



REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL MISC. APPLICATION NO.13 OF 2011

HUDSON WANAMBISI NASIEBONO :::::::::::::::

APPLICANT

~VRS~

MATHEWS WASWA KARAMA :::::::::::::::

RESPONDENT

RULING

The Applicant was the Defendant before the Resident Magistrate's Court at Bungoma. He was acting in person when the case came for hearing on 14/7/2010. The Respondent/Plaintiff and his witness testified and his case was closed. The matter was rescheduled for 1/9/2010 for the defence hearing. When the case was called the Applicant was absent. The court ordered his case to be closed. The matter was adjourned for judgment. The Applicant states that judgment on 6/10/2010 was delivered in his absence. There is no indication that the judgment date was served in him. He subsequently applied to have the judgment and the decree set aside, and that he be allowed to defend the suit. The application was dismissed with costs on 12/1/2011. On 22/2/2011 he filed this motion for leave to appeal the ruling out of time.

The Applicant blames his advocates M/s Khakula & Co. advocates for his predicament. He states that when he was served with reply to defence he instructed the firm. It, however, did not file a memo of appearance until 9/11/2010, and that when the case came for hearing on 31/3/2010 he was not ready to proceed in absence of counsel. The affidavit, however, indicates that a copy of the memo of appearance was annexed as "HWN1" but none was annexed. When the case was adjourned to 1/9/2010, he says, he went through his advocate's offices and then came to court. He says he did not locate the court dealing with the case. The court proceeded to close the defence now scheduled the matter for judgment.

When dealing with an application for extension of time to appeal, the court has to consider the period of delay and the reasons for the delay. **(Bhaichand Bhagwanji Shah v Jamnadas and Company Ltd [1956] EA 838.)** There has to be satisfactory explanation for the delay. The court has to always consider that justice is better served when the parties to a case have had their case decided on merits after the hearing of both sides. When one considers that the ruling sought to be appealed from was rendered on 12/11/2010 and his application was filed on 22/2/2011, it is clear that the delay was for less than 15 days. This was not, by any means, inordinate delay. The explanation given may not be plausible but when the facts show that the Applicant had no notice of the judgment, the court should look at the matter sympathetically. He was entitled to that notice. There is a statement in the ruling that strengthens my belief that justice will be better served if the Applicant is allowed to appeal. The trial court stated that:

"I have also considered the defence filed by the Defendant and I am of the view that even if I am to allow him to present his defence, it may not affect my position in the judgment."

Had the court made up its mind in the matter, even before hearing the Applicant on his defence? Wasn't

that prejudicial?

Lastly, I have considered that any delay or inconvenience to the Respondent can be taken care of by way of costs.

I allow the application and ask the Applicant to file his appeal within 14 days. He will pay costs of the application.

Ruling delivered in open court this 7th day of November 2011 in the presence of the Applicant and Mr. Onchiri for the Respondent.

A. O. MUCHELULE
JUDGE