



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Application 654 of 2008

JOHN GAKOBO MACHARIA.....PLAINTIFF/APPLICANT

VERSUS

THE KENYA POWER & LIGHTING

COMPANY LIMITED.....DEFENDANT/RESPONDENT

R U L I N G

1. On 6th November, 2007 Ms. E.N. Maina, Senior Principal Magistrate delivered a judgment in which she dismissed a suit filed by John Gakobo Macharia (hereinafter referred to as the applicant), against the Kenya Power and Lighting Company Limited, hereinafter referred to as the respondent.
2. By a Notice of Motion filed on 20th November, 2008 under section 79G and 95 of the Civil Procedure Act, the applicant sought leave of this Court to file a memorandum of appeal and lodge a record of appeal out of time against the judgment delivered against him on 6th November, 2007.
3. The applicant has sworn an affidavit claiming he was unaware of the delivery of the judgment on the 6th November, 2007 and only came to learn about it on 3rd June, 2008 upon perusing the Court file. The applicant blamed his former advocate Nyamai & Co. Advocates for failing to advise him of the judgment. He instructed another advocate who applied for copies of the judgment and proceedings on 28th July, 2008, but did not receive the same until 10th November, 2008. The applicant pleaded with the Court not to visit the mistake of his previous counsel upon him. The applicant's current advocate, Patrick Kahonge has also sworn an affidavit in support of the application in which he reiterates the facts relied upon by the applicant. Mr. Kabaka who argued the application before me cited *Kipngetich vs. Republic [1984] KLR 695*, and also *Kiane vs. Njoroge [1986] KLR 402*.
4. The application was opposed through grounds of opposition filed on 27th January, 2009 in which it was contended *inter alia*, that the delay in making the application was inordinate, the basis upon which leave is sought not sufficient for the Court to exercise its discretion, and that the draft memorandum of appeal does not disclose an arguable appeal with any probability of success.
5. Ms. Lubano who appeared for the respondent argued that it was the responsibility of the applicant to follow up his case and push his advocate. Miss Lubano distinguished the present case from the cases cited, contending that the delay was inordinate. Relying on *William K. Too vs. Simon K. Langat Civil Application (Nakuru) 6 of 2007*, and *Bagajo v. Christian's Children Fund Inc. [2004] 2 KLR 73*, it was submitted that the draft memorandum does not raise any arguable points and that the respondent was

likely to suffer prejudice if the application is granted.

6. The applicant herein is seeking the exercise of this Court's discretion in granting leave to file his appeal out of time. Although the application is brought under section 79G and 95 of the Civil Procedure Act, (the appeal sought to be brought being an appeal from the subordinate Court), the application is similar to an application for extension of time for filing notice of appeal brought under Rule 4 of the Court of Appeal Rules, in that it seeks the exercise of the Court's discretion for an appeal to be filed out of time.

7. In *Bagajo vs. Christian Children Fund Inc.* (supra), Ringera Ag. J.A. (as he then was) gave the following guidelines with regard to the exercise of such discretion.

“(iii) in exercising its discretion, the court’s primary concern should be to do justice to the parties. The court should, inter alia, consider: -

(a) The length of the delay in lodging the notice and record of appeal;

(b) Where applicable, the delay in lodging the application for extension of time, as well as the explanation thereof;

(c) Whether or not the intended appeal is arguable;

(d) The prejudice to the respondent if the application is granted;

(e) The public importance, if any, of the matter; and

(f) Generally the requirements of the interest of justice in the case.

(iv) It is for the person seeking the favourable exercise of the discretion of the Court to place such material as will adequately inform the court in the exercise of such discretion. The nature of the case before the superior court, the judgment thereon and reasons for desiring to appeal should be outlined if the court is not to exercise its discretion in the dark.

8. It is evident that the judgment against the applicant having been delivered on 6th November 2007, and this application having been filed on 20th November, 2008, the application was brought almost a year after the end of the 30 day statutory period provided under the Civil Procedure Act for lodging an appeal. Even if I take note of the time taken by the applicant's current counsel to come on record and obtain copies of the proceedings and judgment, the period of delay is still about 8 months. In that regard the delay is inordinate and cannot be compared with the delay on the two cases cited by the applicant's advocate which were for a much shorter period. Secondly, the applicant has blamed his advocate for failing to inform him about the judgment.

9. I do however, concur with the respondent's counsel that it was the responsibility of the applicant to follow up his counsel and seek to know the fate of his case. The applicant has not exhibited anything to demonstrate his efforts to follow up his former counsel so as to know the fate of his case. There is therefore nothing to convince this Court that it was the applicant's former counsel who was to be blamed. The applicant has therefore not satisfied this Court that he had a good and sufficient reason for failing to file the appeal within time.

10. In view of the inordinate delay in bringing the application, and the fact that there is no good explanation for the delay, there is no just cause to justify this Court exercising its discretion in favour of the applicant. Accordingly, the application is dismissed with costs.

Dated and delivered this 18th day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Ms. Mungai for the applicant

Ms. Mikangi for the respondent