



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
MISCELLANEOUS APPLICATION NO. 28 OF 2013

JENNIFER WARINU KAMAU.....PROPOSED APPELLANT

VERSUS

MUTURU MWANGI.....PROPOSED RESPONDENT

RULING

The applicant who is also the proposed appellant herein filed a notice of motion dated 10th April, 2013 in which she has sought leave to appeal out of time against a judgment delivered by the Kigumo Resident Magistrates' court on 24th January, 2013. The application was filed in court on 11th June, 2013 and was brought under **sections 79G and 95 of the Civil Procedure Act** together with **Order 50 Rule 6 of the Civil Procedure Rules**.

Apart from seeking leave to appeal out of time, the applicant also sought for an order that the memorandum of appeal annexed to her affidavit in support of the motion be deemed as duly filed and served upon payment of the requisite fees.

The applicant's explanation for the delay is that the judgment she wants to appeal against was set to be delivered on 13th December, 2013; on that date it was deferred to 18th January 2013. When parties appeared in court on 18th January, 2013, they were informed that the magistrate who was set to deliver the judgment was away on leave and that it was now going to be delivered on notice.

The applicant states that judgment was eventually delivered on 24th January, 2013 without her knowledge and without any notice and that she only came to learn of this judgment on 21st March, 2013.

Immediately she became aware of the judgment, she instructed her advocates to take appropriate steps and appeal against it; acting upon her client's instructions, the advocates immediately applied for certified copies of the proceedings and judgment for purposes of filing of appeal on 22nd March, 2013.

The respondent opposed the application arguing that since the delivery of the judgment in January 2013, no effort had ever been made to obtain the decree or settle the judgment.

I have duly considered the application, the response thereto and the submissions by both counsel for the applicant and the respondent.

The time within which appeal from an order or a decree from a subordinate court can be made is set out in **section 79G of the Civil Procedure Act, Chapter 21 Laws of Kenya**. That section provides as follows:-

79G. Every appeal from a subordinate court to the High Court shall be filed within a period of

thirty days from the date of 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 the good and sufficient cause for not filing the appeal in time.

According to the applicant's version of events, she only became aware of the judgment on 21st March, 2013 almost two months after the judgment had been delivered and in any event long after the time within which the appeal ought to have been filed had lapsed.

The applicant says that her advocates acted swiftly and applied for certified copies of the proceedings and judgment. These advocates also filed the motion herein but it took them another twenty days to do that.

In my humble opinion, the applicant may not bear any blame for the delay in initiating appropriate steps to institute the appeal between the time the judgment was delivered and the time she became aware of its delivery because there is no evidence that she was notified of when the judgment was going to be delivered particularly after it had been deferred on more than two occasions; however, when the applicant became aware of the judgment she was from then on held accountable for each day that passed without an appropriate action being taken towards filing of the appeal. She must satisfy the court that the moment she became aware of the judgment she acted diligently and took the necessary steps without inordinate delay.

As far as this application is concerned the two actions that the applicant took and the time those actions were taken are subject to scrutiny in this ruling. The first action is the application for a certified copy of the proceedings and judgment. **Section 79 G** of the Act says that an appeal from a subordinate court to this Court should be filed within a period of thirty days from the date of decree or order appealed against; however, the period of thirty days does not include such time that the lower court may certify as having been requisite for the preparation and delivery to the appellant a copy of the ***decree or order***.

It is apparent from this provision of the law the pertinent document relevant for the filing of the appeal is the order or, as in this case, the decree appealed from and it is this document that the intended appellant ought to apply for and not the proceedings or judgment. This question was addressed by the Court of Appeal in the case of **Kyuma versus Kyema (1988) KLR 185**. In this case just like the case herein, the applicant was caught by time and he could not file his appeal against orders issued by the magistrate's court without extending time. Just like in this case, the applicant applied for a "certified copy of the proceedings and judgment/orders". He ultimately got the certified copies of the proceedings and judgment and was also issued with a certificate of delay that certified the period required to prepare the proceedings and the judgment; based on this certificate, he filed his appeal.

The learned judge (Shields J, as he then was) held that the certificate of delay was not the one contemplated under **section 79G** of the **Act 21**. The Court of Appeal upheld the High Court's judgment and said:

The appellant was entitled to appeal to the High Court against these orders if he felt aggrieved by them. Section 65(1) of the Civil Procedure Act confers a right of appeal on him. But in order to set on foot a competent appeal, the appellant must have filed his appeal within thirty days from the date of the order...This period may be extended provided he obtained from the magistrates court a certificate of delay within the meaning of section 79G of Act 21. The section allows the thirty days to be extended by such period as was required to make a copy of the "decree or order of the court". As the appeal was to be filed beyond the 30 days prescribed by the rules, the appellant ought to apply and file with the memorandum of appeal, not only the order of the court, but also a certificate of delay.

What this means is that where an appeal has to be filed as prescribed by section **79G** it is incumbent upon the applicant to apply for an order or a decree which he will file together with the memorandum of

appeal; apart the memorandum of appeal and the decree the applicant must obtain and file a certificate of delay certifying the time taken to prepare and deliver the order or the decree, where the appeal is to be filed out of time.

This is explained further and better by the Court of Appeal in its judgment. It said at page 189:

The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay? Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of Order 41 permits this latter document to be filed as soon “as possible and in any event within such a time as the court may order”. Therefore a certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant “a copy of the order” of the magistrate. But the certificate of delay exhibited by the appellant, did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were “the proceedings and judgment”.

The relevance of these extracts to the application herein is that the applicant ought to have applied for a certified copy of the decree which she is to file together with her memorandum of appeal should she have persuaded this court to extend time. It is apparent from the Court of Appeal decision in **Kyuma versus Kyema** (supra) that an application for proceedings and judgment for purposes of filing an appeal is contrary to **section 79G** of the Act and it is not at any rate sufficient to demonstrate that the applicant was diligent in taking the appropriate steps to file an appeal out of time.

The upshot of **Kyuma versus Kyema case** (supra) as far as the application herein is concerned is that the applicant took an immediate but a wrong step once she became aware of the judgment against her. For purposes of filing an appeal, her counsel ought to have applied for a certified copy of the decree and not, as he did, a copy of the proceedings and judgment.

The second step under scrutiny in the applicant’s application is the time it took for the applicant to file the application for extension of time to file the appeal. I have carefully read affidavits sworn by the applicant and her counsel in support of application; neither of these affidavits explain the delay of twenty days before the application was filed. If the court has to exercise its discretion and extend time to file the appeal sufficient cause has to be shown. While I am satisfied with the explanation given for the delay between the time the judgment was delivered and the time the applicant became aware of it, I am not satisfied with the applicant’s deafening silence on why it took her counsel twenty days before the application for extension of time was filed once she became aware of the judgment.

In the final analysis I am inclined to find that the applicant’s application has no merit and it is therefore dismissed with costs.

Dated, signed and delivered in open court this 23rd day of May, 2014

Ngaah Jairus

JUDGE