



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISC CIVIL APPLICATION NO. 89 OF 2013**

**ELIJAH MBOGO M'MURUNGA.....APPLICANT**

**VERSUS**

**SEBASTIAN MWENDA.....RESPONDENT**

**RULING**

1. The applicant through an application brought pursuant to section 79G of the Civil Procedure Act and all enabling provisions of the law sought court's leave to file an appeal out of time against a ruling dated 23rd May 2013 and delivered on 2<sup>nd</sup> July 2013. The application is based on several grounds on the face of the motion dated 21<sup>st</sup> November 2013. The main ground being that the ruling was scheduled to be delivered on 16<sup>th</sup> November 2012 but was deferred to 20<sup>th</sup> November, 2012, then to 15<sup>th</sup> February, 2013 but the same was not delivered as the trial Magistrate was transferred. The applicant averred that the ruling was to be delivered on notice which notice was never issued to the applicant nor his advocate when ruling was delivered on 2<sup>nd</sup> July, 2013 by Hon Gichumu, the Successor to Hon Ochieng, who had heard that matter. The applicant became aware of the ruling when he was served with notice to show cause on 5<sup>th</sup> November, 2013 and on perusal of the court file discovered that the ruling had been delivered way back on 2<sup>nd</sup> July, 2013 and his application dismissed. The applicant reiterates the reasons in his grounds in face of the application in support of the application in his affidavit dated 21<sup>st</sup> November, 2013 as to which he has attached annexures in support thereof.

2. The respondent is opposed to the application and has filed replying affidavit dated 9<sup>th</sup> December, 2013.

3. I have carefully perused the application, affidavit in support and the replying affidavit. The court has also considered the submissions by both counsel and the law applicable.

4. **Section 79 G of the Civil Procedure Act** provides:-

***“79G. 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.”***

5. The issue for determination in dealing with the applicant’s application is whether he has satisfied the court that he has good and sufficient cause for not filing the appeal in time.

6. A quick perusal of the court proceedings do not show any delivery of the notice having been issued upon the applicant or his counsel to attend ruling on 2<sup>nd</sup> July, 2013. The court having set to give ruling on notice was under obligation to issue notice of the date of ruling to parties and/or their counsel to enable any aggrieved party to proceed on appeal if need be within the prescribed period, failure to do so, did not only prejudice the aggrieved party but went against the very root of fair trial as enshrined in Article 50 of the constitution of Kenya 2010 which provides:-

***“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”***

7. The court fell into an error by failing to deliver its ruling within 30 days of conclusion of the hearing of the matter and having failed to do so was under obligation to issue ruling notice to parties and/or their advocates (see order 40 Rule 5 of the Civil Procedure Rules.

8. The respondent did not controvert the allegations raised by the applicant that ruling notice was not issued to him and that he and became aware of the ruling on 5<sup>th</sup> November, 2013. The applicant subsequently filed the current application on 22/11/2013 which is within a reasonable time after discovery of the delivery of ruling.

9. In view of the above, I am satisfied that the applicant has met the conditions set out under section 79G to warrant granting the application. The applicant has satisfied the court that he had good and sufficient cause for not filing the appeal in time.

10. The upshot is that the applicant's application is allowed. The applicant is granted 14 days from today to file appeal out of time. Costs shall be in the cause.

**DATED AT MERU THIS 30TH DAY OF OCTOBER, 2014**

**J. A. MAKAU**

**JUDGE**

**Delivered in open court in presence of:-**

Mr. Kahumbi for the applicant

Mr. Maganga for the respondent

**J. A. MAKAU**

**JUDGE**