



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 331 OF 2013**

**BENSON NG'ANG'A NDIRANGU.....APPLICANT**

**VERSUS**

**PETER WAITITU GATOTO..... RESPONDENT**

**RULING**

Aggrieved by the judgment and decree of C. Riany issued on or about 18th October, 2012 in Naivasha Resident Magistrates' Civil Suit No. 339 of 2012 the applicant, Benson Ng'ang'a, brought the notice of motion dated 18th October, 2013 praying that he be granted leave to file an appeal out of time against that judgment and decree; and that the leave, if granted, do operate as stay of execution of the said judgment and decree and all other consequential orders pending the hearing and determination of the intended appeal.

The application was brought under Section 1A, 1B, 3A, 79G and Order 42 Rule (1), (2), (5) of the Civil Procedure Act and Rules respectively and is premised on the grounds that the applicant intends to file an appeal against the said judgment and decree; that the intended appeal has high chances of success. The applicant is apprehensive that, unless the orders sought are granted, the respondent might carry out execution against him thus occasioning him irreparable injustice, besides rendering the intended appeal nugatory.

In the affidavit sworn in support of the application, the applicant contends that he was neither served with summons nor a notice of entry of judgment as by law required; and he is not the owner of Motor Vehicle No. KAS 557B Isuzu Lorry which allegedly collided with motor vehicle registration No. KBD 213Q. Further the respondent had no locus to lodge the claim against him and that since the respondent was not the registered owner of motor vehicle registration No. KBD 213Q then no employer-employee relationship existed between him and his co-defendant (Stephen Maina Njau).

In opposition to the application the respondent filed the replying affidavit sworn on 14th March, 2013 in which he has, inter alia, deposed that the application has been brought under the wrong provisions of the law; that the applicant is guilty of material non-disclosure and that the application has not been brought in good faith (is a continuation of the applicant's scheme to frustrate him). Further that the issues raised in the application were heard and finally determined in other applications which the applicant had earlier on filed, and the orders sought cannot issue as the applicant's right was to set aside the interlocutory judgment hereto or file an appeal against the refusal to set aside the interlocutory judgment or appeal against the conditional leave to defend which was granted on 21st March, 2013.

Terming the contention by the applicant that he was not the owner of motor vehicle registration

number KAS 557B and that the respondent was not the owner motor vehicle registration number KBD 213Q false, the respondent has maintained that he had sufficient interest in motor vehicle registration number KBD 213Q having bought it from its registered owner.

In a rejoinder the applicant filed a supplementary affidavit in which he reiterates that his application is properly grounded in law and that the lower court in granting him a conditional stay acknowledged that the service was irregular. He contends that the conditional stay granted by the lower court was punitive. He has denied the allegation that he has resorted in filing a multiplicity of applications and explained that all the applications he filed were necessary in the circumstances and made within the ambit of law; that he only decided to move to this court when he realized that the trial magistrate had taken a prejudicial position on his pursuit for justice. He reiterated his contention that he was non suited as a party in the suit at the lower court and that no evidence was adduced in the lower court to prove his connection with his co-defendant and that the respondent was the owner of the suit property. Further that in view of the affidavit evidence adduced before this court, it cannot be said he is out to frustrate the respondent's rights which he contends were unprocedurally obtained.

As concerns the alleged procedural defects in his application, the applicants contents that this court has immense powers to rectify any errors apparent on record and give substantive justice to those who approach it for relief.

I have read and considered the rival arguments herein, the sole issue for determination is whether the applicant has satisfied the legal requirements for grant of leave to appeal out of time.

It is not in dispute that under section 79G of the Civil Procedure Act, 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 on time.

In the instance application, it is contended that the applicant has not demonstrated why he failed to file the appeal on time. The respondent argues that the appellant only preferred the present application after all his other motions to frustrate the judgment failed. In reply to the foregoing contention the applicant has deposed as follows:-

"10. That it is not true that I have filed multiple similar motions that have been dismissed as I demonstrate herein below;

**a) Notice of motion dated 28.1.2013 was allowed on condition I deposit in court Kshs.656,435.00 (the court recognized that indeed I had not been served with summons to enter appearance) but the condition given was too prohibitive and punitive and being aggrieved by it, I sought it to be reviewed and or varied in the light of evidence I had then;**

**b) The motion dated 31.7.2013 sought to review the conditional order requiring I deposit Kshs.656,435.00 in court before be I heard on my defence; it further sought to review the judgment of 18.10.2012 upon discovery of new evidence that the respondent did not own the motor vehicle subject matter of the judgment he got, and I too, was not suited in the claim as I did not own the motor vehicle said to have occasioned the accident;**

**c) That when the motion dated 31.7.2013 had been argued between the parties and was awaiting ruling on 12.8.2013, the respondent retrieved the court file from the magistrate's chambers, and filed a motion seeking to have the proceedings conducted by my advocate, Wycliffe Ouma Okuta expunged from court record on account of him not having taken a practising certificate for 2013, facts that had not been raised all along was away of technically denying me justice. The said application was withdrawn with cost but a similar one filed on 29.8.2013, having regularised his practice status within 2 days. My advocate on record advises me that this does not amount to two motions since one was withdrawn and a similar one filed;**

**d) It is only the application dated 29.8.2013 that was dismissed despite its merit prompting me to take the logical step of seeking assistance of another court, High Court, which I am doing..."**

It is clear from the foregoing explanation that the applicant opted to apply for review of the order of the lower court granting him a conditional leave to defend the suit.

Under the provisions of order 45 rule 1 of the Civil Procedure Rules the applicant had an option of applying for review or filing an appeal against the decision of the lower court. Preference for review over an appeal of the impugned decision of the lower court only suspended the applicant's right to appeal.

After the trial court refused to grant the applicant's application for review or set aside its impugned order, the applicant had the right to apply to this court for leave to file an appeal against the impugned decision of the lower court out of time. This notwithstanding, I agree with the respondent's argument that the respondent could only seek leave to apply against the lower court's refusal to set aside its *ex parte* judgment and/ or the lower court's refusal to review its conditional order for leave to defend. Be that as it may, I take note that through the intended appeal the applicant seeks to set aside the entire judgment of the lower court on, among other grounds, the grounds that there was no evidence that he was served with summons to enter appearance or that there existed an employer-employee relationship between him and his co-defendant or that the respondent owned the suit property at the material time. In my view, these are pertinent matters which the court should investigate in the interest of justice. Consequently leave is granted for applicant to file the appeal out of time. The same be filed within 21 days hereof. Costs of the application be borne by applicant.

**Dated, Signed and Delivered at Nakuru this 17th day of September, 2014.**

**H.A OMONDI**

**JUDGE**