

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CIVIL APPLICATION NO. 54 OF 2010

RONALD SHIUNDU WANJALA APPLICANT

VERSUS

NATHAN LUCHELI LUVONGA RESPONDENT

RULING

1. The Applicant herein, **Ronald Shiundu Wanjala** by his Notice of Motion dated 18.10.2010 seeks orders under **Order XLIX Rule 5** of the Civil Procedure Rules that leave be granted for him to file his Appeal out of time.
2. In his Affidavit sworn in support of the Application, he has deponed that the judgment in the subordinate court was delivered in his absence and he only came to know of it on 8.9.2010 when he went to make an enquiry at the court registry. That in fact the judgment had already been delivered on 7.5.2010 and he blames his erstwhile advocates on record for failing to inform him of the date or outcome of the judgment. That he should not be punished for the mistake of his advocate.
3. In his Replying Affidavit sworn on 30.11.2010, the Respondent has deponed that the Applicant did not exercise due diligence when he failed to take any action between the date of judgment and 8.9.2010 and that his attempt at shifting blame to his advocates was not convincing. Lastly, that the intended Appeal is hopeless as the judgment had already been executed and there was nothing left to be pursued on appeal.
4. Are the reasons given for delay plausible and was the delay so inordinate as to prohibit the due exercise of discretion in favour of the Applicant? I think not. There is no evidence that when submissions were concluded on 19.2.2010, the date of judgment was given as 17.5.2010 and it is most likely that a prior date was given but judgment was finally delivered only on the latter date. There is also no evidence that any notice of delivery of judgment on the latter date was given. Granted, the five months' delay between 17.5.2010 and 21.10.2010 when the Application was filed may look inordinate in other circumstances but in the instant case, the Applicant moved to have the Application for leave filed, two days or so after he discovered that judgment had been entered against him.
5. I am convinced that where a party hires an advocate who fails to follow up a matter and fails to communicate with his client, the consequences of his inaction should not be visited upon the client. The reasons given are therefore plausible and the delay, looked at in the totality of the case, is not inordinate.
6. In the event, I will grant leave to institute the appeal and the Appellant shall file the Appeal within 14 days of today's date.
7. Orders accordingly.

Delivered, dated and signed at Kakamega this 17TH day of March, 2011

ISAAC LENAOLA
JUDGE