



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**MISCELLANEOUS APPLICATION NO. 1 OF 2016**

**JAMLECK GACHOKI NGARI.....APPLICANT**

**VERSUS**

**GRACE KABARI KAGAI.....RESPONDENT**

**RULING**

1. Before this Court is a Notice of Motion dated 4<sup>th</sup> January 2016 brought by **Jamleck Gachoki Ngari** the applicant herein seeking for the following reliefs namely:-

*i. That leave be granted to the Applicant to file appeal out of time.*

*ii. That costs be provided.*

2. The Applicant has moved this Court under **Order 50 rule 6** of the **Civil Procedure Rules** and **Section 79 G** of **Civil Procedure Act** on the following grounds:-

*i. That the delay to file an appeal against the ruling of the lower court was caused by delay in typing of proceedings.*

*ii. That the delay in lodging the appeal was not inordinate.*

*iii. That the appeal filed stands high chances of success.*

3. **Mr. Gachero**, learned counsel for the Applicant argued and submitted that the ruling the Applicant intends to appeal against was delivered on 30<sup>th</sup> September, 2015 and that the Applicant applied and paid for the proceedings on 5<sup>th</sup> October, 2015. He further submitted that the proceedings were supplied late as demonstrated through a certificate of delay dated 31<sup>st</sup> December, 2015 exhibited in the affidavit in support of this application. It is contended that in view of the fact that this application was filed on 4<sup>th</sup> January, 2016, there was no delay on the part of the Applicant. In his view the Respondent has not faulted the reasons advanced for the delay but rather has gone into issues which will become relevant at the hearing of the intended appeal.

4. **Grace Kabari Kagai** the respondent herein has opposed this application through her replying affidavit sworn on 22<sup>nd</sup> August, 2016. In her opposition, the Respondent has faulted the Applicant for being vexatious. In her view the order the Applicant intends to appeal against is not adverse to him in any way because the order given was to enjoin another party to the suit pending in the lower court. **Mr. Magee**, learned counsel for the Respondent submitted that the inclusion of another party to the suit was necessitated by the Applicant who had moved the court to set aside the judgment entered against him on

the grounds that Kings Millers company Limited was liable and not himself personally as a director. The Respondent argued that on the basis of the same she applied to amend her pleadings to introduce the said Kings Millers Company Limited and wondered what prejudice the inclusion of that party in the suit would cause to him. In her view the application to appeal out of time was mischievous as well as belated as Kings Millers Limited has already been enjoined as party in the suit as the 2<sup>nd</sup> defendant and exhibited the amended plaint in her replying affidavit to demonstrate that fact.

5. I have considered this application and the submissions made by both counsels. Before I go into the merits of the application before me it must be noted that when a party desires to appeal against an order or a decree passed against him or her all he/she requires to lodge an appeal is only a copy of the decree or order to be appealed against. The entire proceedings of a case is really unnecessary in a first appeal. **Section 79 G** of the **Civil Procedure Act** provides as follows:-

***“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 appeal against, excluding from such period anytime 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.” (Emphasis added).***

It is obvious and clear there that where an intended appellant does have an acknowledgment from the lower court that either an order or decree was supplied to him late, he/she really does not require leave to appeal because the law clearly excludes the time the order or the decree was being prepared and supplied and time only runs when the order or the decree applied has been delivered. That in my view is the correct position in law going by the letter of cited provision of law. It is also important to note that the section also adds a proviso giving the discretion to court to admit the appeal out of time if sufficient cause is shown. An appellant therefore is required by law to file the appeal in the first place before moving the court to admit the same out of time because going by the proviso under **Section 79 C** a court can only exercise that discretion of admitting the appeal out of time if there is an appeal on record. Strictly speaking, it is a misconception for a party to file a miscellaneous cause asking to be allowed to file appeal out of time under **Section 79 (G)** of the **Civil Procedure Act**. The law requires him/her to file the appeal and move the court for good and sufficient cause to admit the appeal out of time. Having stated what in my view is the correct procedure in law let me now turn to the merits of this application.

6. The Applicant in this case apparently applied for proceedings on 5<sup>th</sup> October, 2015 as demonstrated through a court receipt exhibited in his supporting affidavit sworn on 30<sup>th</sup> December, 2015. He was supplied with the proceedings on 31<sup>st</sup> December, 2015 and moved this Court on 4<sup>th</sup> January, 2016 for leave to appeal out of time which I find unnecessary. He ought to have applied for a copy of the ruling and simply lodge his appeal as there was no legal impediment stopping him from filing his appeal if he was to show that he applied for the order appealed from and was supplied to him on 31<sup>st</sup> December, 2015.

I have considered the basis of the intended appeal particularly in the context of the provisions of **Sections 1A** and **1B** of the **Civil Procedure Act**. The case pending in the lower court (Kerugoya Chief Magistrate’s Court Civil Case No. 302 B of 2012) shows that the matter proceeded *exparte* on 2<sup>nd</sup> April, 2013 after the Respondent’s counsel failed to turn up in court. Judgment was entered against the Applicant herein and vide an application dated 28<sup>th</sup> April, 2014 he successfully sought to review and set aside the judgment entered against him and in allowing the application the lower court found the involvement of Kings Millers Limited in the suit as a distinct and separate entity distinct from the applicant as a factor among other reasons. The Respondent on the basis of the court’s ruling moved the court seeking to amend her pleadings to enjoin Kings Millers Limited as the 2<sup>nd</sup> defendant and the subordinate court ruled in her favour. I have noted the contents of an affidavit sworn by the applicant on 10<sup>th</sup> October, 2013 exhibited by the Respondent herein and from that affidavit, under paragraph 9, the Applicant herein clearly states on oath that the Respondent herein sued him wrongly and that she should have sued the company she transacted with which is Kings Millers Limited. I do not find why the Applicant would find a problem when the Respondent duly moved the court to include Kings Millers Limited as a party in the suit unless he of course wants to be mischievous as alluded by the Respondent herein and unnecessarily cause some delay. The provisions of **Order 1 rule 10 (2)** of the **Civil Procedure**

**Rules** clearly allows addition or substitution of parties at any stage of the proceedings whenever it is just and expedient to do so.

7. The Applicant has contended or submitted that his chances to succeed in the intended appeal are high but in view of the facts and the legal position I have observed above, I am simply not convinced that the intended appeal would serve any other purpose other than undesired effect of delaying the disposal of the suit pending at the court below. This Court under the cited sections of the law (**Section 1A and 1B** of the **Civil Procedure Act**) cannot give room to a party who appears for all intents and purposes intent at going against the overriding objective of the cited section of the law. This Court can only exercise its discretion in order to facilitate the just, expeditious proportionate and affordable resolution of civil disputes.

In the premises, this Court finds no merit in the Notice of Motion dated 4<sup>th</sup> January, 2016. The same is disallowed. Costs shall be in the cause of the case pending in the lower court. It is so ordered.

**Dated and delivered at Kerugoya this 25<sup>th</sup> day of May, 2017.**

**R. K. LIMO**

**JUDGE**

25.5.2017

Coram: Hon. Justice R. K. Limo J.,

Wachira court assistant

Parties

Applicant present

Sitati holding brief for Gacheru for applicant.

**SITATI:** I have instructions to take the ruling.

**COURT:** Ruling signed, dated and delivered in the open court in the presence of the applicant, Sitati holding brief for Gacheru and in the absence of Magee.

**R. K. LIMO**

**JUDGE**

25.5.2017