



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL MISC. APPL. NO. 525 OF 2016
JACKSON KAKAI NZOMOAPPLICANT
VERSUS
ALL TYMES TENTS LIMITED.....1ST RESPONDENT
DANIEL MAINGI MWAURA.....2ND RESPONDENT
RULING

1. The application dated 10th October, 2016 seeks orders that leave be granted to file a memorandum of appeal out of time and/or that the time for filing and serving the same be extended.
2. The application is premised on the grounds stated in the application and is supported by the affidavit sworn by the Applicant's counsel, Dorry Wamugo and the affidavit of the Applicant, Jackson Kakai Nzomo. The delay in filing the appeal within time is blamed on the late instructions from the Applicant who was unreachable as he was away in Kyuso at the time the judgment was delivered. It is stated that the award of general damages was too low. It is further stated that the lower court failed to address the issue of loss of earnings and loss of future earning capacity. That the appeal is arguable with high chances of success and will be rendered nugatory if the orders sought are not granted.
3. The application is opposed. It is stated in the replying affidavit that following the delivery of the judgment on notice the Respondents were informed of the decretal sum and the same was settled. That five months later they were served with the instant application. According to the Respondents, the Applicant has come to court with unclean hands without disclosing that the decretal sum was settled.
4. During the hearing of the application, the parties relied on their affidavits and the annexures thereto.
5. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, 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. Provided that 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.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil

6. The court therefore has the discretion to extend time within which to file an appeal. As stated by the Court of Appeal in the case of **Aviation Cargo Limited v St. Mark Freight Services Limited [2014] eKLR**:

“...whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”

7. Turning back to the case at hand, it is noted that the judgment of the lower court was delivered on 29th April, 2016. From the Applicant’s counsel’s affidavit, it is apparent that neither the Applicant nor the Advocate attended court on that day. What the Applicant’s counsel has deponed is that a pupil from their firm attended court and informed her that the judgment would be “issued” on 10th May, 2016. That the Applicant’s counsel’s firm followed up on the judgment and confirmed delivery of the same and on 14th June, 2016 applied for certified copies of the same. Failure to immediately peruse the court file is blamed on “the exercise that was being undertaken in the 2012 registry” There is no explanation on what exactly the said exercise involved and how it impeded the Applicant’s counsel from perusing the court file or obtaining the certified copies of the judgment in time.

8. Sending a pupil alone to court is dereliction of duty. It is noted that the Respondent’s counsel attended court after receiving the notice for the delivery of the judgment on 29th April, 2016. It is therefore apparent that the Applicant’s counsel sent a pupil to court at their own peril. They only have themselves to blame if they did not receive the correct information.

9. The application at hand was filed on 10th October, 2016. That is over six months following the delivery of the judgment. The Respondent has exhibited a letter dated 29th June, 2016 forwarding the cheque for the decretal sum of Ksh.498,760/=. The letter is stamped as received on 30th June, 2016 by the Applicant’s counsel. The Applicant’s counsel had on 28th June, 2016 written to the Respondent’s counsel demanding payment of the decretal sum. There is also a letter dated 26th July, 2016 sent to the Applicant’s counsel by the Respondent’s counsel forwarding a cheque of Ksh.71,146/= being the costs of the suit.

10. There is no satisfactory explanation why the Applicant’s counsel was already receiving the decretal sum way back in June 2016 but waited until October 2016 to file the application under consideration. It is noteworthy that the Applicant’s counsel’s affidavit has not disclosed the dates or months that their office tried to contact the Applicant who could not be reached. It’s not disclosed through which method they tried to reach the Applicant. Although the Applicant has stated in his affidavit evidence that he lives in Kyuso and it was difficult to get any information, it has not clearly come out how he was able to previously communicate with his Advocates including getting information on the hearing date.

11. The Applicant’s affidavit evidence fails to reveal when he became aware of the judgment. This could have helped the court to weigh whether he acted diligently in giving the instructions to his advocate to appeal. Both the affidavit by the Applicant and by his counsel have failed to disclose the communications with the Respondent’s side and the receipt of the decretal sum long before the filing of the instant application.

12. It appears the application herein is an afterthought. No satisfactory explanation has been given for that delay. Consequently, I dismiss the application with costs to the Respondent.

Date, signed and delivered at Nairobi this 27th day of April, 2017

B. THURANIRA JADEN

JUDGE