

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Misc Appli 7 of 2004

ISAAC M. TARICHIA THIRUNGO
APPLICANT

VERSUS

JOEL GIKUNDA & 2 OTHERS RESPONDENT

RULING

The present applicant's suit in Meru CMCC No. 41B of 1993 was dismissed on 11th November, 2003 for want of prosecution. In his Notice of Motion amended on 11th March 2004 the applicant seeks leave to appeal against the dismissal out of time. He contents that when the suit was dismissed on 11th November 2003 neither he nor his counsel were in court. He applied for typed proceedings and ruling on 27th November 2003 after he learnt that his erstwhile advocate had misled him that he had preferred an appeal.

The typed proceedings and ruling were supplied on 19th January 2004 accompanied by a certificate of delay. Only the 1st, 2nd and 3rd respondents have filed replying affidavits. They state that the application is defective as the certificate of delay is not signed and also that the affidavit in support of the application bears a different signature from the one used in the previous pleadings.

They further argue that the supporting affidavit is defective for the reason that it has been amended. Finally, the 3rd respondent has averred that the application is incompetent as the applicant has already filed the memorandum of appeal on 19th January 2004.

I have carefully considered these arguments. The applicant's suit was dismissed on 11th November, 2003 for want of prosecution.

In terms of section 79G of the Civil Procedure Act the applicant was expected to appeal within thirty (30) days. The first application for leave to appeal out of time which was subsequently amended was filed on 19th January 2004.

In accordance with section 57 of the Interpretation and General Provisions Act, the applicant ought to have filed the appeal on 26th December 2003. The court, however, has an unfettered discretion to extend time so long the applicant offers sufficient and satisfactory explanation for failing to file the appeal within time.

The court in considering such application must take into consideration the period of time taken by the lower court to prepare and deliver a copy of the decree or order to the applicant.

The applicant has averred that he applied for typed proceedings and ruling. According to a copy of certificate of delay issued on 19th January 2004 typed proceedings and ruling were collected on 5th January 2004.

The period for which explanation is required is between 5th January 2004 when the ruling and proceedings were collected and 19th January 2004 when the instant application was lodged.

The applicant blames his former advocate for misleading him that he had filed an appeal yet no appeal had been filed. That must have been prior to 27th November 2003, in which case the applicant was still within time.

I find that the applicant has absolutely no explanation why he did not bring the application immediately he received typed proceedings and ruling. Indeed nothing prevented him from applying for extension of time on 26th December 2003 when the thirty (30) days were elapsing. For that application he did not need typed proceedings and ruling so long as he was determined to challenge the decision in question on appeal.

For the stated reasons, this application fails and is dismissed with costs.

Dated and delivered at Meru this 22nd day of January 2009.

W. OUKO

JUDGE