



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 779 of 2006

Editorial Summary

1. *Civil Appeal*
2. *Civil practice and procedure*
3. *Subject of subordinate court case*
 - *Application – Order XVI rules 5 Civil Procedure Rules to dismiss suit for lack of prosecution.*
- 3.1 *Application granted by trial court 13 of June 2006.*

Suit dismissed for lack of prosecution.
- 3.2 *Under Order XLII rule 1 (1) Civil Procedure Rules right of appeal lies to the High Court.*
- 3.3 *Original plaintiff fails to file appeal on time namely, by 14 July 2006.*
- 3.4 *Files miscellaneous application on 9th October 2006 for leave to appeal out of time.*
4. ***Application 9th October, 2006.***
 - 4.1 *Leave to appeal out of time.*
 - 4.2 *Suit dismissed due to former advocate failing to give proper and diligent representation.*
 - 4.3 *Was always ready to proceed with former suit.*
 - 4.4 *Advocate failed to respondent on position of file.*

5. In Reply

5.1 *Appeal out of time application sought with inordinate delay of 4 months.*

5.2 *Took 6 years to come to court*

5.3 *Leave to file application required.*

6. Held

i) *Application filed under former rules*

ii) *Leave to appeal out of time.*

iii) *Negligence of former advocate*

iv) *Application granted*

7. *Case law*

8. *Advocates:*

i) *M Munoko instructed by Nyandieka & Co Advocates for applicants*

ii) *H Gachugi instructed by J K Kibicho & Co Advocates for respondents*

REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 779 OF 2006

ELIJAH MWANGI NGURE. 1ST APPLICANT

ESTHERY W MWANGI. 2ND APPLICANT

VERSUS

KENYA TEA DEVELOPMENT AUTHORITY. 1ST RESPONDENT

FRANCIS KAMAU. 2ND RESPONDENT

LUCY MUTHONI NGANGA. 3RD RESPONDENT

RULING

Application For Leave To File Appeal Out Of Time

9th October 2006

I. INTRODUCTION

1. The Respondent/original defendant filed an application before the subordinate court case CMCC 485/1993.

Elijah Mwangi Njue & Another

Versus

KTDA & 2 Others

in which the advocate sought, on behalf of his client, to have the suit dismissed for lack of prosecution. The suit had been pending for 10 years and whereas the law provides for three months of inactive action on a file, on application, may be dismissed.

2. The application was not opposed or reply filed. The plaintiff's advocate was absent.
3. The court in its ruling of 13th June, 2006 dismissed the suit for want of prosecution.
4. The original plaintiff was unaware of these orders. She then, on checking the exact position of the file, discovered the dismissal orders by the court.
5. The said original plaintiff filed this court application Notice of Motion 9th October, 2006 seeking for leave to file appeal out of time.

II. APPLICATION

6. The applicant stated that upon filing suit on

10th September, 1993 and upon awarding injunctive orders, the case had been listed for hearing on various occasions. The last date of hearing was 14th April 2003 when the case was adjourned "due to pressure of work". There had been no availability of dates to court. On inquiry further of the matter on

1st September, 2006, it transpired that the suit was dismissed for lack of prosecution on 13th June, 2006.

7. The applicant moved with haste to file this present application for leave to appeal out of time; as the requisite

30 days to appeal (under Order XLVI, I (1) Civil Procedure Rules) had expired.

8. That, out of interest of justice, they be granted the same.

9. The application was opposed. The main suit was said to have been left dormant for 3 years with no action by the parties suing, taken. There had been no reasonable probability of success on the main appeal, if admitted to hearing. There had been undue delay.

III. OPINION

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10. Under XLVI r I 17(1) Civil Procedure Rules, there lies a right of appeal to the High Court for an application that has been dismissed under the Order XVI rule 5 Civil Procedure Rules for want of prosecution. This had to be filed within 30 days (Section 79 of Civil Procedure Act).

11. The applicant stated he was not aware of the ruling dismissing the matter. The Hon.

Magistrate was to deliver the suit on 30th May 2006 but delivered it on 13th June, 2006. There was no indication that the parties were notified to attend court.

12. The records show that the ruling was delivered in the “Absence of the Parties” and N/A (presumably to read “non appearance”) by advocates.

13. I would therefore, conclude that none of the parties were aware of this ruling in order that an aggrieved party may appeal within the 30 days required.

14. The applicant became aware of the orders on 1st September, 2006. Upon so being aware, the applicant said, through his advocate that he obtained the proceedings, then filed the application on 9th October, 2006.

15. I would accordingly agree that the said application before me has merits. The application for leave to file appeal out of time be and is hereby granted.

16. The appeal be filed within 30 days of today’s date.

17. There will be costs in the appeal.

Dated this 7th day of March 2012 at Nairobi.

M. ANG’AWA
JUDGE

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Advocates:

i) *M Munoko instructed by Nyandieka & Co Advocates for applicants*

ii) *H Gachugi instructed by J K Kibicho & Co Advocates for respondents*