



Editorial Summary

1. *Civil Appeal*

2. *Subject of subordinate court case*

TORT/CONTRACT

2.1 *Employee/employer*

2.2 *Workplace injury*

2.3 *Cause of action arose*

15th August 1997

2.4 *Employer paid all hospital bills and*

Workman's compensation of Ksh. 49,200/-

2.5 *Employee sues 3mployer on 6th December 2000*

2.6 *Hon. Trial Magistrate dismisses application*

to amend plaint (19th November 2003)

2.7 *Hon. Trial Magistrate in ruling [read judgment]*

*dismisses suit on 12th February 2004 on grounds
that claim had been filed out of time.*

2.8 *Employee fails to file appeal in 2004.*

2.9 *Application for leave to file appeal*

31st March 2022

21st October 2011

seven years from judgment

3. *Application dated 31st March 2011*

3.1 *Leave to file appeal out of time.*

Reasons:

3.2 *Advocate wrote to the client/appellant*

on 8th april 2008

24th June 2008

but was never received.

3.3 *The applicant had lost his employment
and moved upcountry.*

3.4 *Breakdown of communication.*

3.5 *Went to enquire of his case on*

3rd March 2011.

3.6 *Prays for leave to appeal out of time.*

4. *In reply:*

- 4.1 *The delay was inordinate*
- 4.2 *The appellant failed to appeal against ruling and judgment*
- 4.3 *Failed to apply for stay of judgment pending appeal.*
- 4.4 *No ‘good cause’ for inordinate delay of 9 years to bring application.*

5. *Held:*

- a) *Good sufficient cause established.*
- b) *Leave to appeal out of time*
- c) *Justice would not have been done.*
- d) *Probability of success*
- e) *Application granted.*
Appeal be filed within 30 days of today’s date.

6. *Case Law:*

7. *Advocates :*

i) *N. Kaburu instructed by Nelson Kaburu & Co Advocates for
applicant/original plaintiff*

ii) *C Ngala instructed by C W Ngala & Co Advocates for
respondent/original defendant*

**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Miscellaneous Application 429 of 2011**

DAVID MUGO MURURIA APPLICANT

VERSUS

LE STUD LIMITED RESPONDENT

R U L I N G

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Application to file appeal out of time

Notice of Motion 31st March 2011

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I. INTRODUCTION

1. The application notice of motion 31st March 2011 seeks prayers to file an appeal against the decision of the subordinate court case dated

12th February 2004 out of time.

2. The original suit before the subordinate court arose from a workplace injury. The parties being employee/employer.

3. Whereas the original plaintiff employee was injured at his workplace on 15th August

1997. Whereas all his hospital bills were paid through the workman's compensation amounting to Ksh. 49,200/=, the employee sued the employer on 6th December 2000.

4. The defence inter-alia claimed "that the plaintiff had no cause of action under the tortious law of negligence as such a claim [in tort] was statutory barred." The claim under contract was fully paid. A Preliminary objection would be raised.

5. The Hon. Trial magistrate dismissed the application brought to amend the plaint before judgment on the 19th November 2003. The

Hon. Magistrate in her ruling [read judgment?] dismissed the whole suit on 12th February 2004 on grounds that the claim by the employee had been filed out of time.

6. The applicant's intention was to appeal immediately against this decision. The advocate wrote the following day 13th February 2004 to the court that they intended to file appeal if they would provide the appellant "with certified copies of the decree and uncertified copies of the proceedings for purposes of appeal."

7. The proceedings were not ready until the advocate was notified by a letter dated 23rd March 2008 as being ready for collection. The advocate paid for the proceedings then on 8th April 2008 wrote to the appellant informing the applicant to come to the chambers for purposes of an application to file appeal out of time.

8. There was no response from the appellant.

9. On the 24th June 2003, a reminder was written, again there was no response.

10. It was not until the 3rd March 2011 that the applicant reported to his advocate, to find out the status of his case. It was then that the present application was filed on 31st March 2011.

II APPLICATION 31ST MARCH 2011

FOR LEAVE TO APPEAL OUT OF TIME

11. The reasons of the delay in filing the application was at first the delay in obtaining the proceedings. Between the date of the decision of

12th February 2004 and 8th April 2008, the proceedings were not ready from the courts.

