



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Application 944 of 2011

JOSEPH KANGETHE KABOGO :::::::::::::::::::: 1ST APPLICANT /DEFENDANT

BENSON MBURU KANGETHE :::::::::::::::::::: 2ND APPLICANT /DEFENDANT

- VERSUS -

MICHAEL KINYUA NGARI :::::::::::::::::::: RESPONDENT/PLAINTIFF

R U L I N G

The Applicants/Defendants filed the Notice of Motion dated 5th December 2011 seeking as the main prayer that the leave of this court to enlarge time to file the Memorandum of Appeal out of time. The intended appeal arises out of **THIKA CMCC NO. 406 OF 2004, MICHAEL KINYUA NGARI – VS – JOHN KANG’ETHE & ANOTHER**. That case, following the alleged regrettable oversight on the part of the Applicant, proceed *ex-parte* and judgment was delivered on 6th September 2010 but the Applicant’s were only notified of the same in September 2011. The Applicant’s being dissatisfied with the judgement now wish to appeal, but are time barred and hence this application for leave to file Memorandum of Appeal out of time.

The application is supported by the affidavit of M/s LILIAN MUNYIRI who is a legal officer with M/s Gateway Insurance Company Limited, the insurer of the Applicant/Defendant dated 5th December 2011 together with its annexures.

The application is opposed by a replying affidavit by Mr. CHARLES MUCHEMI KARWERU, the counsel for the Respondent in this matter.

The application is based on grounds that this court has unfettered discretion to grant the orders sought, and that the intended appeal raises fundamental points of law and fact that need to be considered and determined by this court. It is also submitted on behalf of the Applicants that the extension if allowed would ensure that the ends of justice are met and that the Respondent will suffer no irreparable loss if the orders prayed for are granted. The Applicant is prepared to deposit an insurance bond as security.

In opposing the application the Respondent has submitted that the application is incompetent having been made by a person without authority and a non-litigant and that the affidavit sworn in support should be struck out as it is sworn by a stranger to the proceedings. Further it is submitted for the Respondent that the delay in filing the application is not sufficiently explained, judgment having been entered on 6th September 2010, and that it is sheer indolence and indifference that it took over 1 ½ years for this application to be made. On these grounds I have been asked to dismiss the application.

I have considered the application and the opposing affidavits and submissions. I wish to raise two issues for determination:-

1. ***Whether this application is competently before the court.***
2. ***Whether the delay in filing this application is appreciable.***

In regard to the first issue, it has been submitted that M/s LILIAN MUNYIRI is not competent to depone to an affidavit as she has done because she is a stranger to the suit. In her affidavit dated 5th December 2011 M/s Munyiri describes herself as a Legal Officer of Gateway Insurance Company Limited, the insurer of the Applicants/Defendants hence competent to swear this affidavit on the strength of the principle of subrogation and with authority from the company. The Respondent insists that this is unlawful.

In my view, an application can be supported by the affidavit of any person who has an explained legal nexus with the Applicant. The affidavit sworn in the support of this application is done by a person with such legal nexus to the Applicant, more so through the explained doctrine of subrogation. I therefore find that this application is competency before the court.

On the issue of delay it is worth noting that Judgement in the relevant matter was delivered on 6th September 2010. The Applicants/Defendants allege that they were informed of the same on 5th September 2011, one year after the Judgement was delivered. That fact may be acceptable. What, however is due for consideration are the steps taken by the Applicants once they were informed of the Judgement. The current application was filed on 5th December 2011. That is about 90 days after the Applicants became aware of the Judgement. There is no explanation at all why this delay was necessary once the Applicants became aware of the Judgment and intended to appeal against it. It is not demonstrated at all what the Applicants were doing during these 90 days. If the Applicants had brought this application within 30 days of the receipt of the notice of the judgement, that would have been late enough, but could be considered.

I find that the delay in bringing this application is not explained. The Applicant cited Article 159 (2) (d) of the Constitution and urged the court to administer substantive justice and to disregard technicalities. I accept that provision. But my point of departure is that Article 159 (2) (d) is not an omnibus provision to cure incompetencies, illegalities or abuse of court processes.

I dismiss the application with costs to the Respondents.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 5TH DAY OF JUNE 2012.

E. K. O. OGOLA

JUDGE

PRESENT:

Mwang'ombe for the Applicant

Gaita H/B for Karweru for the Respondent

Teresia – court clerk