



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Misc. 64 of 2009

GEOFFREY MUTUKU MUNYAO..... APPLICANT

VERSUS

DANIEL KILONZO KITAMA.....RESPONDENT

RULING

1. The Application before me is premised on section 79G and section 3A of the Civil Procedure Act, Order XXI Rule 22 of the Civil Procedure Rules and the substantive prayer is that leave be granted to the Applicant, Geoffrey Mutuku Munyao, to file an Appeal out of time against the judgment and decree in RMCC 32 of 2008 (Kangundo) dated 19.12.2008.

2. The grounds in support are that:-

- a) *“That the Applicant is aggrieved and dissatisfied with the judgment delivered on 19.12.2009 and intends to appeal against the said judgment and consequential decree.*
- b) *That the statutory period within which to lodge such an Appeal has lapsed hence the need to file this Application for leave to appeal out of time.*
- c) *That unless stay is granted, execution will issue and therefore this application and the intended appeal will be rendered nugatory.*
- d) *That the delay in lodging the Appeal within the statutory period is excusable and is not due to indolence on the part of the Applicant.*
- e) *That the Applicant is seized of an Appeal with high chances of success and is likely to suffer substantial loss if the orders sought are not granted.*
- f) *That the Applicant is willing to furnish security in such manner as the court deem fit to order.*
- g) *That no prejudice, hardship or injustice will be suffered by the respondent by granting the orders sought.”*

3. I have read the Affidavit of Lillian Munyiri and she has explained her duties as that of Deputy Legal Officer, Gateway Insurance Company Ltd *“the insurers of the Applicant herein and therefore ultimately liable to satisfy the decree in Kangundo RMCC No. 32 of 2008”*. I accept that explanation and would also accept the proposition that although she is not the Applicant in the matter, the Applicant’s insurers have a

duty to indemnify the Applicant under the principle of subrogation and where there is any threat by way of attachment, to the Applicant, the insurer has a legal duty to protect both the Applicant and itself from such a threat. I say so because in other situations I would have taken a dim view of either an advocate or a legal officer in an insurance company purporting to know, for example, the loss that a litigant will suffer if attachment is levied against him. However in a case where the matter is one of mere delay in filing an appeal, the issue is quite different.

4. Having so said, the reason for delay in filing the Appeal herein within time is given as that after the trial in RMCC 32/2008, the judgment was to be given on notice but thereafter, the trial magistrate was transferred and no notice was in fact given of the date of the reading of the judgment against the Applicant but subsequently a Notice of entry of judgment was given and the judgment sum was stated to be Kshs. 452,180/= and the said judgment aggrieved the Applicant but by the date of filing the instant Application, the time for filing the appeal had lapsed.

5. I have seen the Replying Affidavit by the Respondent and in it he depones that;

i. the Application herein was brought with undue delay.

ii. the deponent to the Supporting Affidavit was incompetent to depone to matters in contention.

iii. he will suffer prejudice if the orders sought are granted.

6. No submissions were made on behalf of the Respondent because his advocate failed to appear at the hearing but I have taken into account the issues raised in his Replying Affidavit.

7. Firstly, I have already dealt with the capacity of Ms Munyiri and I would merely reiterate that neither counsel nor non-parties should generally enter disputed territory but I have said why I will excuse the present situation.

8. Secondly, the decree in RMCC No.32/2008 (Kangundo) is dated 19.2.2008 but the present Application was only filed on 3.3. 2009 and the reason given for the delay is that the judgment was to be given on Notice because the trial magistrate was transferred soon after the hearing was concluded. That thereafter it was only when execution proceedings were commenced that the Applicant got to know that there was a judgment against him. I have seen no response to that issue and I take it that the Applicant's contention in that regard is undisputed. That being so, the delay is reasonably explained and I cannot hold it against the Applicant.

9. Lastly, all that is presently sought is leave to appeal out of time and once I have accepted the reasons for the delay, then I must grant leave as prayed.

10. The Appeal shall be filed and served within 14 days and each party will bear its costs.

11. Orders accordingly.

Dated and delivered at Machakos this 28th day of May 2009.

Isaac Lenaola

Judge

In the presence of: Mr. Makau h/b for Mr. Juma for Applicant

No appearance for Respondent

Isaac Lenaola

Judge