



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Miscellaneous Civil Appeal 508 of 2010**

**FARAJ OMAR MWINYIKOMBO.....APPELLANT/APPLICANT**

**VERSUS**

**TELKOM KENYA LTD.....RESPONDENT**

**RULING**

1. The Plaintiff's services were terminated on or about 19<sup>th</sup> December, 2004 after working for fourteen years. He filed a suit for wrongful dismissal in Voi SRMCC 66/2005. Hearing was completed and the judgment date was fixed for 12<sup>th</sup> April, 2007. On that date, the judgment was not ready and delivery was fixed for 10<sup>th</sup> May, 2007. It was read out in the absence of counsel for the Defendant but in the presence of Plaintiff's counsel. His suit was dismissed with costs.
2. The present motion was filed on 17<sup>th</sup> December, 2010 under Order 42 and 51 of Civil Procedure Rules and Sections 3A, 79G and 95 of the Civil Procedure Act. The Plaintiff Applicant seeks leave to appeal out of time or enlargement of time to file an appeal. His grounds are that:
  - his counsel did not inform him on the date of judgment
  - the counsel's mistake should not be visited on him
  - he has a triable appeal, a draft memorandum of which he annexed to his affidavit
  - he later found out that his case was dismissed and that his counsel had applied for the typed proceedings and judgment copies of which he also annexed
3. Both parties filed written submissions which the court has duly considered.
4. Under Section 79G an appeal from the subordinate court is required to be filed:

***“... 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 an appeal may be admitted out of time if the Appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”***
5. The court's power to admit out of time is therefore provided for in Section 79 G of Civil

Procedure Act. The Appellant has also invoked Section 95, and Orders 42 and 51 none of which are relevant to an application to file out of time or to enlarge time. Section 3A on inherent powers of the court is also invoked.

6. To succeed what must be accomplished by the Applicant is to:

***“Satisfy the court that he had a good and sufficient cause for not filing the appeal in time.”***

It is clear that counsel for the applicant at the hearing in the lower court was present on 10<sup>th</sup> May, 2007, at the reading of the judgment sought to be appealed from. On the same day his counsel wrote to the Registrar, *inter alia*, as follows:

***“We hereby request to be supplied with the certified typed proceedings and judgment of the above case for the purpose of Appeal.”***

7. In his affidavit, the Applicant does not say when the proceedings and judgment were received, but he annexed them to his affidavit in the present application. They were sought by his then counsel for purposes of appeal. Applicant does not explain the cause of the delay in filing the appeal, has not annexed any other correspondence with his counsel, or annexed a certificate of delay in preparing the proceedings. His only explanation is that his counsel did not notify him of the date and delivery of judgment.

8. In applications for late admission or extension of time, it is settled that the courts take into account the following:

a) the length of delay: Here it is over 6 years 7 months

b) the reason for the delay: Here it is blamed on the counsel's failure to notify Applicant of the judgment

c) the chances of the appeal succeeding: In this case I have perused the 3 grounds of appeal. In summary they contest the Trial magistrate's error in law and in fact:

- in dismissing the suit without adjudicating on triable issues
- in delivering the judgment without considering the Appellant's evidence and submissions and
- In that he misdirected the court that the Plaintiff had not proved his case and dismissed it.

d) the degree of prejudice to the Respondent if the application is granted.

9. In my view, the Appellant's appeal is, overall, on the sole issue that the learned Magistrate erred in law and in fact in coming to his decision. It is a generalised and simplistic approach to the appeal, although the Magistrate explained and gave several reasons for his decision to uphold the summary dismissal.

10. Accordingly, I do not think that the appeal rises serious issues with chances of success. I also consider that putting the Respondent though an appeal over 3 years after the decision had been made, over 7 years after the case commenced and 8 years after the Applicant's services had been terminated would lead to prejudice to the Respondent.

11. Accordingly, I hereby dismiss the application. Given the circumstances, I make no order as to costs.

**Dated, signed and delivered this 19<sup>th</sup> day of December, 2012.**

**R.M. MWONGO**

**JUDGE**

**Read in open court**

**Coram:**

Judge: R.M. Mwongo

Court clerk: R. Mwadime

**In Presence of Parties/Representative as follows:**

- a).....
- b).....
- c).....
- d).....