



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CIVIL MISC. APPL. NO. 2 OF 2011

PAUL MUNGAI MBURU1ST APPLICANT
NAKUMATT HOLDING LTD2ND APPLICANT

VERSUS

JOHN OMONDI MUOMARESPONDENT

RULING

Paul Mungai Mburu and Nakumatt Holding Ltd the first and second Applicants respectively applied on 2nd February, 2011 for “*leave and extension of time to file an appeal out of time*” against the judgment of the Principal Magistrate, Hon. Okello, delivered on 10th November, 2010 in Bomet P.M.C.C. Case No. 23 of 2010 in which the 1st and 2nd Applicants were the Defendants while **John Omondi Muoma**, the Respondent herein, was the Plaintiff. The trial magistrate in that case delivered judgment and ordered on 10th November, 2010 that the Applicants herein were 100% liable and awarded the Respondent Shs. 420,000/= for loss of user and Shs. 50,000/= for repairs plus costs of the suit.

The Applicants did not lodge appeal against the judgment within thirty (30) days as required by **Section 79** of the **Civil Procedure Act, Cap 21** of the laws of Kenya. The period for lodging appeal expired on 10th December, 2010.

On 2nd February, 2011, the Applicants filed a Notice of Motion seeking a temporary stay of execution of the decree pending the hearing inter partes of the application for extension of time and “*leave and extension of time to appeal out of time*”. The reasons proffered for the failure to file appeal in time and the delay in bringing the application for extension of time were contained in the affidavit sworn on 1st February, 2011 by the 1st Applicant in support of the application. They show that the 1st Applicant’s advocates on record in the lower court informed the 1st Applicant’s insurers of the judgment. In paragraph 7 of his affidavit in support of the application, the 1st Applicant averred that he was “*informed by R.N. Kitheka(Mrs), the claims manager of the 1st Applicant’s insurer that they had misplaced his file in their office, hence the delay in appealing against the judgment*”. The 1st Applicant did not indicate in the said averment when he was informed about the misplacement of the file nor when the file went missing. Mrs. R. N. Kitheka did not put in an affidavit to explain the circumstances relating to the misplacement of the file and when it was retrieved. However, the 1st Applicant averred that the delay in appealing was not deliberate and that the intended appeal had overwhelming chances of success. The 1st Applicant described the misplacement of the file and failure to appeal in time as “*mistake*” of the insurer which he contended ought not by implication to be visited on an innocent litigant like himself and the 2nd Applicant. But the

misplacement of the file was not a mistake in the sense in which the expression is normally used nor was there full disclosure by the 1st Applicant and Mrs. R.N. Kitheka regarding the precise dates when the 1st Applicant's advocates informed the 1st Applicant's insurers and when Mrs. R.N. Kitheka found the file missing and what steps the Applicants or their advocates or their insurers took to forestall delay. Although the Applicants aver that the application filed on 2nd February, 2011 after about two months was filed without delay, it is not possible to state whether this is the case unless one is in possession of the dates when the Applicants' advocates informed the Applicants' insurers, and when the latter found their insured's file misplaced, and when the file was retrieved and all the facts relating thereto. The Applicants were represented by counsel and they knew the consequences of not taking steps within the time set by law. The delay involved spanned close to two months.

The application was opposed by the Respondent who submitted in his replying affidavit sworn on 18th February, 2011 that the application for leave to file appeal out of time does not give any sufficient reason or explanation for the delay nor does it show that the appeal raises triable issues.

Mr. E.N. Wangila, the learned counsel for the Applicants urged the court to allow the application as the intending Appellants had a good appeal. He was not able to throw any light on timelines relating to the circumstances that led to the failure to file appeal within the stipulated time.

On her part, **Miss Khasoa**, learned counsel for the Respondent, in opposing the application pointed out. That if the Applicants were serious in lodging appeal, they could have done so by obtaining the documents they needed from the court. She contended that no sufficient reason for the delay had been put forward and urged the court to dismiss the application.

I have carefully perused the application and considered the submissions made by both counsel. Under **section 79G** of the **Civil Procedure Act**, the court has jurisdiction to admit appeal out of time if the Applicant satisfies the court that he had good and sufficient cause for not filing appeal in time. The power to admit appeal out of time is discretionary. It is exercised judicially. It aims at doing justice to the parties.

In the present application, the delay of close to two months has been explained in a desultory and casual manner. There is glaring omission to allude to dates when the advocates for the Applicant's informed the latter's insurers of the judgment, and when the Applicant's file was found misplaced by the insurers, and when it was retrieved etc. Without these facts it is difficult if not impossible to discern whether the Applicants acted diligently and whether they were prevented by any sufficient cause from filing appeal in time. The burden of demonstrating that there were good and sufficient reasons that militated against the filing of the appeal in time reposed on the Applicants. It was not discharged. The explanations given for the failure to file appeal in time do not constitute a sufficient cause.

The application has no merit and I dismiss it with costs. The temporary stay ordered is hereby lifted. The Applicants shall pay the Respondent the costs of the application.

DATED at KERICHO this 13th day of April, 2011

G.B.M. KARIUKI, SC
RESIDENT JUDGE

C OUNSEL APPEARING

Mr. E.N. Wangila Advocate for the Applicants

Miss. Khasoa Advocate for the Respondent

Mr. Bett – Court Clerk