



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
MISCELLANEOUS CIVIL APPLICATION 1 OF 2012
DAVID KIPTARUS NDIEMA.....APPLICANT
VERSUS
HOUSING FINANCE
CO-OPERATION OF KENYA LTD.....RESPONDENT

RULING:

The application is a Notice of Motion dated 19th January, 2012 under Sections 3, 3A, 79 (G) and 95 of the Civil Procedure Act and Order 50 rule 5 and Order 40 rules (1) and (2) of the Civil Procedure Rules.

The Applicant relies on the grounds on the face of the application and the Supporting Affidavit made by the Applicant sworn on the 19th January, 2012 and the Further Affidavit sworn on the 6th February, 2012. The Applicant prayed that the application as presented be allowed.

The application was opposed by the Respondent and it relied on the affidavit sworn by RICHARD SIELE dated the 27th January, 2012.

Counsel for the Respondent submitted that the intended appeal had no chances of succeeding. That there was nothing to appeal against as the suit had been struck out for want of jurisdiction. The Applicant had annexed evidence, annexure "DKN5" that showed that the property in issue was valued in excess of Kshs 500,000/=. Therefore the magistrate was correct in holding that the subordinate court had no jurisdiction to entertain the initial suit.

Counsel further submitted that the Ruling intended to be appealed against was delivered on the 28th October 2011 and the application for enlargement of time was filed on the 19th January 2012 and there was unreasonable delay in filing the same.

In conclusion counsel contended that there was nothing capable of being stayed only a reversal of the ruling by way of appeal.

Counsel prayed that the application be dismissed with costs.

After hearing both Counsels submissions, the court finds the following issues for determination:

- a) Inordinate delay.
- b) Chances of intended appeal succeeding.
- c) Discretion.
- d) Costs.

The ruling was delivered on the 28th October, 2011 and the application herein for enlargement of time was filed on the 19th July, 2012. The explanation given at paragraphs 9, 10, and 11 of the Applicants affidavit is that the delay in filing the appeal is attributed to failure on the part of the subordinate court in providing the proceedings dispute a request for the same being made.

The provision to Section 79 (G) reads as follows;

“.....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 court finds that the explanation given by the applicant for not filing the appeal to be a sufficient reason and the delay in presenting the application herein, is not inordinate.

On the second issue the court finds that the chances of success of the intended appeal are very, very slim as the same relates to only one ground, that is jurisdiction, and the subordinate court did not have jurisdiction to entertain the suit.

This court has the discretion to enlarge time and to admit an appeal out of time but this discretion has to be exercised in a judicial manner and not whimsically and arbitrarily.

The intended appeal is a non-starter and there are no good grounds for the court to exercise its discretion.

The court finds that the application for enlargement of time in which to file the intended appeal has no merits and the same is dismissed with costs to the Respondent.

The injunctive order granted herein is discharged.

Dated and delivered at Eldoret this 25th day of June 2012.

A.MSHILA

JUDGE

Coram: Before Hon. A Mshila J

CC; Andrew

Counsel for the Applicant: No appearance.

Counsel for the Respondent: No appearance.

A. MSHILA

JUDGE