

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Misc Civ Appli 348 of 2002

SUPER EXPO COMPANY LIMITED 1ST APPLICANT

WILLIAM BICHUNGI 2ND APPLICANT

VERSUS

BONIFACE WANJALA KABAKHANA RESPONDENT

R U L I N G

This is an application for extension of time within which to file an appeal. It is made under the provisions of Section 79 G of the Civil Procedure Act.

The Applicants contend that the judgement in the suit in the Subordinate Court was to be delivered on 17th April, 2002. This was in Eldoret CMCC. No. 738 of 2000 Judgement was not delivered as scheduled. On 11th September, 2002, they received a notice from the Respondent's advocates that judgement had been delivered on 2nd September, 2002 against them with liability at the ratio of 90:10.

The Applicants claim that they wrote to the Respondent's advocates seeking clarification since the contents in the Notice appeared to be incorrect. In the meantime, they asked for instructions from their client. They were instructed to lodge an appeal against quantum of damages. By that time the prescribed period for appealing had passed. This application was filed on 31st October, 2002.

The application is opposed by the Respondent which filed a Replying Affidavit through his Counsel.

I have considered the application and the rival affidavits. Notice of delivery of judgment was given on 20th August, 2002 by the Court for the 2nd September, 2002. Judgement was not delivered and was deferred to 29th September, 2002. It was duly delivered then. It becomes apparent that Counsel for the Applicant did not attend. No reasons were given for the failure to attend Court. Time to file an appeals runs from the date of delivery.

The applicant then received a Notice of delivery of Judgement on 11th September, 2002. They did not file their Memorandum of Appeal then. However, on 20th September, 2002 they wrote a letter to the Counsel for the Plaintiff telling them to correct some particulars in their Notice i.e. on liability. On 26.9.02, the Plaintiff's Advocates gave a fresh Notice with the correct ratio on liability. The prescribed period for filing had still not expired. Nothing seems to have happened until one month later, on 31st October, 2002 when this application was filed.

It is my view that the Notice of Entry of Judgement by the Plaintiff was for purposes of execution. It was the Defendant's duty to peruse the Court file if they did not attend the delivery of the same. As earlier stated the reasons for not attending court on the date of delivery were not explained. The time to file appeal starts to run from the date when Judgement was delivered and not from the date Notice is given by the Plaintiff for execution purposes. I do not accept that the said reasons are justifiable.

From the circumstances of this case I find that the reasons for the delay in filing the Appeal are not convincing for the Court to exercise its discretion in favour of the Applicants. Also the delay in filing the application was inordinate. No reasons are given to explain why it took a whole month to obtain instructions.

Lastly, two other aspects persuade me that the Applicants do not deserve the indulgence of this Court. Firstly, there is no evidence that they applied for proceedings. Secondly, the Applicants clearly did not prosecute the present application diligently from the date it was filed on 31st October, 2002.

I do hereby dismiss the application with costs to the Respondent.

DATED AND DELIVERED AT ELDORET ON 16TH DAY OF APRIL, 2008.

MOHAMMED K. IBRAHIM

JUDGE

In the presence of:-