



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

Miscellaneous Application 40 of 2007

GERALD M'LIMBINE.....APPLICANT

VERSUS

JOSEPH KANGANGI.....RESPONDENT

CIVIL PROCEDURE AND PRACTICES

: An application to admit an appeal out of time Under Section 79 G of the Civil Procedure Act and Practice inconsistent with requirements of Section 79 B of the Civil Procedure Act and is therefore incompetent unless accompanied by the proposed appeal (Ss.79 B & 796 of the Civil Procedure Act (Cap 21 Laws of Kenya)

RULING

By an application brought by way of a Notice of Motion dated 4.05.2007 but filed on 15.05.2007 the intended Applicant/Respondent Gerald M'limbine prays for leave to file an appeal against the judgment and decree in Maua PMCC No/43 of 2000, outside the statutory period, and that if he is allowed to do so, costs would be in the cause.

The Applicant says in the grounds for the Motion, that his appeal has high chances of success. Of course without examining the record of appeal together with the proceedings and judgment, decree and order intended to be appealed against, the Court cannot with any confidence say that the appeal has high chances of success.

The Applicant's grounds in support of the motion for leave to file an appeal out of the statutory period are set out in his supporting Affidavit sworn on 4th May 2007, and are these:-

- (1) Judgment was delivered on 1.02.2007 in respect of Maua PMCC 143 of 2002) but that the intended appellant was not present when the judgment was delivered.
- (2) he saw his Advocates later after 2 weeks and instructed them to file or lodge an appeal against the judgment
- (3) much later on 23/04/07, he saw his then Counsel in his Chamber, and the Counsel informed him to look for services of another Advocate/ and that by the time he had procured the services of another Advocate, the days allowed for the appeal had expired.

This was the theme followed by Mr. Lompo learned Counsel for the intended appellants. The intended applicant did not deliberately fail to file the appeal outside the statutory period. It was the Advocate in the Lower Court who had failed to carry out the Applicant's instructions, and the Respondent would suffer no prejudice if the Appeal was filed out of the statutory period.

The application for leave was opposed by the Respondent through his Replying Affidavit sworn and filed on 11th July 2007. the essence of the Replying Affidavit is that if the proceedings were late as alleged by the Applicant then there ought to have been annexed a Certificate of Delay from the subordinate Court, and also a letter applying for the proceedings and receipt for the same.

The Respondent also falls into the same trap that the appeal has no chances of success. Again without looking at the proceedings and judgment I cannot also say that the Appeal has no chances of success. I am also unable to say that the application is an afterthought without first perusing those primary documents, and for the same reason I cannot at this stage say that the application is frivolous, vexatious or an abuse of the Court's process, that it ought to be dismissed with costs.

The Motion is brought pursuant to the provisions of Section 79 G of the Civil Procedure Act (Cap 21, Law of Kenya) which says: -

"79 G. Every appeal from a subordinate Court to the High Court shall be filed within a 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 a copy 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."

My understanding of the proviso to Section 79G is that an applicant seeking "an appeal to be admitted out to time" must in effect file such an appeal and at the same time seek the Court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the Court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the Court's process which under Section 79B says –

"79 B- Before an appeal from a subordinate Court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding Section 79C, reject the appeal summarily"

It seems to me therefore, it is not open to the Court to exercise its discretion under the proviso to Section 79G of the Civil Procedure Act except upon the existence, and perusal of the appeal to be "admitted" not to be "filed out of time" Admission presupposes that the appeal has been filed, and will be "admitted" for hearing after a judge has established under Section 79 B, that there is "sufficient ground for interfering with the decree part of a decree or order appealed against."

To allow the Applicant's Motion would be to defeat entirely the requirements of Section 79 B of the Civil Procedure Act, and indeed Section 79 G itself upon which the applicant relies – the requirement for a Certificate of delay in the preparation and delivery to the appellant of a copy of a decree or order. The Applicant's Motion is bereft of such explanation or Certificate. Default by the Applicant's former Advocate would then have been properly anchored on such certificate.

For those reasons, the Appellants Motion dated 4th May 2007 and filed on 15th May 2007 is dismissed with costs to the respondent.

Dated delivered and signed at Meru this 5th day of June 2009.

M. J. ANYARA EMUKULE

(JUDGE)