



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Miscellaneous Application 187 of 2012**

**PETER NGAHU NJENGA.....PLAINTIFF**

**VERSUS**

**TIMSALES LIMITED.....DEFENDANT**

**RULING**

By a Motion on Notice Peter Ngahu Njenga (*the Applicant*) sought leave to file an appeal out of time against the judgment and orders of Hon. Tanui Senior Resident Magistrate delivered on 1<sup>st</sup> September 2011 in Nakuru CMCC No. 1972 of 2006, in the matter of **Peter Ngahu vs. Timsales Limited.**

The facts are not in dispute. The judgment by the lower court was due for delivery on 21<sup>st</sup> July 2011. The Hon. Magistrate was not sitting on that date, and in any event the judgment was said not to be ready on that date, and the 25<sup>th</sup> August 2011 was given as the new judgment date, but as fate would have it the court was not sitting on that date and a new date was conspicuously put on the court's Public Notice Board that judgment would be delivered on 1<sup>st</sup> September 2011.

The Applicant claims that neither he nor his counsel on record had notice of the date of delivery of judgment. The Applicant also claims that he did not know of the date of delivery judgment until 2<sup>nd</sup> April 2012, some 7 months later.

The Respondent, Timsales Ltd through the Replying Affidavit of Moses Obura, its Personnel Manager argues on the advice of its counsel on record that the application is an afterthought, and that there is no plausible reason for a delay of seven months for preferring an appeal and that the application is itself an abuse of the process of the court and should therefore be dismissed with costs.

I have considered these rival arguments. The Motion is founded upon the provisions of Sections 3A and 79G of the Civil Procedure Act and Order 50 rule 5 of the Civil Procedure Rules.

Section 79B of the Civil Procedure Act requires every appeal from a subordinate court to the High Court to be filed within 30 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 satisfied the court that he had good and sufficient cause for not filing the appeal in time.

Order 50, rule 6 of the Civil Procedure Rules also empowers the court to enlarge time –

***“upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.***

***Provided the costs of any application to extend time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”***

The principle of enlargement of time enshrined in Section 79G of the Civil Procedure Act is also restated in Section 59 of the Interpretation and General Provisions Act (*Cap. 2 Laws of Kenya*). Section 58 of the said Act however re-emphasize the principle that even where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as the occasion arises.

In this case the delay of seven (7) months in making the application for enlargement of time is certainly unreasonable, and the delay if considered alone, shall amount to an afterthought.

The Replying Affidavit of the Respondent's Personnel Manager is however argumentative, and suggests that the Applicant's appeal has no merit allegedly because a “*treatment card*” which he describes as a “primary document” was not produced in the plaintiff's evidence before the lower or trial court.

So far as I know, there is no law or binding precedent that a patients “*treatment card*” at a health facility is a primary document without which a plaintiff's claim will be dismissed. If there is no other evidence in support of a plaintiff's claim, and no treatment card, a plaintiff's claim may well have no leg to stand on and therefore fall apart. That finding however must be left to an Appellate Court to make and not reason to disallow an applicant's application for enlargement of time.

Both Section 79A and Order 50 Rule (1) provide that the costs for an application to enlarge time will be borne by the Applicant. In other words, the Respondent will be compensated in costs for its trouble in contesting the application for enlargement of time.

I would therefore allow the Motion here on terms that the Applicant will pay upfront the costs of the application herein, and that the appeal be filed within 60 days of the date hereof, and in default the orders herein will lapse without further orders of court.

It is so ordered.

**Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of April, 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**