

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

MISC CIVIL APPLICATION NO 44 OF 2014

JOSEPH MBOGO.....APPLICANT

VERSUS

1. DAVID KAMAU SAMUEL

2. DANIEL IRUNGU SAMUEL (thru' his appointed attorney

CAROL NJOKI KINYANJUI).....RESPONDENTS

RULING

1. The Applicant herein, **Joseph Mbogo** (who was the plaintiff before the trial court) has sought by **notice of motion dated 20/06/2014**, in effect, an order for extension of time to lodge appeal against the judgment (wrongly labeled as a ruling) and decree of the lower court passed on 26/11/2012 by which the plaintiff's suit against the Respondents (who were the defendants) was dismissed with costs to the 2nd Respondent, **Daniel Irungu Samuel** (2nd defendant). The application is supported by the Applicant's affidavit annexed thereto.

2. The 1st Respondent, who is the Applicant's son, has not filed anything in response to the application. But the 2nd Respondent (who is the Applicant's brother) filed a replying affidavit on 01/02/2016 through his appointed attorney, **Caroline Njoki Kinyanjui** (his daughter).

3. I have read the affidavits sworn in support of and in opposition to the application. I have also considered the parties' submissions. They were all unrepresented by counsel.

4. The decree sought to be appealed against having been passed on 26/11/2012, appeal should have been lodged within 30 days thereof (excluding from 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). See **section 79G** of the **Civil Procedure Act, Cap 21**. But under the proviso to that section 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.

5. The Applicant's present application was filed on 23/06/2014. That means that he is about 1½ years out of time. He has explained that delay in two ways –

(a) That the lower court delayed in supplying him with certified copies of the proceedings and judgment, which were supplied on 28/01/2013.

(b) That by that time he was unwell and undergoing treatment for about a year.

6. To begin with the Applicant has not exhibited any certificate of delay from the lower court. The appeal should thus have been filed on or before 26/12/2012. Secondly, the medical document dated 25/04/2014 annexed to the application shows that that Applicant was diagnosed with pulmonary tuberculosis on 20/04/2011. He was on treatment for the next 6 months. He thus completed his treatment long before his case was heard and the judgment he now seeks to appeal against passed on 26/11/2012. He was declared cured of the tuberculosis on 04/10/2011! He had developed peptic ulcer disease during his treatment for the PTB. It has not been shown how the peptic ulcer disease could have prevented him from pursuing his case.

7. The Applicant has not satisfied this court that he had good and sufficient cause for not filing his appeal in time. His application by notice of motion dated 20/06/2014 has no merit. It is hereby dismissed with costs to the 2nd Respondent. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 16TH DAY OF MARCH 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 24TH DAY OF MARCH 2017