



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**MISC. APPLICATION NO. 193 OF 2014**

**JOSHUA OMONDI OGAL.....APPLICANT**

**VERSUS**

**ATLAS PLUMBERS & BUILDERS (K) LTD. ....RESPONDENT**

**RULING**

1. Before this court is an application dated 28<sup>th</sup> August, 2014 and filed on the 4<sup>th</sup> September, 2014 by one Joshua Omondi Ogal and filed under the provisions of Order 42 Rule 6(1) and 51 Rule 1 of the Civil Procedure Rules and Section 3A and 79G of the Act. The applicant seeks leave of court to file an appeal out of time, against the Judgment and decree of the trial court in Nakuru CMCC No. 1176 of 2010.
2. The application is supported by the applicant's affidavit sworn on the 28<sup>th</sup> August, 2015 and grounds on the face of the application as follows:
  1. That Judgment in the lower court was delivered on the 18<sup>th</sup> July, 2014.
  2. That by the time the applicant became aware of the terms of the Judgment and wanted to file an appeal, time to file the appeal had lapsed.
  3. That the applicant wishes to file appeal against liability.
  4. That the court has discretion to allow the application.

In the applicant's supporting affidavit, he deposes that he received his Advocate's letter informing him of the Judgment on the 20<sup>th</sup> August, 2014 while at his rural home and travelled to see the advocates on the 26<sup>th</sup> August, 2014 where he learnt of the terms of the Judgment upon which he instructed the Advocates to lodge an appeal, but as at that time the period of 30 days had lapsed. The applicant's counsel submitted that soon thereafter he filed this application. It is his submission that the delay was not unreasonable and that Section 79 (G) of the Civil Procedure Act gives the court discretion to extend time to file appeal out of time.

3. Mr. Gekonga Advocate for the applicant urged the court that the Decretal sum is already deposited in the parties Advocates' joint account hence enough security for costs and that the respondent will not be prejudiced in any way.

A draft Memorandum of appeal has been filed together with this application.

4. In opposing the application, learned counsel Mr. Mahinda for the Respondent relied on grounds of opposition filed on the 23<sup>rd</sup> September, 2014. He submitted that there was no evidence that the letter from the Advocates reached the applicant on the 20<sup>th</sup> August, 2014 and that the Supporting Affidavit did not disclose what efforts were made by his advocates to reach him. He further argued that the Respondent had filed an appeal from the same Judgment being **Nakuru High Court Civil Appeal Number 120 of 2013**, and pending hearing.
5. This court has considered the application, the supporting affidavit and submissions as well as the respondent's grounds of opposition and submissions.

Section 79(G) of the Civil Procedure Act states:

***“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 anything 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.”***

6. The above section gives the court a wide discretion to allow filing of an appeal out of time if satisfied that there was good cause as to why the appeal was not filed within time. I have considered the time lapse between the date Judgment was delivered by the trial court on the 18<sup>th</sup> July 2014, the date the applicant's Advocates wrote a letter to the applicant and time the said letter was received on the 20<sup>th</sup> August, 2014 and the date the applicant travelled from his rural home to the Advocates office in Nakuru on the 26<sup>th</sup> August, 2014. That is a period of thirty seven(37) days, a delay of seven(7) days only.
7. This application was filed on the 4<sup>th</sup> September, 2015 upon receipt of instructions on the 26<sup>th</sup> August, 2015.

In my view the delay was not unreasonable and was well explained.

On why this application was not filed within the appeal he filed for the respondent in the same matter. The applicant stated that he was not aware of the filing of the appeal, as it had not been served upon him.

8. It has been submitted that the decretal sum in the lower court has already been deposited in the parties' Advocates Joint account pending hearing of the appeal filed by the respondent in **Nakuru High Court Civil Appeal Number 120 of 2013**. The decretal sum having been secured in a bank deposit as aforementioned, I see no reason why the applicant should be denied an opportunity to file his appeal.
9. It was urged that the applicant could have filed a cross appeal in the above appeal. That could have been the right thing for the applicant to do, but again, and as submitted, he did not have knowledge of the existence of the said appeal at the time he filed this application.

It is my view that allowing the appeal to be filed out of time will not prejudice the respondent's interest in the matter as the decretal sum is already secured as aforementioned.

10. I am satisfied that sufficient cause has been shown why the appeal could not have been filed within the stipulated time and in the exercise of my discretion as donated by Section 79(G) of the Civil Procedure Act, I allow the applicant to file and serve the respondent with the intended appeal within seven(7) days of this ruling.

The respondent shall have costs of this application.

**Dated, Signed and delivered in open court this 18<sup>th</sup> of June 2015**

**JANET MULWA**

**JUDGE**

**In the presence of :**

Ms. Tarus Holding brief for Malinda for Respondent

No appearance for Applicant

Court clerk – Lina.