



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC APPL NO. 462 OF 2012

JOSEPH NJOROGE KIHARA..... APPLICANT

VERSUS

SUSY NAMALWA MURIUKI.....RESPONDENT

RULING

1. This is an application (**notice of motion dated 15th August 2012**) seeking the main order that the court be pleased to grant the Applicant leave to file an appeal out of time.

2. The application is brought under **section 79G** of the **Civil Procedure Act, Cap 21**. It is premised upon the grounds-

- (i) That failure to appeal in time was inadvertent and excusable.
- (ii) That the intended appeal has high chances of success.
- (iii) That it is in the interests of justice that the leave sought be granted.

3. The application is supported by the affidavit of one **JOSEPH NJOROGE MURIUKI** who says that he is the Applicant. The Applicant as named in the title of the application is **JOSEPH NJOROGE KIHARA**. This discrepancy in the Applicant's name has not been explained.

4. The Respondent has opposed the application by replying affidavit filed on 19th November 2012. The grounds of opposition emerging therefrom include-

- i. That the Applicant's advocates were informed of the judgment by the Respondent's advocates by letter dated 29th September 2011.
- ii. That the Applicant's insurers were similarly informed of the judgment by a letter dated 19th October 2011.
- iii. That the Applicant has not shown any good and sufficient cause for not filing his appeal in time.
- iv. That the application is intended only to delay and obstruct the course of justice.

5. The application was canvassed by way of written submissions. Those of the Applicant were filed on

11th February 2013 while the Respondent's submissions were filed on 25th February 2013. I have considered the submissions. No authorities were cited.

6. Under section 79G aforesaid, 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. But 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.

7. In this case there is no certificate of delay issued by the lower court. The decree of the lower court was passed on 29th September 2011. So, the Applicant had until 28th October 2011 to file his appeal. The present application was filed on 21st August 2012. There was thus a delay of nearly ten (10) months.

8. How is this delay explained? There is absolutely no explanation for the delay in the supporting affidavit. The Applicant merely says at paragraphs 6 and 7 of the supporting affidavit -

“6. ...I was dissatisfied with the judgment but the final instructions were to come from the insurance company under the right of subrogation.

7. ... I am advised by my advocate on record that the insurance company has now given instructions to file the appeal.”

9. Why did it take the insurance company so long to give instructions? There is simply no explanation under oath for the delay. The explanation given in the submissions cannot hold water. Submissions are **not** evidence.

10. I am **not** satisfied that the Applicant had good and sufficient cause for not filing his appeal in time. The application is without merit and is hereby dismissed with costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF AUGUST 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 15TH DAY OF AUGUST 2013