



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 322 OF 2008

MICHAEL KINYANJUI MBUTHIA.....APPELLANT

VERSUS

JOHN KAMAU
NGANGA.....RESPONDENT

R U L I N G

1. By a notice of motion dated 12th March, 2009, Michael Kinyanjui Mbuthia, (hereinafter referred to as the applicant), seeks an order under Section 79G of the Civil Procedure Act and Order XLIX Rule 5 of the Civil Procedure Rules, to have his appeal admitted out of time and deemed duly filed and served. In his affidavit filed in support of his application, the applicant explains that he applied for certified copies of proceedings and ruling on 17th April, 2008, but the same were only availed on 13th June, 2008. It is contended that the appeal was filed on 19th June, 2008 which was three days after leave was granted by the lower court.
2. The application is opposed on the grounds that there is no competent appeal before the court. It is maintained that the applicant ought to have moved the court by way of a miscellaneous application. It is also contended that no sufficient reasons have been given for the delay as it was not necessary for the applicant to obtain certified copies of proceedings and ruling before filing the appeal.
3. Having considered this application, the court record and the record of appeal which has been filed, I do note that the proceedings in this matter were initiated, through a record of appeal containing a memorandum of appeal which was filed in this court on the 19th June, 2008, upon which Civil Appeal No.322 of 2008 was registered. As at that date, leave to file the appeal had been obtained from the lower court pursuant to Section 75 of the Civil Procedure Act and Order XLII Rule 3 of the Civil Procedure Rules on 25th April, 2008. It is evident that that appeal was filed out of time as the order appealed against was delivered on 15th April, 2008. It is for this reason that the applicant has now come to this court seeking to have the appeal admitted out of time, and deemed duly filed and served.
4. It was submitted that the application is fatally defective as there is no competent appeal before the court. However, Order XLIX Rule 5 of the Civil Procedure Rules, states as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

Therefore, the fact that the applicant filed the appeal before obtaining extension of time does not fetter the power of this court to enlarge time so as to deem the appeal which was filed on 19th June, 2008 as properly filed.

5. The applicant has explained that the delay was caused by the time taken to type the proceedings and judgment by the lower court. That may well be so. However, as contended by the respondent, copies of the proceedings and ruling were not necessary for the filing of the appeal. Further, it is evident that the applicant was granted leave to file the appeal on 25th April, 2008 and not 16th June, 2008.

6. Nevertheless, given the circumstances of this case, and the applicant having indicated his willingness to deposit the decretal sum, I think it is fair and just that the applicant be given an opportunity to ventilate his appeal. Accordingly, I do allow this application and extend time for the applicant to file his appeal and do order that the appeal filed on 19th June, 2008 shall be deemed to be properly filed and served. Costs of this application is awarded to the respondent in any event.

Those shall be the orders of this court.

Dated and delivered this 8th day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mwaura for the applicant

Advocate for the respondent absent

Erick – Court clerk