



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 537 OF 2013**

**JOSHUA OGADAH ONYANGO.....PLAINTIFF**

**VERSUS**

**PAYLESS CAR HIRE & TOUR LIMITED .....DEFENDANT**

**RULING**

1. The plaintiff/applicant has filed a notice of motion dated the 21 May 2013. It's brought under sections 3 A, 1A, 1B 65(D) (B) 67 (1) and 79G of the Civil Procedure Act. The orders sought by the applicant are as follows:-
  - i. That the court be pleased to grant the applicant leave to file a memorandum of appeal out of time in Nairobi *CMCC No.2380 of 2009-Joshua Ogadah Onyango vs. Payless Car Hire & Tours Ltd* against the judgment of Honorable L. Arika delivered on the 8 February 2012.
  - ii. That the court does grant leave to the applicant to file the intended appeal in Nairobi CMCC No. 230 of 2009 out of time.
  - iii. That cost of the application be in the cause.
2. The application is grounded on five grounds (a) to (e) stated on the face of the application. It's also supported by the affidavit of Peter Mwaura Kamau counsel for the appellant. The main reasons given for not filing the appeal within the requisite period is that the advocates firm was not notified of the date the judgment was to be delivered. That counsel kept checking on the court file and when he got it, he found out that judgment had been delivered on the 8 February 2012 in the absence of the parties. That by 16 July 2012, the 30 days allowed for appeal had lapsed. That he immediately applied for typed copies of the proceedings and the judgment and the same were supplied to them on 14 November 2012. He sought for a certificate for delay which was issued to him on 2 May 2013. That the delay in filling the appeal has been caused by circumstances beyond his control. That the applicant has good grounds of appeal and he prays that the application be allowed.
3. The application is opposed. Mr. Michuki counsel for the defendant filed a replying affidavit dated 19<sup>th</sup> August 2013. He avers that judgment was delivered on 8<sup>th</sup> February 2012 in Nairobi CMCC No.2380 of 2009. The court dismissed the plaintiff's suit against the defendant. That the reasons given by the applicant are not sufficient to warrant leave of the court to file the appeal out of time for reasons and that the applicant did not need copies of the proceedings to lodge his appeal. That the applicant became aware of the judgment in July 2012 yet he did not file his application then, but did so 10 months later. That this is inordinate delay. That the applicant has exhibited indolent behavior in filing the application for leave for an extension of time. The application lacks merit and it is an abuse of the court process. That the applicant has not shown that he has good and sufficient cause of filing the appeal on time in terms of section 79(G) of the Civil Procedure Act.

4. I have considered the averments in the parties' affidavits. Section 79(G) provides that an appeal from the Subordinate Court to the High Court should be filed within 30 days from the date of the decree or orders appealed against. The proviso states that "***provided that an appeal may be admitted out of time if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal on time***". The applicant has stated that he was not informed of the date the judgment was to be delivered after the court put it off on 19<sup>th</sup> October 2011 and that he learnt of the delivery of the judgment on the 16<sup>th</sup> July 2012.
  
5. The applicant has attached a letter dated 13<sup>th</sup> July 2012 where he requests for the proceeding and judgment plus a certificate of delay dated 2<sup>nd</sup> May 2013. I agree with the respondent that the appellant did not need the copies of the proceedings to lodge his appeal. The applicant does not explain the delay of 10 months from the 13 July 2012 to the date his application was filed. The proviso to section 79 (G) states that the applicant has to show good and sufficient cause. Maybe the applicant thought he was to have all the proceedings and the judgments before filing his application. May to August is about 21/2 months. I will give the applicant the benefit of doubt and allow the application as follows:-
  - i. The applicant is granted leave to file his memorandum of appeal out of time within the next 21 days from the date of this ruling.
  - ii. The applicant is also granted leave to file the intended appeal out of time within the next 21 days from the date of this ruling.
  - iii. Costs of this application are however granted to the defendant/ respondent

Dated, signed and delivered this 15<sup>th</sup> Day of November 2013

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....For the Plaintiff/ Applicant

.....For the Defendant/Respondent

.....Court Clerk