12. Thereafter the appellant stated that he had lost his employment. He moved upcountry and had all along used a box number that was care of one Joseph Kiseli. He had lost contact with this person. He failed to give his advocate his address and as a result there was a breakdown of communication. He now has an address in evidence.

13. He prayed that the application be allowed.

IN REPLY

14. The respondent employer objected strongly to this application. The grounds being that the delay of 9 years was inordinate and that the application be not allowed.

15. The reasons being when the ruling rejecting the amendment of the application was made on 19th November 2003, then the ruling judgment of 12th February 2004 there was no appeal filed.

16. There was also no application to stay judgment pending appeal filed. The application should be dismissed.

III OPINION

17. Upon the judgment delivered on 12th February 2004, the applicant intimated his wish to appeal against the decision. This was seen when he appealed for the proceedings and decree to be proved to him.

18. The law to which time to file an appeal is permitted from the subordinate court is outlined under Section 79B

“Every appeal from the 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 anytime which the lower court may certify as having been requisite for the preparation and delivery of the appellant of a copy of the area or order.

_____”

19. It is common knowledge that law courts in Kenya take a very considerable time to produce the typed proceedings for purposes of appeal. In some courts, photocopy of the trial magistrate’s handwritten notes are given to the advocates to be typed by them and returned to be certified as a true copy of the original by the court. This is not the ideal solution, what may be required is to have sufficient qualified typists, reintroduction of stenographers and adequate staff to reproduce the proceedings to court.

20. Our laws nonetheless provides under the said Section 79B of the

Civil Procedure Act, that if the proceedings are typed, the period in which the typing is taking place does not run. In this case, the proceedings were asked for in the year 2004. The courts took four years to have the proceedings ready and typed, namely April 2008. It is then that the applicant would begin to count the 30 days required to appeal. A memorandum of appeal would be filed within those 30 days, in this case it would be sometime in the month of May 2008.

21. Where the period lapses, then, as in this case, leave to appeal out of time would be made.

22. Unfortunately, the period taken to make request was actually another 4 years from when the proceedings were ready.

23. The Section 79B has a provision that states:

***“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.*”**

24. The respondent took issues that the delay of filing the application was inordinate. Four years is indeed a long period to file application. The applicant attributed the delay not only on the courts but on the applicant losing touch with his advocate. Justice delayed is justice denied. This period of 4 years was the same period used to reproduce the proceedings. The question arises as to whether “if the applicant is denied leave to appeal out of time, would justice have been done?” The answer is no.

25. This is because the applicant demonstrated a “good and sufficient cause” to attribute to the delay namely that he moved from Nairobi upon losing his employment. He lost contact with his last known address whereby he was using a box number in another person’s case.

26. Further, would the appeal if filed have a probability chance of success?

27. The appeal arises from a tortious claim, according to the respondent. In their defence they managed to convince the trial magistrate that because the act was tortious, the limitation of action was 3 years. The suit was therefore not able to stand as it was filed out of time.

28. The Hon. Trial Magistrate may not have been aware, nor did the advocate for the applicant bring it to the Hon. Magistrate's attention that a claim between the employer and employee is unique. It arises out of a contract on torn when a tortious action occurs. For a claim in contract the limitation of action is 6 years and therefore a cause of action that arose on 15th August 1996 may be filed on or before 14th August 2003. A claim under tort is 3 years and may be filed by 6th December 2000. Because of the special relationship of master/servant between the parties, the limitation of action would expire in the year 2003 and not the year 2003.

29. There further nothing in law precluding the employee, after being paid workman's compensation to file suit regardless that he has been compensated under the workman's compensation. This must be adequately assessed by the courts on both liability and quantum.

30. An argument was put forward by the respondent that the applicant ought to have filed an application for stay of judgment. The suit was dismissed. There was nothing to stay. If applied for, the prayer was ineffective to which the argument could not be upheld.

31. In conclusion, I would find that there was "good and sufficient" cause given by the appellant for the delay in filing this appeal. I hereby grant the application that leave be and hereby be granted to file appeal out of time. That the appeal be filed within 30 days of today's date.

32. The applicant is to pay costs to the respondent/original defendant.

DATED THIS 26TH DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

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Advocates :

i) *N. Kaburu instructed by Nelson Kaburu & Co Advocates for
applicant/original plaintiff*

ii) *C Ngala instructed by C W Ngala & Co Advocates for
respondent/original defendant*