



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Application 556 of 2011

JOSEPH MWANIKI WAMBUGU. APPLICANT

VERSUS

SAVA INDUSTRIES LIMITED. RESPONDENT

R U L I N G

The application before the court is the Notice of Motion dated 5th November, 2010 but filed on 26th November, 2010. It seeks leave to appeal out of the prescribed time. It is supported by an affidavit sworn by Joseph Mwaniki Wambugu, the Applicant herein.

In the supporting affidavit, the Applicant depones that the judgment intended to be appealed against in Nairobi CMCC No. 775 of 2007, was delivered on 21st May, 2009. That the Applicant became aware that the judgment did not contain an order concerning interest and costs which, consequently, were excluded in the decree and certificate of costs that were drawn thereafter.

The Applicant's supporting affidavit further depones that to correct the anomaly touching on interest and costs, he filed an application dated 19th June, 2009, for the review of the judgment aforesaid. The said application was not filed, however, until 10th September, 2009 and it was heard and dismissed on 2nd December, 2009.

The Applicant further depones that although he decided to appeal and applied for a certified copy of proceedings and judgment, he never received the same until August, 2010 when time to appeal had already expired. The court observes that a similar application for enlargement of time dated 5th November, 2010 filed in court on 26th November, 2010 was withdrawn before Sitati, J on 10th December, 2010 before this application was filed 13 days later.

It is clear from the record that there was a delay of 18 months after the relevant judgment was filed before this application seeking leave to appeal out of time was filed. It is also observed that although the review application was dismissed on 2nd December, 2009, the Applicant did not file this application until 23rd December, 2010, a period of delay of three weeks. It is not clear why a similar application for extension of time filed on 26th November, 2010 was to be withdrawn on 10th December, 2010.

I have considered this application. It is not clarified by the Applicant whether he wishes to appeal against the original entry of judgment orders which left out orders relating to interest and costs or the

order rejecting the review application. There is no doubt that the Applicant had chosen to seek relief of review after the court had entered some judgment he considered incomplete. It is possible to accept that he might have forgotten to file the intended appeal while he pursued the review relief. He, however, has not explained the cause of delay of about thirteen (13) months which passed on after the review application was rejected on 2nd December, 2010 and before he filed this application on 23rd November, 2010, seeking leave to enlarge time to appeal.

There is a feeling, just a feeling, from the Applicant that he was trying to rely on the delay by the court to supply him with certified copy of proceedings and judgment as the reason for delay. Mr. Kamere for the Applicant, did not however come out and explain the above as the real reason for delay.

Furthermore, there was no reason why the Applicant failed to file a Memorandum of appeal in court while awaiting the copy of proceedings and judgment from court for the purpose only of preparing a record of appeal. He really only needed the copy of proceedings and judgment not to file an appeal but to prepare a record of appeal.

In the above circumstances, the Applicant has not really convinced this court that he had sufficient reason for failing to file his appeal in time.

On the other hand, the judgment entered in this case for Ksh.810,028/- noted at the same time that the sum originally claimed in the same plaint was Ksh.1,817,925/- of which all except Ksh.810,028/- had been paid by the Defendant while the claim was pending in court. While, therefore, the court eventually allowed a judgment for the said sum of Ksh.810,028/- with costs and interest, the issue of costs and interest to the rest of the money already received while the claim pended, remained to be considered by the same court.

The above is a substantive issue which this court cannot ignore and it is my view that the Applicant should be given leave to agitate the same in the intended appeal.

For the above reasons, I give the Applicant leave to file an appeal out of time both against the original judgment and the refusal to review the original judgment. The costs of this application will be in the result of the intended appeal. To the above end, the Applicant shall file his appeal within 14 days. Orders accordingly.

Dated and delivered at Nairobi this 25th day of September, 2012.

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D A ONYANCHA
JUDGE