



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. CIVIL APPLICATION NO. 64 OF 2013

**IN THE MATTER OF AN APPLICATION FOR EXTENSION OF TIME TO FILE AN APPEAL
OUT OF TIME**

JOSPHAT MURIITHI NDONGA.....APPLICANT

VERSUS

BERNARD KABANDIRESPONDENT

RULING

This is in respect of the applicant's Notice of Motion founded under **Section 79 G of the Civil Procedure Act** and **Order 51 Rule 1 of the Civil Procedure Rules** seeking the following prayers:-

1. – *Spent*
2. *That this Court do grant a stay of execution in Wang'uru P.M.C.C No. 124 of 2012 pending the hearing and final determination of this application and the intended appeal*
3. *That this Court do extend time to file an appeal against the ruling of Hon. B.M. Ochoi dated 15th January 2013 in Wangu'uru PMCC No. 124 of 2012.*
4. *That the costs be in the appeal.*

The same was supported by the affidavit of the applicant and grounded on the following:-

- a. *That the applicant was not supplied with proceedings in good time to enable him file the appeal*
- b. *That the applicant had been ailing and bed ridden hence incapacitated from filing the application*
- c. *That the applicant risks going to civil jail unless a stay of execution is granted pending the hearing and final determination of this application and the intended appeal*
- d. *That the applicant has been condemned un-heard.*

In his supporting affidavit, the applicant depones that the ruling which he wishes to file an appeal against was delivered on 15th January 2013 and being aggrieved by the same, he applied for certified copies of the proceedings and ruling which were only supplied on 22nd March 2013 and a certificate of delay was issued on 26th March 2013 and since then, he has been ailing and on bed rest and the respondent has now applied for his committal to civil jail.

The application is opposed and in his replying affidavit, the respondent depones, inter alia, that the same lacks merit and is an abuse of the Court process and the applicant does not explain why

he did not file this application on 22nd March 2013 when he got the proceedings and had to wait till 14th June 2013 yet he already had the proceedings. The respondent adds that this application is infact an afterthought.

I have considered the application, the rival affidavits and submissions on record.

Section 79 G of the Civil Procedure Act states as follows:-

“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:

Provided 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”.

The key words in the above provision are ***“good and sufficient cause for not filing the appeal in time”***. The reasons given by the applicant as to why he did not file the appeal in time are that:-

- 1. Though he applied for the proceedings in time, he only obtained them on 22nd March 2013 and a certificate of delay was issued***
- 2. That he has been ailing and on bed rest since March 2013.***

As stated earlier in this ruling, the order sought to be appealed against was issued on 15th January 2013. The applicant did not need the proceedings and judgment of the subordinate Court to commence his appeal as that is not mandatory under the Civil Procedure Rules. All that is needed is a certified copy of the decree or order which is the subject of the appeal and then too, this can be filed subsequently and not necessarily with the memorandum of appeal. An appeal is merely commenced with the filing of the memorandum of appeal setting forth the grounds of appeal. The certificate of delay does not assist the applicant at all as it does not answer the question as to why he did not file his memorandum of appeal in time and as I have said, he did not require the proceedings or ruling.

And even after he obtained the proceedings and ruling on 22nd March 2013, it took him upto 14th June 2013 (some three months) to file this application. He depones in paragraph 6 of his supporting affidavit that he was on bed rest since mid March 2013 and has annexed a copy of his treatment card. The card shows that he was last seen by a doctor on 3rd June 2013. The applicant does not explain what he was doing between 3rd June 2013 and 14th June 2013 when he filed this application. It is clear that he only moved this Court when he become aware that an application to commit him to civil jail was coming up for hearing in the subordinate Court on 11th June 2013. I am far from satisfied that the applicant has shown proper diligence expected of one who seriously wishes to pursue his right to appeal. It was his duty to move with speed and alacrity and put in motion the necessary measure in filing his appeal and I am not convinced that he acted diligently. Even after the ruling was delivered on 15th January 2013, it took him upto 8th February 2013 to apply for copies of the proceedings. Clearly, the applicant has not demonstrated ***“good and sufficient cause”*** to warrant the granting of the orders sought to file his appeal out of time and it follows therefore that the plea for a stay of execution in Wang’uru PMCC No. 124 of 2012 is not available to him.

The up-shot of the above is that the applicant’s Notice of Motion dated 14th June 2013 is dismissed with costs.

B.N. OLAO

18TH SEPTEMBER, 2013

18/9/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Mr. Kinyanjui for Kahiga for respondent – present

No appearance for applicant

COURT: Ruling delivered this 18th day of September 2013 in open Court.

Mr. Kinyanjui for Kahiga for respondent present

No appearance for applicant.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2013