



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS CIVIL APPLICATION NO. 8 OF 2017

JULIA MUMBI MUTURI.....APPLICANT

VERSUS

SIMON KINGORI MUHORO.....RESPONDENT

RULING

The applicant has moved this court under **sections 3A, 79G and 95** of the **Civil Procedure Act (cap.21)**; **orders 22 rule 22; 42 rule 6; 50 rule 6 and 51 rule 1 and 3** of the **Civil Procedure Rules, 2010** for an order that this honourable court be pleased to grant leave to the applicant to file an appeal out of time against the judgment delivered on 6th February, 2017 in Nyeri Chief Magistrates Court Civil Suit No. 146 of 2014.

The motion is premised on the ground that the applicant instructed his advocates to lodge an appeal against the decision of the magistrates' court on 15th March, 2017, by which date the time of filing the appeal had lapsed.

The affidavit in support of the motion was sworn by Pauline Waruhiu who described herself in that affidavit as the General Manager, Claims Department at Directline Assurance Company Ltd which is the company that insured motor vehicle registration number KAQ 268 N. Apparently, the suit in the magistrates' court arose out of a road traffic accident involving this particular motor vehicle and the insurance company is effectively pursuing its right in the name of the insured under the doctrine of subrogation.

Ms Waruhiu deposed that the applicant's advocate on record informed her that on the date when the judgment was delivered, he sent his court clerk to take the judgment; unfortunately, this court clerk left employment in the advocate's firm before communicating the results of the judgment to him. Counsel only came to learn of the judgment after the order staying its execution had lapsed and the decree holder had commenced execution proceedings.

Counsel for the respondent opposed the application and confirmed the applicant's assertion that the applicant was represented when the judgment was delivered. Having been so represented, the applicant's counsel cannot be heard to say that he was not aware of the judgment until after the execution proceedings commenced. In fact, according to counsel for the respondent, the applicant only moved into action and filed the present application when the respondent took steps to execute the judgment.

Section 79G of the Civil Procedure Act (Cap.21), is the prescriptive law on the limitation period for filing appeals from the magistrates' court to this Court in those cases covered by that Act and the rules made thereunder; it states as follows:

79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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.

The proviso to this section is a window for filing an appeal outside the statutory 30-day period; however, that window is discretionary and is only open to an applicant who can demonstrate to the satisfaction of the court, that he has ‘a good and sufficient cause’ for failure to beat the prescribed deadline.

The applicant’s application thus turns on this question; has it been demonstrated that she has ‘a good and sufficient cause’? The first thing one notes in the applicant’s application is that as much as the applicant’s underwriter is pursuing its rights under the doctrine of subrogation in the applicant’s name, the applicant herself has not sworn any affidavit in support of the underwriters’ representative’s assertions. There is no doubt that according to this doctrine, the underwriter has every claim to the applicant’s rights in any proceedings for those particular rights but it is the applicant herself who must assume the active role in such proceedings. The rationale is simple- it is the insured who is party to the proceedings though whatever benefit he may derive from such proceedings is owed to a third party which, in this case, is the insurance company.

Secondly, whatever little the underwriter’s representative deposed in her affidavit is attributed to the applicant’s counsel. I am aware that in practice, depositions by counsel in support of or in opposition to any application is discouraged for the reason that counsel is thereby exposed to being asked to take the witness stand and cross-examined on his depositions when he ought to be articulating his client’s case in a more noble capacity. However, this counsel has not been identified and thus the source of the applicant’s information is doubtful.

Again, nobody from the firm of advocates representing the applicant has sworn that a particular clerk was tasked to take the judgment on the material day. Similarly, there is no information on when the clerk left the employment of the applicant’s firm of advocates.

It is curious that the applicant’s unnamed counsel only became aware of the judgment when the respondent commenced proceedings to execute the judgment in his favour. This begs the question why counsel never took any interest in getting to know the fate of the suit against his client when his clerk returned and had to be reminded of the judgment only when the respondent’s auctioneers moved to attach the applicant’s property in execution of the judgment. Without a sufficient reason to this question, I am inclined to agree with counsel for the respondent that the applicant was all along aware of the judgment and sat pretty to enjoy the order for stay but was only nudged into action after the order lapsed and the respondent moved to execute the judgment.

In these circumstances, I also agree with counsel for the appellant that there is no material before court that would persuade me to exercise my discretion in favour of the applicant.

All I have said boils down to one thing-the applicant has not demonstrated to my satisfaction that she has good and sufficient cause for not filing the appeal in time. Accordingly, I decline her motion dated 20th March, 2017. It is hereby dismissed with costs.

Signed, dated and delivered in open court this 13th day of October, 2017

Ngaah Jairus

JUDGE