



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
HMCA NO. 205 OF 2010

KENNEDY KIPKOECH KOSGEYAPPLICANT

=VERSUS=

KORMOTO GENERAL AGENCIES LIMITED.....RESPONDENT

RULING

The application before me is dated 27th July 2010. It is by **Kennedy Kipkoech Kosgey**, (hereinafter “**the applicant**”). It is expressed to be brought under Sections 3A, 79G and 96 of the Civil Procedure Act, Order L Rule 1 and all the enabling provisions of the Law. It seeks one main order, namely that leave be granted to the applicant to file an appeal out of time against the judgment of the Chief Magistrate in Eldoret CMCC No. 583 of 2006. The application is based on the main ground that the said judgment was delivered in the absence of the parties and as soon as the applicant learnt of the same, he lodged this application. The applicant believes that he has an arguable appeal.

The application is supported by an affidavit sworn by the applicant’s counsel **Isaac K. Terer**, in which the cause of delay is explained. Annexed to the said affidavit is, *inter alia*, a draft of the proposed memorandum of appeal.

The application is opposed on the basis of Grounds of Opposition filed by counsel for the respondent. The gist of the opposition is that the applicant is guilty of inordinate delay in moving the court.

I have considered the application, the supporting affidavit, the grounds of opposition and the submissions of counsel. Having done so, I take the following view of the matter. The judgment sought to be challenged was delivered on 25th November 2009. The record shows that the same was delivered in the absence of the parties. Counsel for the applicant has sworn that he only came to know of the judgment on 29/7/2010 and was instructed to appeal against the same hence this application which was lodged on 29/7/2010. The factual position as stated by counsel for the applicant has not been challenged by the respondent. I therefore have no reason to doubt the same. That being the position, the applicant lodged this application a mere five days after learning of the judgment intended to be challenged. In the premises,

I find that the applicant is not guilty of unreasonable delay.

I have perused a draft of the proposed memorandum of appeal and cannot say that the same is frivolous or vexatious. In other words, the appeal is arguable and is not an abuse of the process of the court. The respondent did not file a replying affidavit. It has therefore not demonstrated that it would suffer any prejudice if the leave sought is granted.

In the end, I see no impediment to the applicant's application. The same is allowed as prayed in paragraph (a) thereof. The applicant is granted ten (10) days within which to file and serve his appeal.

The respondent shall have the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF FEBRUARY 2011.

F. AZANGALALA

JUDGE

Read in the presence of:-

Korir for the applicant

F. AZANGALALA

JUDGE