



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Miscellaneous Application 687 of 2008**

**GEOFFREY KAMAU KINGAU .....APPLICANT**

**V E R S U S**

**TRUST BANK LIMITED .....RESPONDENT**

**R U L I N G**

In this application (by **notice of motion dated 28<sup>th</sup> November, 2008**) the Applicant seeks two main orders:-

1. Leave to file appeal out of time against the order of the lower court (in **Nairobi RMCC No. 3117 of 2003**) made on 1<sup>st</sup> April, 2005.
2. Stay of execution of decree pending disposal of the intended appeal.

The said order of the lower court reviewed and varied the element of interest in the judgment passed on 19<sup>th</sup> November, 2004 against the Applicant (who was the defendant in the lower court). By that judgment the Respondent (which was the plaintiff) was awarded a sum of money (KShs. 610,004/00) and interest thereon at court rates. The order of review raised the rate of interest to 13.5% per annum.

The Applicant had already appealed against the decree of the lower court vide **Nairobi HC Civil Appeal No. 1075 of 2004**. That appeal was dismissed on 6<sup>th</sup> December, 2006 for want of prosecution. An order to review the order of dismissal was itself dismissed on 20<sup>th</sup> December, 2007.

The application is supported by the Applicant's affidavit. In it he gives a chronology of events leading up to the present application. The application is essentially made under sections **79G and 3A** respectively of the **Civil Procedure Act, Cap.21**.

The Respondent has opposed the application as set out in the grounds of opposition dated and filed on 19<sup>th</sup> January, 2009. Those grounds include:-

1. That there has been inordinate delay in bringing the application.
2. That the Applicant has not made out a "**good and sufficient cause**" under section 79G aforesaid.
3. That with the making of the order of review now sought to be appealed against out of time, the Applicant could have simply amended his memorandum of appeal in his Civil Appeal No. 1075 of 2004

aforesaid.

4. That the Applicant has not satisfied the legal requirements for grant of stay of execution of decree.

No replying affidavit appears to have been filed.

I have considered the respective written submissions filed on behalf of the parties, including the authorities cited. It appears that one of the issues to be raised in the intended appeal is that the lower court did not have jurisdiction to review its judgment when the same had already been appealed against, and while the appeal was pending. This issue may ultimately be moot because the appeal was subsequently dismissed for want of prosecution. As already seen, an application to review and set aside the order of dismissal was itself dismissed. The Applicant has stated that he lodged a notice of appeal in respect to dismissal of his application for review. But beyond that, no intention to pursue the intended appeal has been demonstrated. The Applicant's main huddle, however, is to demonstrate that he had **good and sufficient cause** for not filing his appeal in time as demanded by the **proviso to section 79G** of the Act.

The order of review sought to be appealed against was made on 1<sup>st</sup> April, 2005. The present application was filed on 15<sup>th</sup> December, 2008. That was more than three (3) years and eight (8) months later. This is inordinate delay by any definition. The Applicant states at paragraph 7 of the supporting affidavit that the application for review was heard on merit, which means that it was heard *inter partes*. There is no allegation that the Applicant was not represented when the ruling was delivered. So, why did he not lodge appeal timeously?

In paragraph 10 of the supporting affidavit the Applicant states as follows:-

**"10. That the aforesaid failure to file an appeal was occasioned by an oversight and an inadvertent muddle, as I verily believed that the appeal against the first judgment was sufficient and would address my complaints."**

Even if that were so, the application to review the order that dismissed the appeal having been refused on 20<sup>th</sup> December 2007, why did it take another one year for the Applicant to file the present application (it was filed on 18<sup>th</sup> December, 2008)? The fact that the Applicant lodged a notice of appeal in respect of the order of 20<sup>th</sup> December, 2007 surely is not any explanation for the delay! Even after the Respondent raised the issue of inordinate delay in the grounds of opposition, the Applicant did not seek leave to file a supplementary affidavit to explain the further delay I have pointed out.

There is no credible explanation for the inordinate delay in bringing the application, especially the one year delay after the dismissal of the application to review the order that dismissed the appeal. It seems to me that the Applicant is now merely trying all that he can to avoid meeting the decree that was passed against him by the lower court, the appeal that he had lodged against it having been dismissed for want of prosecution.

I am afraid that the Applicant has not demonstrated that he was prevented by a good and sufficient cause from filing appeal in time. I must refuse his application for leave to appeal out of time. Having so decided, his application for stay of execution of decree becomes otiose and is also refused.

In the result, the notice of motion dated 28<sup>th</sup> November, 2008 is hereby dismissed with costs. It is so ordered.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MAY, 2009**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 29<sup>TH</sup> DAY OF, MAY,  
2009**