



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS APPLICATION 1211 OF 2004**

**PETER NDUNGU GITAU .....APPLICANT**

**V E R S U S**

**LEAH WARUCHU WAWERU .....RESPONDENT**

**R U L I N G**

This is an application (notice of motion dated 14<sup>th</sup> October, 2005) seeking leave to appeal out of time against the decree of the lower court in **Limuru SRM CC NO.286 of 2003** delivered on 23<sup>rd</sup> April, 2004. By that decree the plaintiff (the Respondent herein) was awarded *mesne* profits in the total sum of KShs. 255,000/00 in respect to two plots of land, L.R. Nos. **LIMURU/KAMIRITHU/T. 791 and LIMURU/KAMIRITHU/T.538/3**. The plots previously belonged to the Applicant (the defendant in the lower court). The application is brought under section 79G of the Civil Procedure Act, Cap 21 (the Act).

There is essentially one ground for the application on the face thereof, that is, that the delay in filing the appeal was occasioned by the lower court in providing to the Applicant's advocate typed copies of the proceedings and judgment, which were ultimately supplied on 27<sup>th</sup> August, 2004. There is a supporting affidavit sworn by the Applicant annexed to the application. There are two other affidavits, both sworn by the Applicant, in support of the application; one is a supplementary affidavit filed on 12<sup>th</sup> July, 2007; the other is a further affidavit filed on 26<sup>th</sup> July, 2007. Both were filed with the leave of the court.

The Respondent has opposed the application as set out in the replying affidavit sworn by her and filed on 26<sup>th</sup> January, 2006. The grounds emerging therefrom are:-

1. That there has been inordinate delay in bringing the application.
2. That the delay was not occasioned by the lower court as alleged but by the Applicant himself.
3. That the application has not been brought in good faith, and in any event, it lacks in merit.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing, including the one case cited. That case, **PATEL –vs- WAWERU & 2 OTHERS, [2003] KLR 361**, is not relevant to the matter at hand as the Court of Appeal was dealing with rule 4 of the Court of Appeal Rules. Those rules are not applicable to this court. But I accept the principle that the power to extend time to lodge appeal under section 79G of the Civil Procedure Act is essentially discretionary. However, an applicant must satisfy the court that he had good and sufficient cause for not filing the appeal in time. See the proviso to section 79G aforesaid.

The lower court heard the Plaintiff's case *ex parte* after it rejected the defendant's application for leave to file defence out of time. The main ground for this ruling of the lower court was that the intended defence raised no triable issues. There was no appeal against that order. Upon what basis then can the Applicant now complain that he was denied a chance to defend the suit when he did not appeal against the order refusing him leave to defend, or even apply to set it aside? That order of the lower court was given on 18<sup>th</sup> March, 2004.

The *ex parte* decree of the lower court now sought to be appealed against was passed on 23<sup>rd</sup> April, 2004. The Applicant was supplied with a certificate of delay on 31<sup>st</sup> August, 2004. The period certified therein, which was about 109 days, was excluded from the 30 days from 23<sup>rd</sup> April, 2004 within which the Applicant was required to file his appeal. See section 79G aforesaid. That means that the Applicant could have filed his appeal without need for leave on or before 9<sup>th</sup> September, 2004. He did not; instead he filed an unnecessary application for leave. Ignorance of the law is no excuse. The application was in any case defective, but it took him a year to withdraw the same and file the present application. No good reason is given in the supporting affidavit for this delay.

Having considered all matters placed before the court, I find no good and sufficient cause why the Applicant did not file his appeal in time. I must therefore reject the application by notice of motion dated 14<sup>th</sup> October, 2005. It is hereby dismissed with costs. It is so ordered.

**DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF APRIL, 2008**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF APRIL, 2008**