



**Delamere Estates Limited v Macharia (Miscellaneous Application
734 of 2007) [2009] KEHC 3875 (KLR) (27 March 2009) (Ruling)**

Delamere Estates Limited v Boniface Kariuki Macharia [2009] eKLR

Neutral citation: [2009] KEHC 3875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION 734 OF 2007**

MK KOOME, J

MARCH 27, 2009

BETWEEN

DELAMERE ESTATES LIMITED APPLICANT

AND

BONIFACE KARIUKI MACHARIA RESPONDENT

RULING

1. The applicant seeks by way of a notice of motion brought under section 79g and 3A of the *Civil Procedure Act* and Order 50 rule 1 of the *Civil Procedure Rules* for leave to file an appeal out of time against the judgment of the Principal Magistrate dated 29th June 2004 in Nakuru CMCC No. 2497 of 2002. This application is premised on the grounds that judgment was delivered in the absence of counsel for the applicant and no notice was served upon that judgment was delivered until after the expiry of 30 days. The applicant then applied before the lower court for leave to appeal out of time which application was allowed by consent. An appeal being HCCA No. 229 of 2004 was filed but when it came up for hearing counsel for the respondent objected on the grounds that it was filed out of time and the appeal was dismissed although the applicant was given liberty to appeal. As a sign of good faith the applicant has deposited 50% of the decretal to the respondent pending the hearing and the determination of the appeal. The applicant has also paid the costs of the appeal that was struck out. The applicant wishes to pursue their right of appeal and urged the court to exercise its discretion to enlarge the time of appeal. Counsel also submitted that the appeal they intend to lodge has reasonable chances of success. Moreover no prejudice would be occasioned to the respondent as the same can be compensated in costs.
2. This application was opposed by the respondent. Counsel submitted that when the judgment was read by the learned trial magistrate on 29th June 2004 Mr. Mbeche held brief for Mr. Mongeri counsel for the applicant. Although counsel for the applicant denies that he had given authority to Mr. Mbeche



to hold his brief no evidence has been tendered to prove this allegation. Moreover the issue of filing the appeal out of time was adjudicated upon in the judgment of the High Court delivered on 18th October 2007 when the Judge found that the excuse given by the appellant for filing the appeal out of time without merit. Further reasons why this application should not be granted is that the applicant is guilty of delay and no reasons have been offered why it took the applicant 40 days to make an application for leave especially when the applicant has annexed a letter dated 5th November 2007 acknowledging receipt of letter of instructions. Counsel urged the court not to exercise its discretion in favour of the applicant.

3. I have considered the arguments both for and against this application. The applicant had filed an appeal HCCA No. 229 of 2004 in which the trial judge held as follows:

“In the present appeal, it is clear that the appellant filed the appeal more than thirty (30) days after the time which he ought to have filed the appeal had expired. The appellant did not seek leave of this court to file appeal out of time. The excuse given by the appellant for filing the appeal out of time cannot stand. Parties to a suit cannot by consent agree to circumvent the established procedure of the court that grants this court exclusive jurisdiction to extend time by which an appellant can appeal out of time. From the foregoing, it is evident that the appeal herein is incompetent. It was filed out of time without the leave of this court. The appeal is consequently struck out with costs to the respondent. The appellant shall be liberty to file an appropriate application for leave to appeal out of time.”

4. After the appeal was dismissed on 18th October 2007 the applicant filed the present application on 22nd November 2007. Such an application can be granted if the applicant can show good and sufficient cause for not filing the appeal in time. I now wish to examine the reasons given by the applicant. Firstly the applicant contends that judgment was delivered in the absence of their counsel and secondly the appeal which was struck out was filed due to a mistaken belief that the lower court can grant leave which was granted by consent. The reasons advanced by the applicant are not valid for reasons the record clearly shows when the judgment was delivered before the trial court Mr. Mbeche held brief for counsel for the applicant. On the second ground that they were under mistaken belief that the lower court can grant leave to file an appeal this is also not a good reason. Ignorance of the law is no defence. The provisions of section 79g are clear that leave should be sought in the High Court. For those reasons I find no good reasons why this court should exercise its discretion to grant leave. In any event discretion is always exercised judiciously to avoid an injustice or an abuse of the court process. The applicant also who seeks the exercise of the court’s discretion must also demonstrate good faith and move to court within a reasonable time. This is not the case with the applicant. Their application before this court was not filed in court within a reasonable period. I decline to exercise my discretion and dismiss this application with costs to the respondent.

RULING READ AND SIGNED ON 27TH DAY OF MARCH 2009

M. KOOME

JUDGE

