



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 656 OF 2016

THE NAIROBI IMAGING CENTRE LIMITED.....APPLICANT

VERSUS

KENYA MEDICAL ASSOCIATION.....1ST RESPONDENT

KNIGHT MEDICAL ASSOCIATION.....2ND RESPONDENT

M.S.WANGAI T/A SANNEX AUCTIONEERS...3RD RESPONDENT

RULING

1. The application dated 19th December, 2016 seeks orders that the court be pleased to grant leave to the Plaintiff/Applicant to appeal out of time against the Judgment made by the Hon. M. Obura dismissing the Applicant's suit on 24th May, 2016 in Nairobi Milimani Chief Magistrates' Court Case No. 5418 of 2013.
2. The application is premised on the grounds stated in the application and is supported by the affidavit sworn by the Applicant's counsel. The Applicant's case is that the lower court delivered a ruling on 24th May, 2016 dismissing the Applicant's case for want of prosecution while the parties were negotiating the matter with a view to settling the same. The delay in filing the Appeal herein is attributed to the Applicant's failure to instruct the advocates in good time as the negotiations were still proceeding. It is further contended that the Appeal has high chances of success and that the Applicant wishes to exercise his constitutional right of appeal.
3. The application is opposed. According to the statement of the grounds of opposition dated 2nd February, 2017, the application is an abuse of the court process as the Applicant Company did not exercise its right of appeal diligently. That the delay in filing the Appeal is inexcusable, unreasonable and has not been satisfactorily explained. That the Applicant's suit was dismissed in the lower court for want of prosecution yet the Applicant has not demonstrated any diligence in filing the Appeal within time.
4. During the hearing of the application, the parties opted to file written submissions. I have considered the said submissions.
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 Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

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. In the case at hand, the ruling of the lower court was delivered on 24th May, 2016. The application at hand was filed on 22nd December, 2016. That is a period of almost seven (7) months. The negotiations alluded to by the Applicant were not a bar to the filing of the Appeal especially taking into account that the Applicant’s suit had been dismissed by the lower court following an application for dismissal for want of prosecution. The Applicant had a duty to instruct his advocate within time and to follow up on the progress of the case. In the circumstances of this case, the delay is ordinate and there is no satisfactory explanation for the delay.

8. With the foregoing, the application is dismissed with costs.

Date, signed and delivered at Nairobi this 16th day of Nov., 2017

B. THURANIRA JADEN

JUDGE