



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**MISC APPLICATION NO. 484 OF 2013**

NZUKI NGULKYO.....APPLICANT

VERSUS

1. FRANCIS KANGATA KIRAGU &  
2. NANCY MWENDE KANGATA

*(T/A SANA SANA FILLING STATION)*

3. JOSEPHAT MUTISO MWANGANGI.....RESPONDENTS

**RULING**

1. This is an application (**notice of motion dated 29<sup>th</sup> April 2013**) for leave to lodge appeal out of time against the decree of the lower court passed on 25<sup>th</sup> March 2013. By that decree the Applicant's suit in the lower court was dismissed with costs.
2. Under section 79G of the **Civil Procedure Act, Cap 21** (the **Act**) an appeal such as is contemplated by the Applicant must be filed within a period of thirty days from the date of the decree (excluding from that period any time which the lower court may certify as having been requisite for the preparation and delivery to the applicant of a copy of the decree. There is no such certificate from the lower court.
3. The court has jurisdiction under the *proviso* to that section to admit an appeal out of time "if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time". The law thus envisages a situation where the appeal is filed out of time and then application made to admit the same; it does not envisage seeking leave to file appeal out of time. It is not a matter of mere semantics: it would be more expedient to seek admittance out of time of an appeal already filed rather than seeking to file one out of time!
4. In the present case the appeal ought to have been filed on or before 24<sup>th</sup> April 2013, which was a working day. The present application was filed on 6<sup>th</sup> May 2013. So, the Applicant was late by twelve (12) days. That is not an inordinate delay.
5. The explanation for the delay offered in the supporting affidavit is that the Applicant's advocate had erroneously diarized the date of judgment as 25<sup>th</sup> April instead of 25<sup>th</sup> March 2013 and therefore did not attend court for delivery of judgment. Further explanation is offered in the supplementary affidavit filed on 16<sup>th</sup> May 2013 as follows: that when the Applicant's advocate sought information from the court clerk of the lower court he was informed that the judgment was in favour of the Applicant; that based on that

information he wrote a letter to the opposite advocate on 28<sup>th</sup> March 2013 demanding payment of the sum allegedly awarded; that it was only upon receipt of the opposite advocate's reply on 19<sup>th</sup> April 2013 that the Applicant's advocate learnt that in fact the Applicant's suit had been dismissed with costs; that the advocate then acted with expedition to ensure that the present application was filed without undue delay.

6. The Respondents have opposed application by replying affidavit filed on 21<sup>st</sup> June 2013. It is sworn by one of the 2<sup>nd</sup> Respondent. Want of proper and credible explanation for the delay is argued. However, the wrong information supplied by the court clerk is not denied. It is also not denied that the Applicant's advocate wrote a demand to the Respondents' advocate based on that wrong information.

7. I have considered the submissions of the learned counsels appearing. No cases were cited.

8. Mis-diarizing information in an advocate's diary is not an outlandish claim; it can happen and does happen. The situation was made worse by the wrong information about the judgment given by the court clerk. But once the true position regarding the judgment was known, the Applicant's advocates moved with speed, thus ensuring that delay was minimized.

9. I am satisfied that the Applicant had good and sufficient cause for not filing the appeal in time. I will allow his application and grant the leave sought. He must file his memorandum of appeal within fourteen (14) days of today.

10. The Respondent shall have the costs of this application. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JULY 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY 2013**