



REPUBLIC OF KENYA

Cases in Magistrate Courts

Civil Miscellaneous 1 of 2012

BENARD ONYANGO ANGINYA.....APPLICANT

VERSUS

DANIEL OJJO KOTWENYA.....RESPONDENT.

[Appeal out of time from the Order in Civil case of the Principal Magistrate's Court dated 18.4.2012 at Homa Bay: HON. C.A. Mutai ESQ., - P.M.

IN

PM'S C. Homa Bay NO. 50 OF 2011]

RULING OF THE COURT.

By the Notice of Motion dated 8.11.2012 and filed herein on even date Benard Onyango Aginya – the Appellant principally seeks leave to Appeal out of time. The intended Appeal is from the order of the Principal Magistrate's Court at Homa Bay in Civil Case No. 50 of 2011. The said order is dated 18.4.2012.

The application also seeks an order that upon granting of leave as sought herein the memorandum of Appeal attached herewith be deemed as duly filed upon payment of the requisite fee.

The grounds for the application as set out in its face are:-

- i. The ruling of the superior (sic) court the subject of this appeal was delivered on 18.4.2012.**
- ii. An appeal from the said ruling can only be lodged with leave of the court and not as of right as the prescribed period has since elapsed.**
- iii. The intended appeal raises points of law which required jurisprudential consideration in as far as jurisdiction is concerned.**
- iv. It is in the interest of justice that the orders sought be granted.**

The Application is supported by an affidavit sworn by the Appellant on 8.11.2012. He depones that he was aggrieved by the decision of the principal magistrate, that he was condemned unheard on a matter in which the court lacked jurisdiction. That he travels a lot due to the nature of his work and that may have contributed to his memory lapse for which eh asks this court to pardon him. Further that his appeal has high chances of success and that the failure to lodge the appeal was not deliberate but due to an

oversight. He asks for the indulgence of the court and deposes that the respondent will not suffer any undue prejudice if the order sought is granted.

At the hearing Mr. Nyauke the Advocate for the Applicant relied on the grounds on the face of the application and the Applicant's Depositions in the supporting affidavit. He reiterated that the orders sought to be appealed from were made in a vacuum as the court did not have jurisdiction. He submitted that the memorandum of Appeal raises issues that are worthy to be raised for consideration by the court and urged the court to find the Application merited.

Mr. Ongoso, Advocate for the Respondent opposed the application on grounds that it is evasive in that it does not comply with S. 79G of the Civil Procedure Act. That the delay between 18.4.2012 when the order was made and 8.11.2012 when this application was filed has not been explained. That the applicant has not come to court with clean hands because although he alleges he travels a lot he has not annexed any documents. He also argued that the appeal has no chances of success and urged the court to dismiss the application.

In reply Mr. Nyauke urged the court to be guided by SS 1A and 1B of the Civil Procedure Act – also S. 34A and 79G. he submitted that rules are not cast on store but intended to give parties the right to be heard. He urged the court to grant the application.

I have considered the application, the grounds thereof the affidavit in support and the rival submissions of the Advocates for both sides.

Principally the applicant seeks leave to appeal out of time and he states that he travels a lot inside and outside of the country because of the nature of his work and this contributed to his memory lapse. If I understand him well he lost track of time due to his regular travel.

S. 79G of the Civil Procedure Act stipulates the time within which an appeal ought to be lodged. However it goes on to provide that if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time the appeal may be admitted out of time. The issue for determination therefore is whether the applicant has satisfied this court that he had good and sufficient cause for not filing the appeal in time.

Whereas I am not satisfied that the reason for the delay is plausible appeal. The application is accordingly granted. The Appeal be filed and served within 7 days from the date of this ruling. Costs of the application shall abide the Appeal.

It is so ordered.

E. N. MAINA
JUDGE 19.3.2013.

Ruling signed dated and pronounced in open court in the presence of:

Mr. Ongoso Advocate holding brief for G.S. Okoth for the respondent.

(Mr. Nyauke for the appellant is absent)
CC Eudice.

E.N. MAINA
JUDGE 19.3.2013