



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISCELLANEOUS APPLICATION 310 OF 2010

GALWAK TEIM KUEI MUOM.....PLAINTIFF/APPLICANT

VERSUS

MAKUPA TRANSIT SHADE LIMITED.....DEFENDANTS

RULING

By Chamber Summons Application dated 26th July 2010 the Plaintiff prays for leave be granted to the applicant to file memorandum of appeal out of time.

There is an affidavit in support of the Application sworn by Leonard dated 26th July 2010.

In the affidavit the plaintiff states that he filed a suit at the lower court being Mombasa RMCC No. 1049 of 2009. That the case proceeded until the 11th May 2010 when parties were to tender their written submissions and take a judgment date. That on that day the court was not sitting and date for judgment was not taken. That the file was missing at the registry and no mention was taken.

The plaintiff avers that on the 29th June 2010 they searched for the file at the registry and to their surprise they discovered that judgment was delivered on 20th May 2012. Consequently the plaintiff states that he did not have opportunity to submit on his case or file appeal within the time required.

There is a Replying Affidavit by the Defendant through its Managing Director David Patrick Killoran dated 14th October 2010. The defendant states that the plaintiff has no good and sufficient cause for not filing appeal in time and the application is scandalous, frivolous and an abuse of the court process.

The Defendant further states that the Plaintiff was aware of the judgment delivered on the 20th May 2010 and his advocate instructed another advocate to hold brief. That the advocate holding brief must have relayed the judgment to the plaintiff's advocate.

The plaintiff filed a further affidavit to clarify on issues raised in the defendant's Replying affidavit. He states that he is informed by his advocate that he consulted Counsel Ms. Luta, who held their brief on the day the Judgment was delivered. The advocate confirmed that she was requested to hold brief by the clerk of the Plaintiff's advocate. The plaintiff avers that the clerk did not inform the advocate of the Judgment; that there was no notice of the judgment and the clerk happened to be present in court when the matter was called and he requested Ms. Luta advocate to hold their brief.

The counsels for the parties filed written submissions.

In his submission counsel for the Applicants states that the failure to file appeal out of time was

occasioned by circumstances outside the control of the Applicant. The submission reiterate the averments in the supporting affidavit and the further affidavit of the plaintiff. Counsel states no notice was given to the parties that judgment was to be delivered and that the handwritten copy of the judgment annexed shows that even the respondents advocate was not present in court.

Counsel also in support of the applicant's application quoted the provisions of the Constitution Article 159 (10 (d) which provides that justice shall be administered without undue regard to technicalities. He also submitted in support the case of **SAVINGS AND CREDIT SOCIETY VS. GORGE ARUNGA SINO Civil Application No. 221 of 2010** where the court stated that the policy of the law as enunciated in the new constitution and the overriding principles in civil litigation guide the court to look at the wider picture and dispense justice without undue regard to technicalities of procedure.

In opposition to the application counsel for the defendant in his submissions state that the court record shows that the applicant's advocate was present through their representative who held brief for the said advocates. The defendants advocate further submits that the incompetence of the advocates and his office should not be burdened by the respondent.

Counsel for the Defendant further in support submitted the authority of **AFRICAN AIRLINES INTERNATIONAL LIMITED VS. EASTERN AND SOUTHERN AFIRCAN TRADE DEVELOPMENT BANK (PTA) CIVIL APPLICATION NO. 50 2002.**

The court held that in determining whether court shall exercise discretion to extend time the following factors should be considered: the length of delay; reasons for delay' whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended.

The defendant submits that the applicant have not shown any basis for the court to use its discretion to give leave to file memorandum of appeal out of time.

I have considered the application and the submissions by counsel.

it is my opinion that there was no inordinate delay in bringing this application for leave to file and serve memorandum of appeal out of time.

The plaintiff has explained that the Judgment was delivered without notice and that although an advocate held brief for his advocate the information was not communicated to him or his advocate by the clerk who was present in court.

Section 79 G of the Civil procedure Act (Cap 21 Laws of Kenya) provides that

“ every appeal from a subordinate court to the High Court shall be file within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that 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.”

I am satisfied by the explanation given by the plaintiff for not filing his appeal in time.

I therefore make the following orders:

1. THAT Leave is hereby granted to the Applicant to file and serve memorandum of appeal out of time.
2. THAT applicant shall file and serve the memorandum of appeal within 21 days from the date of delivery this order.
3. THAT the costs of this application shall be in the cause.

DATED AND SIGNED AT NAIROBI ON THIS 17TH DAY OF JULY 2012

M.K IBRAHIM
JUDGE

DATED AND DELIVERED AT MOMBASA ON THIS 27TH DAY OF JULY 2012

R.M. MWONGO

.....
JUDGE

In the presence of :