



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**MISC CIVIL APPLICATION NO 32 OF 2014**

**1. LUCY WANJIRU NJOROGE**

**2. P C KENNETH KINOTI.....APPLICANTS**

**VERSUS**

**JOHN KARANJA NJOROGE.....RESPONDENT**

**RULING**

1. The Respondent in this application, **John Karanja Njoro**, has a decree for money passed in his favour by the lower court on 15/01/2014 against the Applicants. The Respondent was the plaintiff while the Applicants were respectively the 1<sup>st</sup> and 3<sup>rd</sup> defendants. The plaintiff's case against the 2<sup>nd</sup> defendant (Attorney-General), was dismissed. The plaintiff's cause of action was in false imprisonment and malicious prosecution. The 1<sup>st</sup> defendant was the complainant in the criminal case where the plaintiff was charged with house-breaking and theft. The 3<sup>rd</sup> defendant was the police officer who investigated the complaint and preferred charges against the plaintiff. The plaintiff was ultimately acquitted after a full trial.

2. The application at hand is the **notice of motion dated 22/05/2014** by which the Applicants seek leave of the court to appeal out of time against the aforesaid decree. It is supported by an affidavit sworn by the 1<sup>st</sup> Applicant. The Respondent has opposed the application by a **replying affidavit filed on 09/06/2014**. The Applicants responded to that affidavit by a **supplementary affidavit** (sworn by the 1<sup>st</sup> Applicant) filed on 30/09/2014. It would appear that the Respondent filed a further replying affidavit on 7/10/2014; it is not clear if he had leave of the court to do so.

3. I have read the affidavits sworn in support of and in opposition to the application. I have also given due consideration to the submissions of the learned counsels appearing. No cases were cited.

4. Under the **proviso to section 79G** of the **Civil Procedure Act, Cap 21** 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**.

5. In the present case, the decree having been passed on 15/01/2014, the Applicants ought to have appealed on or before 14/02/2014. The present application was filed on 23/05/2014. The Applicants were therefore late by 98 days (three months and 8 days). Judgment was delivered in the presence of their then counsel, though they themselves were not present. The Appellants state that they were not aware of the judgment date, and that their then counsel did not inform them of the judgment. They say that they next heard of the matter when a notice to show cause was served upon them. They do not state when the notice to show cause was served on them. They urge that they have a good intended appeal. One of the grounds they intend to urge is that having found the Attorney-General not liable, the trial court could not in law have found the 1<sup>st</sup> Applicant (who was merely a complainant in a criminal case and therefore a witness) and the 2<sup>nd</sup> Applicant (who was an agent of the State represented by the Attorney-General) liable for false imprisonment and malicious prosecution.

6. The Respondent has pointed out that the Applicants were served with notice to show cause on 31/3/2014; they therefore did not have to wait until 23/05/2014 (more than two months) to apply. The explanation offered for this further delay (paragraph 8 of the supplementary affidavit filed on 30/9/2014)

is that their new advocates had to make an application for leave to be allowed to come on record, and that it took time to make that application in the lower court. I am not sure that the same was necessary; and if it was, the Applicants did not have to take more than two months to prosecute the application.

7. That notwithstanding, the right of appeal is a very important element in the just administration of justice and will not be lightly denied. In the present case, I am satisfied that the intended appeal will raise an important point of law as outlined elsewhere above. I am also satisfied that the Applicants' failure to lodge the appeal in time was caused in the main by the failure of their former advocate to inform them of the judgment as soon as it was delivered, and also by their present advocate in failing to take immediate action when instructed to seek leave to appeal. These, in the circumstances of this case, constitute good and sufficient cause.

8. I will in the event allow the application and grant the leave to appeal out of time sought. The Applicants shall file their appeal within ten (10) days of delivery of this ruling. They shall also pay the Respondent's thrown-away costs so far incurred, including the costs of this application. These thrown-away costs must be paid within 10 days of taxation thereof or agreement thereon. In default the Respondent may execute for the same. Those will be the orders of the court.

**DATED AND SIGNED AT MURANG'A THIS 16<sup>TH</sup> DAY OF JUNE 2015**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 19<sup>TH</sup> DAY OF JUNE 2015**