



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Civil Appeal 20 of 2008

MOHAMED DIDOAPPELLANT

VERSUS

INYABWANA ABOUT MZAMILDEFENDANT

R U L I N G

The Notice of Motion application dated 15-7-08 is made under section 3A, 65(1) and 79G of the Civil Procedure Act seeking that the memorandum of Appeal lodged by the appellant on 14-7-08 be admitted out of time.

(2) That this court do direct and fix time within which the Appellant shall prepare and file a record of Appeal. It is premised on grounds that:

(i) The applicant was unable to lodge the appeal within the time prescribed by law for reason that unknown to him, his counsel handling the matter got to suffer from a serious mental breakdown.

As soon as the applicant learnt of the incapacity facing his previous counsel, he instructed the present counsel to deal with the issue and thus the filing of this application and appeal.

There is good and sufficient cause for the applicant's failure in not filing the appealing time.

In the affidavit in support of the application, applicant explains that soon after judgment was passed in this matter, he instructed the firm of Kurura Omangi & Co. Advocates to lodge an appeal against the same.

The proceedings were applied for by the said firm of Advocates and certified on 19-2-07 as per annexure marked MD1.

Subsequently, the applicant went out of the country for a peace keeping mission in Sudan and returned in mid June 2008 where upon inquiring he got to learn that Mr. Kurura Advocate who was handling the matter, was unwell, suffering from a mental breakdown for a long time since March 2007 and was therefore unable to deal with the matter at all material times.

So the applicant approached the firm of Maranga & Associates on 27-6-08 and requested them to attend to the matter. It is his contention that the failure to file the appeal within time was not deliberate on his part, but was on account of his previous lawyer who was unwell and incapable of handling the matter and that his appeal stands good chances of success.

The application is opposed on grounds that the proceedings and judgment were certified on 19-2-07 by

the trial court which is the same day applicant states that he applied for them, and that there are no reasons given to account for delay in collecting the proceedings and judgment from the trial court.

Further that the allegation that his previous advocate had a mental breakdown has not been proved.

Also that the allegation that the appellant was out of the country has not been proved.

Respondent also depones that applicant did not apply for enlargement of time within which to appeal and the appeal has no likelihood of success rather this application is a mere ploy to delay the respondent from reaping the fruits of the judgment.

In arguing the application, Mr Maosa for the applicant submits that in fact the proceedings were received on time, its just that no memorandum of appeal was filed, so as soon as he got instructions, he filed an appeal along with the necessary application. He explained (from the bar), that Mr. Kurura is an advocate with a practice in Mombasa and is on medication and sometimes actually runs mad for 2-3 weeks. He wondered how the applicant was expected to get the former advocate's medical records to prove the condition as that is really an intrusion into one's health affairs.

However Mr. Mwarandu argued that it is not known when applicant learnt that his counsel had suffered a mental breakdown and that if there were signs to indicate such incapacity, then applicant ought to have instructed another counsel in good time and that it is not clear when the proceedings were received, so as to help determine whether the delay was reasonable. He also asks for proof that applicant was out of the country.

Section 79 G of the Civil Procedure Act states;

“Every appeal from a subordinate court to the High court shall be filed within period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

What needs to be addressed first is this misrepresentation by Mr. Mwarandu that it is the time of collecting the proceedings is not indicated – indeed that is not the determinant – it is when the proceedings and judgment were certified as ready – this is clearly disclosed in the applicant's affidavit that the same were ready by 19-2-07. In fact applicant has not alluded to there being a delay in collecting or receiving the certified copies of the proceedings and judgment.

There are basically two issues raised by a applicant as to the cause of delay.

- (a) The compromised mental health of his counsel.
- (b) His absence from Kenya for a while.

The case of **Leo Sila Mutisaa V Rose Hellen Wangari Mwangi Civil Application No. 251 of 1997 (Nrb)** dealt with the issue of extension of time within which to file and serve Notice of Appeal and record wherein it stated inter alia:-

“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 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, third (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the appellations is granted.”

In the present application, the applicant filed the appeal on 14-7-08, the proceedings and judgment were ready on 19-2-07 – so there was over one year’s delay. That is a long time. What was the reason for the delay?

His counsel became ill and remains so to date. This could not have been factor within his control. Once he had instructed an advocate to act for him in pursuing the appeal, he was certain that matters had been set in motion and only got to learn more than a year later that nothing had taken place. I don’t think we can lay too much blame on applicant for that – he entrusted the matter with a professional and expected the same to be handled professionally. Unfortunately the professional became mentally challenged. I can understand the difficulty applicant faces or even deigning to ask for medical records of his counsel – that would be deemed to amount to intrusion into personal and very private affairs of an individual.

Of course there is nothing to show that applicant had traveled outside Kenya on a peacekeeping mission to Sudan as there are no travel documents annexed.

I have perused the memorandum of appeal it raises an arguable appeal. I think applicant has to be given a chance to be heard. I will therefore allow the application on the grounds:

- a) The reason for the delay in filing appeal has been adequately explained on account of his former counsel’s illness.
- (b) the applicant has an arguable appeal.

The applicant must prepare file and serve the record of appeal within 21 (twenty one) days from today.

- (c) The costs of this application shall be born by the applicant.

Delivered and dated this **16th** day of **June 2009** in Malindi.

H. A. Omondi

JUDGE

Mr. Shujaa holding brief for Mwarandu for respondent

Mr. Maosa for applicant