed hereto be deemed as duly filed.

c. That the cost of this Application be in the cause.

2. The Motion is supported by the Affidavit of Boniface Atsiavala Chahare, sworn on 3rd April, 2017. He averred that the ruling being appealed against was delivered on 25th November, 2016 date which his advocate had attended a matter in Thika, Civil Suit 54 of 2016 and had no knowledge that ruling had been made dismissing the Applicant's suit. He averred that efforts by his advocates to peruse the file were not successful as the file was in chambers. He averred that his advocate wrote to the Executive officer at Milimani Commercial Courts requesting to know where the file was and after several attempts, the court registry responded that the court file could not be traced. He averred that the court file was traced well after the thirty day period for filing an appeal had lapsed hence this application. He averred that he stands to suffer irreparable loss and damage in the event the application is not granted.

3. The Motion was opposed vide the Replying Affidavit sworn by the 1st and 2nd Respondents on 29th June, 2017. They averred that the Applicant is before this court without clean hands owing to his failure to prosecute the Applicant's suit in the Subordinate Court which led to his suit being dismissed twice. This culminated to the dismissal of the Applicant's suit for want of prosecution on 25th November, 2016.

4. They averred that the Applicant is seeking leave to appeal out of time four months after the lapse of time for filing an appeal. They averred that the Applicant's explanation for the delay is unsubstantiated with no evidence to back it up thus prejudicing the Respondents and they urged this court to dismiss the application with costs.

5. In exercising its discretion, whether or not to extend time to appeal, the court has to weigh the outcomes for both the Applicant and the Respondents respectively. This notwithstanding, for the court to grant leave for an appeal to be made out of time, sufficient reasons that occasioned the delay ought to be explained. The Respondents have argued that the Applicant has failed to demonstrate the circumstances that occasioned the delay to necessitate the application to appeal out of time.

6. The Applicant has specifically stated that the court file went missing. This assertion was not controverted.

7. For this reason alone, I am convinced that this court should exercise its discretion in favour of the Applicant.

8. Consequently, the Applicant is given leave of 10 days to file an appeal out of time. Costs of the motion shall abide the outcome of the intended appeal.

Dated, Signed and Delivered in Nairobi this 28th day of September, 2018.

J.K. SERGON

JUDGE

In the presence of:

.....*For the Applicant*

.....*For the Respondents*