



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU

Miscellaneous Application 37 of 2009

DAVID KURIA MAINA KAMAU T/A

MUKINDURI GENERAL AGENCIES.....APPLICANT

VERSUS

SHEM ONYANGO.....RESPONDENT

RULING

The Application by David Kuria Maina Kamau trading as Mukinduri General Agencies is for the basic order that the time fixed for filing an appeal be enlarged.

The grounds in support of the application are as follows:-

- (a) The parties herein were litigants in Kisumu CMCC No. 1061 of 2002 Shem Onyango –VS- David Kuria & Another.**
- (b) Judgment was entered in favour of the plaintiff therein Shem Onyango on 20th November 2008.**
- (c) That being aggrieved by the decree of the Senior Resident Magistrate’s court, the defendants sought stay of execution pending appeal.**
- (d) That the time fixed for filing an appeal elapsed on the 20th December 2008 whilst the applicants were securing orders of stay of execution pending appeal.**
- (e) That upon resolution of matters relating to stay of execution the applicants now desire to file this appeal out of time.**
- (f) That the honourable court has discretion to enlarge time upon such terms as the justice of the case may require.**

These grounds are enhanced by the facts contained in the supporting affidavit of the applicant’s counsel dated 24th February 2009 and are opposed on the basis of the facts contained in a replying affidavit deponed by the Respondent’s counsel dated 2nd March 2009.

At the hearing both counsels addressed the court on the respective grounds.

Learned counsel for the Applicants, Mr. Kagucia, argued that the delay of two months was not inordinate. That the period is relatively short considering that the Applicants were preoccupied with securing order of stay.

The learned counsel argued further that the delay was occasioned by counsel which by itself accords a reasonable explanation. He said that the intended appeal is arguable considering that the material accident involved two motor vehicles. He urged this court to grant the order sought and relied on the decision in **Musa Kipkorir Arap Baringila –VS- Mansoor Nandlal CAPP. No. 93 of 2007 at Nakuru (C.A) and Chesumot Ltd –VS-Richard Kipkurui Maritim Misc. C.App. No. 26 of 2004 at Kericho.**

Mr. Ragot learned counsel for the Respondent, argued that the explanation for the delay is not good and is illogical considering that the application in the lower court for stay of execution was a constant reminder of the time for filing the appeal.

Learned counsel conceded that the principles for extension of time are similar to those set out by the court of Appeal rules. However, good and sufficient reason has to be given for any extension of time in accordance with section 72 (G) of the Civil Procedure Act.

Learned counsel further argued that when it comes to faults of advocates it must be noted that legal business ought not be handled in a floppy manner. He said that the authorities cited by the Applicant's counsel are different and arose in different circumstances. He urged this court to dismiss the application and relied on the following decisions:-

- (i) **Jayant Kumal Vrajlal Shah & Another –VS MIDCO Holdings Ltd & Others C.App. No. 63 of 2000 (CA).**
- (ii) **John Onger Mariara & Others –VS- Paul Matundura C.App. No. 301 of 2003 (CA).**
- (iii) **Municipal Council of Thika & Others –VS- Local Govt. Workers Union (Thika Branch) C.App. Nairobi 41 of 2001 (CA).**

The issue here is whether the Applicants have offered satisfactory and reasonable explanation for the delay in filing the appeal.

It is the reason behind the delay which is most significant rather than the period of delay even though the decision whether or not to extend time to file an appeal is essentially discretionary.

Under section 79 G of the Civil Procedure Act, the applicant was required to file the appeal against the decision of the lower court within a period of 30 days from the date of the decree excluding from the period of 30 days anytime which the lower court may certify as having been requisite for preparation and delivery to the application of a copy of the decree.

The proviso to the section indicates that an appeal may be admitted out of time if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

Basically, the law as regards the principles that guide the court including applications of the present nature is well settled and is documented in several decisions of the court of Appeal such as the well known case of **LEO SILA MUTISO –VS- ROSE HELLEN WANGARI MWANGI C.APP. NO. NBI 251 OF 1997** where the unfettered discretion of the court in dealing with such applications was emphasized. However, the court of Appeal stressed that whilst the discretion is unfettered, the same must be exercised judicially and not arbitrarily or capriciously nor should it be exercised on the basis of sentiment and sympathy. The court then went ahead and set down the guidelines by stating:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are:-first the length of the delay, secondly, the

reason for the delay, thirdly (possibly), the chances of the appeal succeeding if the application is granted, and fourthly the degree of prejudice to the respondent if the application is granted”.

In Kenya Ports Authority –VS- Silas Obengele C.App. No. 297 of 2004. The court stated that whenever there is a delay, even for one day there must be some explanation for it, otherwise an extension may not be granted.

This principle was followed in **Reliance Bank Ltd (In Liquidation) C.App. No. 118 of 2007 (UR 78/2007)** where it was stated that any amount of delay, even if it be one day, ought to be explained in some way.

The guidelines provided in the **Leo Sila case (Supra)** may not be exhaustive. Each case has to be considered on the applicable facts and circumstances.

Herein, there was a delay of two months. This was inordinate delay in the circumstances. The explanation given is attributable to the mistake of the applicant’s counsel who apparently was not diligent enough and took matters for granted despite several indulgences accorded to him by the Respondent while attempting to secure an order of stay of execution pending appeal.

Although this court would not encourage an advocate to be indolent and sloppy in the performance of his duty the circumstances arising in this case militates against transferring the blame for the delay on the applicants personally or even apportioning them a degree of blame.

It has also not been shown that the Respondent is likely to suffer irreparable damage and be prejudiced if the applicants are granted time to file the appeal. It has been indicated that at the time of the hearing of this application the decree had already been satisfied.

In the end result, this court is inclined to grant the application and allow the applicants to file their intended appeal out of time. Parties to bear own costs.

[Read and Signed at Kisumu this 22nd day of May 2009].

J.R. Karanja

J U D G E

J.R.K/va