



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 191 OF 2011

DAVID MATHENGE MUCHIRI 1ST APPLICANT

KAMA OTE2ND APPLICANT

V E R S U S

**MAPENZI KATANA (Minor suing thro' her mother and
next friend NYEVU KATANA MWANYALE RESPONDENT**

RULING

1. The Applicant by Notice of Motion dated 9th March 2011 applies for leave to file an appeal out of time against part of the judgment in **Mbsa SRMCC No. 712 of 2009** which was delivered on 25th June 2010. In addition Applicant seeks for stay of execution of that judgment pending hearing and determination of the intended appeal.
2. The application is based on the ground that the intended appeal has a high chance of success; that there were stay orders issued on 23rd June 2010 in **Nrb High Court Petition No. 231 of 2010** staying matters that included this one; that that stay order was lifted on 1st March 2011 and that if stay of execution is not granted the Applicant shall suffer substantial loss.
3. Section 79G of Civil Procedure Act Cap 21 provide as follows-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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.”

4. In my view the proviso of that Section requires an Applicant to show to the Court length of delay was not inordinate and that there would be no prejudice on the Respondent.
5. Respondent relied on the case **GERALD M'LIMBINE -VS- JOSEPH KANGANGI [2009]eKLR** where the Court held the view that the words “**an appeal to be admitted out of time**” in Section 79G means that an appeal must first be filed for a party then to apply for it to be admitted out of time. I respectfully differ with that strict interpretation. I am of the view that

those words in Section 79G are double edged. That is, under that Section the Court can both admit an appeal out of time and can grant leave for an appeal to be filed out of time. For that reason the fact that the Applicant has not filed a memorandum of appeal in this matter is not fatal to the application for leave to be granted to file such memorandum of appeal out of time.

6. The judgment of the Magistrate's Court which is the subject of this appeal was delivered on 25th June 2010. The delay in filing the present application is nine (9) months. That in my view is inordinate delay.
7. The reason for the delay is that there were orders staying orders in **Nrb HC Petition No. 231 of 2010** which was lifted on 1st March 2011. The Applicant as correctly submitted by the Respondent failed to attach/annex any evidence of such a Petition or such order of stay. Applicant also deponed by the affidavit in support that the delay in filing the appeal was attributed to Applicant's change of Advocates. It should however be noted that there also was no evidence of such change of Advocates as alleged. Section 107(1) of Evidence Act Cap 80 requires a party who desires a Court to give orders on any legal right to bear the burden of proof. That Section provides-

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The Applicant has failed the test of showing that the length and the reason for the delay should be viewed in its favour.

8. The issue of prejudice will be examined on the available evidence before Court. The Magistrate's Court judgment of 25th June 2010 gave general damages of Kshs. 400,000/- to Respondent. It is now 3 years and 9 months since that judgment was delivered. I am persuaded by the holding in **FARAJ OMAR MWINYIKOMBO –VS- TELKOM KENYA LTD [2012]eKLR** where the Court in considering an application for leave to file an appeal out of time delivered itself as follows-

“I also consider that putting the Respondent though an appeal over 3 years after the decision had been made, over 7 years after the case commenced and 8 years after the Applicant's services had been terminated would lead to prejudice to the Respondent.”

Similarly in this matter the Respondent having waited now for 3 years and 9 months may if an appeal is filed have to wait no less than 3 more years for hearing of that appeal. No doubt Respondent who is being kept away from enjoying the fruits of his judgment will be prejudiced.

9. In the end I find Applicant's application to have no merit and accordingly the Notice of Motion dated 9th March 2011 is dismissed with costs to Respondent. The stay of execution of **Mbsa SRMCC No. 712 of 2009** is hereby vacated.

Ruling by:

MARY KASANGO

JUDGE

DATED and DELIVERED at MOMBASA this 20TH day of FEBRUARY, 2014.

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JUDGE