

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL MISC APP 85 OF 2016

ZAKARIA KINYUA.....APPLICANT

VERSUS

MURIITHI KALLEN

ALEX MUTUA.....RESPONDENTS

RULING

1. This is an application for leave to appeal out of time brought by way of notice of motion under sections 79G and 95 of the Civil Procedure Act (Cap 21) Laws of Kenya as well as under Order 51 (1) of the 2010 Civil Procedure Rules. It is also expressed to be brought under all enabling provisions of the law and procedures. The application is supported by the grounds on the face of the motion. These grounds are that the applicant is a poor man and has been very ill, which arose from the accident that is now the subject matter of the intended appeal. It is due to this illness that he was unable to promptly raise the fees to file this application and memorandum of appeal out of time. And the last ground is that the delay is not inordinate and is excusable.

2. The application is anchored in the applicant's supporting affidavit. The applicant has deponed that judgement was delivered on 21st March 2016. He has also deponed that following the accident, he has been a cripple and has not been able to earn a living. He has also deponed that it has been very difficult for him to raise money to finance this intended appeal. And finally he has deponed that it is his brother, who runs a jua kali business in Meru and his father who assisted him financially to file this application, which he depones is not inordinate.

3. The respondents have opposed the applicant's motion in regard to which they have filed written submissions. The respondents have filed two grounds of opposition to the applicant's motion pursuant to Order 14 Rule 14 of the 2010 Civil Procedure Rules. The first ground is that the application is devoid of merit. The second ground is that the application is an abuse of the court process. According to their counsel, the delay of about three months on the part of the applicant is inordinate and has not been fully explained. They have further submitted that the power vested in the court to grant or refuse an application of this nature is of a discretionary nature and must be exercised judicially. They have cited the case of Mariam Warfa & 2 others v. Maalim Ibrahim Mohamed (2011) eKLR in support of their case.

4. It is also their submission that it is of public notoriety that the cost of filing a memorandum of appeal in the High Court is a minimal fee. According to them, it is highly unlikely if not impossible that the applicant could not raise the filing fees within a period of thirty days, when he was ably represented by counsel. In furtherance of their submission they have pointed out that the applicant did not file the plaint in the subordinate court as a pauper and they have also pointed out that the applicant was only required to raise a sum of Kshs 75/- to file a memorandum of appeal.

5. I have considered the affidavit evidence of the applicant that he was crippled following the accident that gave rise to this intended appeal. I find his evidence to be credible that he is a poor person because of the illness brought about by this accident. I also believe his evidence that he was unable to promptly raise the fees to file this application and the memorandum of appeal within the time prescribed as required by section 79G of the Civil Procedure Act. I find that a period of three months between the date of judgement which was 21st March 2016 and the filing of this application on 24th May is not inordinate

delay. The delay has been explained satisfactorily. I have also perused his memorandum of appeal which runs to 7 grounds and I find that there is merit in the intended appeal.

6. In the light of the foregoing matters, I find that the delay of three months has been explained adequately. I further find that the intended appeal is not frivolous and is not an abuse of the process of the court as submitted by counsel for the two respondents.

7. In the circumstances, I exercise the discretion conferred upon the court by section 79G in favour of granting to the applicant leave to appeal out of time, on condition that he files and serves the memorandum of appeal within 30 days failing which the order granted herein will lapse.

8. Costs of this application shall be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **16th** day of **AUGUST,2016**

In the presence of both Mr Kamunyori for the Applicant and Mr Chomba holding brief for Mr. Githee for the Respondent.

Court clerk Njue.

J.M. BWONWONGA

JUDGE

16.08.16