



REPUBLIC OF KENYA

High Court at Kitale

Miscellaneous Application 34 of 2012

1.THE TRUSTEES OF THE LEGIONS OF MARY}

2.THE BISHOP OF THE LEGIONS OF MARY} APPLICANTS

V

JOSEPH KEBO NGIMICHURUS} RESPONDENT

RULING

The Applicants herein filed a Notice of Motion dated 28/06/2012 and filed in Court on 02/07/2012 seeking leave to file an appeal out of time. The Applicants were Defendants in Lodwar Senior Resident Magistrate Civil Suit No. 11 of 2007. The Respondent in this application was the Plaintiff in the Lodwar case. The Plaintiff in the Lodwar case succeeded in his claim in a judgment delivered on 08/09/2010. The Defendants in that case were to file an appeal within 30 days from the date of judgment but they did not do so. They have now come to Court seeking leave to file their appeal out of time. The Applicants through William Ewalan Kowot, Bishop of the 2nd Applicant depones in the Supporting Affidavit that their Advocates in the lower court case never informed them of the delivery of judgment and that whenever they called him, he kept telling them that full judgment had not been delivered until sometime in early 2011 when they lost contact with him. He further depones that he only came to learn of the judgment when they were served with the decree. He contends that they have an appeal with high chances of success.

The application is opposed through Replying Affidavit sworn Joseph C. K. Cheptarus Counsel for the Respondent who contends that the Applicants are guilty of laches and that their appeal has no chances of success. The proviso to Section 79 G of the Civil Procedure Act provides 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. In the present application, the reason why the Applicants seek leave to file the appeal out of time is that they were not informed of the judgment by their lawyers. The judgment from which the Applicants intend to appeal was delivered on 08/09/2010. The judgment was delivered in the presence of their Advocate Mr. Wambura who immediately applied for copies of proceedings and judgment. The Applicants in their application admit that they became aware of the judgment on 23/12/2011 when they were served with a decree from the suit. For another six months from the time they became aware of the judgment, they had not filed an application for leave to file appeal out of time. They did so on 02/07/2012. There has been a delay of over 2 years since judgment was delivered. The question on whether to allow an appeal out of time is a discretionary one. This discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice – see **Shah Vs Mbogo & Another [1976] EA 116.**

In the case of **Pan African Paper Mills (EA) Ltd. Vs Olaka [2001] KLR 8**, Justice Okubasu Judge of

Appeal quoted with approval a holding from the case of Leo Sita Mutiso Vs Rose Hellen Wangari Mwangi in Civil Application No. NAI 255 of 1997 unreported where the Court of Appeal observed as follows:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which courts take into account in deciding whether to grant an extension of time are:-

first; the length of the delay; secondly, the reason for the delay, thirdly; (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted...”

I have already said herein above that the delay is over 2 years almost three years. The reason given for the delay is that the Applicants did not get communication from their Advocate. They say that they learnt of the judgment on 23/12/2011. On 31/01/2012 they instructed their current Advocate Mr. Ombasa of Barongo Ombasa & Co. Advocates to come on record for them in the lower court case. Mr. Ombasa filed an application for leave to come on record in the lower court file in place of M/S Wambura & Co. Advocates. The fate of this application is not known. It is not until 02/07/2012 that the present application was filed. This was after seven months from the time the Applicants say they became aware of the judgment. It is clear that this delay is unexplained. The delay is simply inexcusable and the reason given for the delay is not convincing. This alone without considering other grounds is enough to dispose off this application. I find that the Applicants have failed to demonstrate that they have good and sufficient cause for not filing the appeal in time. The application fails and is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered in Open Court on this 14th day of May, 2013.

E. OBAGA

JUDGE

COURT

Ruling delivered at 9.35 am in the absence of parties. Parties can read the ruling at the registry.

Court Clerk: Koskey.

E. OBAGA

JUDGE

14/05/2013