



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 685 of 2006

FELISTA WANJIRU NYINGI.....APPLICANT

VERSUS

SAMUEL CHEGE GACHIE

(t/a BRACE ELECTRICALS & HARDWARE).....RESPONDENT

R U L I N G

Before me is an application by way of Notice of Motion by the defendant seeking leave to file appeal out of time. The application is based on the grounds as stated on the body of the Notice of Motion and supported by an affidavit sworn by the applicant on 29th August 2006.

The facts which gave rise to this litigation briefly may be stated. The Respondent instituted a suit against the Applicant at the Principal Magistrate's Court Muranga being PMCC No. 1 of 1998 claiming damages. The applicant was served with summons but failed to file defence. The Respondent successfully applied for judgment in default of defence and the same was entered. The applicant filed an application seeking order to set aside the said default judgment. The trial Magistrate granted the order but on condition that the Applicant deposits the whole of the decretal sum being Sh 273,933/= in court within 4 days.

The applicant was aggrieved with the condition which she left was punitive and appealed against that ruling to the High Court being HCC No. 49 of 1998. The appeal was allowed and the applicant was granted unconditional leave to file defence. The applicant again failed to file defence and the Respondent filed yet again an application for judgment in default for defence which was again granted. The applicant applied again to the trial Magistrate for extension of time to file defence which application the trial Magistrate declined to grant. The applicant filed an appeal against that refusal being HCCC No 242 of 2006 within time which appeal she withdrew. On 25th July 2006 the Defendant filed another appeal being HCCC A. No 497 of 2006 which appeal was struck out having been filed out of time without leave of court. Thereafter the applicant filed this notice of motion for extension of time to file appeal.

Mr. Thangu appearing for the Defendant/Applicant submitted that the defendant has a good defence to the Plaintiff's claim but was let down by his advocates. He further submitted that the mistakes of an advocate should not be visited on his client.

Mr. Kimani appearing for the Plaintiff/Respondent in opposing the application submitted that the

defendant's application has no merit and should be dismissed with costs. He went on to submit that this is the 4th appeal being sought by the Defendant arising from the same matter. Mr Kimani further submitted that the appeal will not serve any purpose since the matter has been settled by consent and execution having taken place and the whole of decretal amount paid to the Respondent and in conclusion he submitted that this is an abuse of the process of the court.

This being an application for extension of time to file appeal, all that the Applicant is required to do is to place sufficient material before the court explaining the reason for the inordinate delay. As was said in RATMAN V. CAMARASAMY [1964] All ER 933 by Lord Guest at p. 935:

“The rules of the court must prima facie be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

The decision whether or not to extend the time for appealing is essentially discretionary. It is well settled that in general the matters which the court takes into account in deciding whether to grant the extension of time are first the length of delay. Secondly the reason for the delay, thirdly (possibly) the chances of appeal succeeding if application is granted and fourthly degree of prejudice to the Respondent if the application is granted.

I have carefully considered the submissions by both Counsel appearing for both parties. It is conceded that the whole of the decretal amount has been released to the Respondent by consent.

That being the position this appeal would serve no useful purpose and I agree with Counsel for the Respondent that it is an exercise in futility.

The upshot of the foregoing is that this application fails and is dismissed with costs.

Dated and delivered at Nairobi this 28th day of May 2008.

J. L. A. OSIEMO

JUDGE