

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

MISC CIVIL APPLICATION NO 100 OF 2013

KAMAU MUHIA.....APPLICANT

VERSUS

AGRICULTURAL FINANCE CORPORATION.....RESPONDENT

RULING

1. The Applicant herein filed his **notice of motion dated 4/11/2013** (for leave to appeal out of time) without a supporting affidavit. Clearly the application was going to stand or fall upon certain facts as would explain to the satisfaction of the court that he had good and sufficient cause for not filing his appeal in time. See the *proviso* to **section 79G** of the *Civil Procedure Act, Cap 21*. It was necessary therefore that an affidavit setting out such facts be annexed to the application. Without such affidavit, the application would be incompetent and liable to be struck out.

2. Initially the Applicant's application came up for hearing on 10/03/2015. In a preliminary ruling dated and delivered on 5/06/2015 the court directed the Applicant to file and serve a supporting affidavit within 14 days of that date in the interests of justice as he was unrepresented, and the Respondent to be at liberty to file and serve a replying affidavit. Indeed the Applicant filed such supporting affidavit on 12/06/2015 in which he endeavored to explain the delay in filing his appeal.

3. The application then came up for further hearing on 31/08/2016. The only ground argued by the learned counsel for the Respondent in opposing the application was that the same was incompetent for want of a supporting affidavit. Learned counsel's submission was obviously founded on an erroneous fact; as we have already seen, following the directions of the court, the Applicant indeed filed a supporting affidavit. He also stated that he had served the same upon the Respondent. Learned counsel for the Respondent did not protest that there was no such service.

4. As it is, the reasons given by the Applicant in his supporting affidavit explaining the delay in filing his appeal were not controverted by the Respondent as he did not file any replying affidavit. In the circumstances I will allow the Applicant's application and grant him leave to appeal out of time. He shall lodge his memorandum of appeal within 14 days from the date of delivery of this ruling. Costs of this application shall be in the appeal. In the event that no appeal is filed, the Respondent shall have costs of the application. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF NOVEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 25TH DAY OF NOVEMBER 2016