



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

**AT MACHAKOS**

**Civil Misc. Case 99 of 2008**

**ELIZABETH K. MUTUA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JONES MUSYOKA MALEKWA.....DEFENDANT/APPLICANT**

**RULING**

1. The Application dated 7.5.2008 substantially seeks orders that leave be granted to appeal out of time on such terms as may be just. In the Affidavit in support sworn on 7.5.2008 by Jones Musyoka Malekwa it is deponed that the intended appeal arises from proceedings in Mwingi SRM's Court Divorce Cause No. 9/2007 which had been filed on 26.7.2007. On 4.11.2007 the hearing proceeded in the absence of the Applicant and certain adverse orders were made against him on 2.1.2008. His attempts at setting aside the judgment did not succeed and his application in that regard was dismissed on 30.4.2008. That by that time the appeal was already out of time, hence the present application.

2. In the Replying Affidavit of the Respondent sworn on 26.5.2008, the Respondent depones that the delay in taking action has not been explained although the Applicant was aware of the judgment from 28.1.2008 when notification of it was made to the Applicant's employer, County Council of Mwingi.

3. I have taken into account the submissions by both advocates appearing but the matter is straight forward because;

4. Firstly, in Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application Nairobi 255/1997 the Court of Appeal held as follows;-

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

5. It is also the law as laid down in Pan African Paper Mills (E.A.) Ltd vs Olaka [2001] KLR 8 that the exercise of discretion to extend time is *“intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it's not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”*

6. The above principles if applied to this case would lead me to say, secondly, that the Applicant seems to be unhappy with the decision of the subordinate court in awarding Kshs. 20,000/= maintenance

to the Respondent without hearing him. The Applicant however fails to appreciate that the said issue is not before me in this Ruling and I am looking only to the period of delay and the reason for delay in filing the Appeal. He has not said anywhere in his Supporting Affidavit for how long he has delayed and why. He only says this at paragraph 11 thereof that;

*“I have been informed by my advocates on records (sic) which information I believe to be true that before filing an appeal leave of this court is required.” /*

This is not sufficient information to lay before this court

7. In submissions before me, Mr.Nyamu for the Applicant sought to explain the delay as follows:- that the Applicant had no notice of the judgment because the hearing proceeded ex-parte. He went further to state from the Bar that the delay of three (3) months was not inordinate. He presented me with the decision Cut Tobacco (k) Ltd vs British American Tobacco (K) Ltd, Civil Application No.336/1999 where Okubasu, J. referred to Peter Maina Munyua vs Damaris Njoroge, Civil Application No.Nairobi 210/1999 where Lakha, J. said as follows:-

*“where there is no explanation there can be no indulgence.”*

8. The Applicant failed to adhere to that statement! I say this respectfully, because the Applicant ought to explain in the first place why he failed to attend court on 4.11.2007. In his Affidavit, he says nothing of that event which triggered all subsequent events. I have seen the Ruling declining to set aside the judgment and the reason is given as that:-

*“at paragraph 8, the respondent who is the applicant herein conceded to the petition. The applicant says that he did not attend the hearing of petition because he was pursuing an out of court settlement with the petitioner’s parents.”*

9. It also appears that the Application was served with a hearing notice for 4.11.2007 but for the reasons that he gave in the subordinate court, he did not see it fit to attend court and waited until he was served with a notice of attachment for him to swing into action. Curiously, and in addition the Respondent has said at paragraph 9 of her Replying Affidavit that *“the applicant works within 200metres from the Mwingi Law Courts. He has not explained why he did not visit the court to know the outcome of the pending case and can only blame himself for not taking action.”* This statement has not been controverted in any way and I hold it to be true that the Applicant was not serious about the divorce cause and the present Application a mere afterthought.

10. Thirdly, I have said elsewhere above that no explanation for the delay in filing the Appeal is given and I see that the present Application was only filed on 9.5.2008 when the judgment was delivered on 2.1.2008. No explanation for that delay is given either and yet notice of entry of judgment against him had been given on 5.2.2008 and his salary for March 2008 attached. Without these explanations, no indulgence can be granted.

11. Lastly, the Applicant is clearly unhappy with the order to pay maintenance and not the whole judgment of the subordinate court. That unhappiness has not translated into a worthy application before me for which discretion should be exercised.

12. I find that the Application before me is without merit and to grant it would be to encourage indolent litigants to elongate litigation. It is dismissed with costs to the Respondent.

13. Orders accordingly.

Dated at Machakos this 9<sup>th</sup> day of July 2008.

**Isaac Lenaola**

**Judge**

In the presence of : Mrs Nduva h/b for Mr Nzilli for Respondent

Mr. Okello for Applicant

**Isaac Lenaola**

**Judge**