



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. APPLICATION NO. 43 OF 2006

MUSA ASHIHUNDU SHITAMBASI

.....**PLAINTIFF/RESPONDENT**

VERSUS

**CHARMAN B.O.G. SHIKOKHO SECONDARY
SCHOOL.....DEFENDANT/APPLICANT**

R U L I N G

1. The Applicant herein, Chairman, B.O.G. Shikokho Secondary School, seeks orders under section 79 G of the Civil Procedure Rules that leave be granted to file an appeal out of time to challenge the decision of the Kakamega SRM's Court in its case no.367/2001.

2. The grounds in support are the following;

“1. ***THAT the Applicant applied for proceedings in time but the same were supplied late.***

2. ***THAT the delay in not filing the appeal in time is not deliberate nor is it inordinate.***

3. ***THAT it is in the interest of justice that the prayers sought be granted.***

4. ***THAT the intended appeal has overwhelming chances of success.***”

3. In his Supporting Affidavit sworn 5.4.2006, the Applicant's advocate Reuben Ingonga, deponed that

a Ruling was delivered on 11.10.2005 in the subordinate court whereby the Applicant's Application was dismissed. I have perused that Ruling and it was one in which an ex-parte judgment entered against the Applicant was sought to be set aside but was denied. That the same was delivered on 21.6.2005 but the Applicant's advocates only applied for proceedings vide a letter dated 17.10.2005 and later obtained the proceedings on 26.1.2006.

4. It is the Applicant's case that the intended appeal has overwhelming chances of success and that the delay was occasioned by failure to obtain proceedings in time.

5. In his Replying Affidavit sworn on 13.9.2010, Musa Ashiundu Shitambasi stated that the Applicant did not act diligently and failed to explain why it took long to seek leave to appeal out of time. Further, that the intended appeal is an excuse in futility since the transaction, subject of the proceedings, has been rendered null and void by operation of the law. That litigation must come to an end and the Application should therefore be dismissed.

6. I have also read a further Affidavit sworn by Aggrey Shitsama, advocate, on behalf of the Applicant, and of interest is a document headed

"*compromise*" and which is dated 11.4.2006. In it, the Respondent undertook to withdraw Kakamega CMCC no.367/2001 and transfer title no. Idakho/Shitoli/238 to the Applicant.

7. I have taken into account the decision of the Court of Appeal in Muchugi Kiragu vs James Muchugi Kiragu & Another C.A. No. Nai 356 of 1996 where it was held as follows;

"I think it is now settled that an application of this nature..the court is being asked to exercise its unfettered discretion and that for an applicant to succeed he must satisfy the court that the delay was not inordinate and that the delay has been sufficiently explained. The other issue to be considered is whether the intended appeal is arguable. Lastly the applicant has to show that no prejudice would be caused to the Respondent if the application to extend time is allowed..."

8. I am guided and in this case, there is no doubt that the Applicant was conscious of its duty to act expeditiously and I am aware that it tried to review the subordinate's courts orders and on failing to do so, sought proceedings which took time to be supplied. Of course that is not to say that it could not have filed its Memorandum of Appeal upon the Application for setting aside being dismissed.

9. Looking at the case in its entirety however, I am inclined to exercise discretion and grant leave as prayed. The Applicant shall file its appeal within 14 days and costs of the Application shall abide the Appeal.

10. Orders accordingly.

Delivered, dated and signed at Kakamega this 17th day of February, 2011

ISAAC LENAOLA

JUDGE