



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Miscellaneous Civil Application 53 of 2008

**BILHA KAMWITHA .....APPLICANT**

**VERSUS**

**ISAACK KARIUKI KAMWITHA .....DEFENDANT**

**RULING**

Before me is an application dated 5<sup>th</sup> March, 2008. It is a Notice of Motion application expressed to be brought under *order XLIX rule 5* of the Civil Procedure Rules, *sections 79G and 3A* of the Civil Procedure Act and all other enabling provisions of the law. In the application, the applicant seeks one basic order that he; “.....be granted leave to file a fresh appeal out of time”. The grounds in support of the application are that the applicant had initially filed appeal number 5 of 2004 in this court. However on the day of the hearing of the same, it transpired that it had been filed out of time by 15 days, that the applicant’s advocates honestly believed that *order XLIX subsection 3A* of the Civil Procedure Rules was applicable in the computation of time which was not the case though. Thus he withdrew the appeal, though the applicant was still keen on pursuing the same. Counsel’s lack of proper computation of time and or misdirection should not therefore be visited upon a litigant. Finally, he was of the view that the applicant’s intended appeal had overwhelming chances of success.

The application was supported by the affidavit of the **Mr. Kimwera Josephat**, learned advocate for the applicant. In pertinent paragraphs he deponed that:

“1.

**2.That I was instructed to file an appeal on behalf of the applicants after being aggrieved by the decision of the provincial (sic) dispute tribunal dated 30<sup>th</sup> January 2003.**

**3.That I thereafter made an application to file the appeal out of time which application was allowed by consent on 11/12/2003 and order issued on 14<sup>th</sup> January, 2004.**

**4.That I thereafter filed the memorandum of appeal on 14<sup>th</sup> January, 2004 believing that under *order XLIX rule 3A* which exempts 21<sup>st</sup> December to 6<sup>th</sup> January in computation of time that time for filing the appeal elapsed on 17<sup>th</sup> January 2004.**

**5.That the appeal was admitted the record certified as correct and directions taken and the day the appeal was coming up for hearing on 3/3/2008 the issue of time was canvassed and I was persuaded**

**that the appeal may have been out of time and I withdrew the appeal before it was heard.**

**6. That I verily believed when I filed the appeal (sic) it was within time.**

**7. That the said delay of 15 days was neither inordinate nor intentional and not meant to defeat justice but a result of an honest mistake and this application has been brought without undue delay.**

**8. That my lack of computation of time properly and or misdirection should not be visited on the client who has an arguable appeal and who is willing to pursue the appeal.**

**9. That the said appeal has a high chance of success.**

In his oral submissions in support of the application, **Mr. Kimwere** merely reiterated the grounds on the face of the application as well as what he had deponed to in the supporting affidavit.

The application as expected was opposed. Grounds of opposition as well as a replying affidavit were filed. It was stated in the grounds of opposition that the application was incompetent and misconceived, it was brought after inordinate delay, that there are no provisions of law that allows this court to extend time for filing an appeal from the provincial land disputes appeals committee and finally that there is no decree issued and an appeal against an award does not lie to this court.

In his replying affidavit, the respondent depones in pertinent paragraphs as follows:

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3. **That the application is misconceived and an abuse of the court process.**

4. **That the applicant was given a chance to file appeal out of time vide order dated 14<sup>th</sup> January 2004 and should not be given another chance.**

5. **That the delay exhibited by the applicant in prosecuting his appeal number 5 of 2004 at Nyeri High Court is a clear indication that he has lost interest in the appeal.**

6. **That litigation must come to an end.**

In his oral submissions in opposition to the application, **Mr. Mugo**, learned advocate for the respondent stated that the provincial land disputes appeals committee had not been made a party to the application, that there can be no extension of time from an award of the provincial land disputes appeals committee, the applicant had earlier sought and obtained leave to file an appeal out of time. However he opted to leave it to the last day to do so. The applicant has not been eager to prosecute the appeal. Before the appeal was withdrawn it had been left unattended to for 8 years.

I have now considered the application, the supporting and replying affidavits with the annexures thereto, rival oral submissions and the law. What I am being asked to do is to exercise a discretion. Of course I have unfettered discretion in dealing with such an application. However, like all judicial discretions, the court has to exercise its discretion upon reasons and sound judicial principles and not upon caprice and whims of the court. To guide the court on what to consider when exercising this discretion, the case law has established certain matters that must be taken into account. These are the period of delay, reasons for such delay, whether the appeal or the intended appeal for which extension is sought is arguable and that it is not frivolous, the prior conduct of the applicant and fifthly, the court is required to consider if the respondent will be prejudiced if the application is granted. These are but the main principles to be considered but the list not by any means exhaustive and can never be exhaustive, as the exercise of discretion by itself demands that the court should not be restricted in its considerations. See generally **Patel V Waweru & 2 others (2003) KLR 361 and Leo Sila Mutiso V Rose Hellen**

**Wangare Mwangi, Civil Application Number NAI.251 of 1997 (UR).**

In the application before me, the main reason advanced by the applicant for the delay is ignorance of the law. It is a time honoured maxim of the law that ignorance of the law is in itself no defence. It matters not that such ignorance is manifested by a lawyer. Indeed a court may perhaps look softly at litigant who acts in person and makes such a mistake but not for a lawyer. It is presumed that by virtue of their training, lawyers know the law and more particularly in mundane things such as computation of time. This is not the first time though that the applicant has come to this court in this matter seeking to file an appeal out of time. By his own admission the initial appeal was also only filed after he had sought and obtained leave to file it out of time on 11<sup>th</sup> December, 2003. Having obtained such leave it was not until 14<sup>th</sup> January, 2004 that he filed the appeal believing that *Order XLIX rule 3A* exempted the period between 21<sup>st</sup> December, to 6<sup>th</sup> January in computation of time. This is not a conduct of a person who was desirous of filing and prosecuting the appeal timeously. There was no reason for the applicant to have considered the period of exemption aforesaid in his endeavour to file and prosecute the appeal unless of course he was interested in dragging this matter in court unnecessarily.

Once the appeal was filed the applicant never took the necessary steps to prosecute it. I have called for and perused the court file in respect of Civil Appeal number 5 of 2004 and I am persuaded that the applicant has all along been indolent. As correctly deposed to, the delay exhibited by the applicant in prosecuting his appeal number 5 of 2004 at Nyeri High Court is a clear indication that he has lost interest in the appeal. Before the appeal was withdrawn as aforesaid the appeal had been languishing in this court for well over 5 years without being attended to by the applicant. Much as the dispute herein involves land, the interest of both the applicant and the respondent ought to be balanced. The respondent should not be denied the fruits of the award due to the indolence of the applicant. Yes the sins of counsel should never be visited upon a litigant. However if those sins can be traced to the deliberate acts of counsel to delay the determination of a matter, then the same may very well be visited upon a litigant. This is what seems to have happened here. Much as the delay in mounting the application is not inordinate, I am not however satisfied with the reasons advanced for the delay.

This matter has been on going since 2002, a period in excess of seven years. This is a long time indeed for a party to be denied the fruits of his judgment. Public policy demands that litigation must at some point come to an end. In my view that time has come for the applicant.

Having considered what has been urged before me and bearing in mind the guiding principles in matters of this nature, I am of the view that no sufficient material has been placed before me to warrant the granting of the prayers sought. In view of the foregoing leave is hereby denied with the consequence that the application is dismissed with costs to the respondent.

***Dated and delivered at Nyeri this 18<sup>th</sup> day of June, 2009.***

**M.S.A. MAKHANDIA**

**JUDGE**