



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Misc. Appli. 149 of 2006

MARY JONATHAN KATUMO (*suing as legal representative of the estate of*

JONATHAN KATUMO MAINGI – DECEASED PROPOSED APPLICANT

VERSUS

NZOMO MULI PROPOSED RESPONDENT

RULING

1. The Application dated 8/7/2006 seeks orders under Section 79 G and 95 of the Civil Procedure Rules for leave to appeal out of time from the judgment delivered on 9/2/2006 in **Machakos CMCC No. 167/2004**. The reason for the delay in filing the Appeal, is said to be that although proceedings were sought and applied for on 11/2/2006, the same has never been received to-date. That therefore the delay is excusable and no prejudice would be suffered if the orders are granted. Subsequently, I have seen the Certificate of Delay issued by the Chief Magistrate, Machakos and as at 26/5/2008, the proceedings were still not ready.

2. The grounds of opposition to the Application are that:-

a. **“There is no occasion and/or basis for grant of the extension of time as the issues raised in the draft memorandum of appeal annexed to the Application are frivolous and have no merit.**

b. **The Applicant has not in any event proffered a reasonable ground for delay in the circumstances save for reliance on lack of typed proceedings and judgment.**

c. **The reasons given for the delay in filing the appeal are immaterial and irrelevant and there has been inordinate delay in filing the appeal.**

d. **The proposed appellant has not attached a certificate of delay from the lower court.**

e. **The court should not assist a party who has not been diligent.**

f. **The Application is in any event misplaced, bad in law and fundamentally defective.**

g. **The Application is in any event an abuse of the process of this Honourable Court.”**

3. I have taken into account the submissions made and the authorities cited by advocates for the parties and to begin, I should restate the law on the subject as I understand it. In **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, C.App. NAI 255/1997**, Okubasu J.A. stated as follows:-

“It is now well settled that the decision whether or not to extend the time of 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 degree of prejudice to the respondent if the application is granted”.

4. In this case, I have already set out the reason for delay but the more problematic area is the period of delay. The present Application was filed on 13/9/2008, some seven (7) months after the judgment of the subordinate court. The reason for the delay is still obtaining and even if leave is granted, I do not see what will change if the proceedings are still not ready. In any event, I have seen the Memorandum of Appeal and there are only three (3) simple and straight forward grounds raised. The same grounds could have been raised with or without the proceedings and I do not see why it took seven 7 months to consider the Appeal to be necessary.

5. I am not able to determine whether the Appeal would have any chance of success but at a glance the Memorandum of Appeal raises in all its three (3) grounds only the issue whether the suit in the lower court was properly dismissed or not. That issue becomes pertinent when considering the prejudice to be caused to the Respondent. The burden of the suit has been lifted from him and to restart litigation in circumstances obtaining in this case would be unfair.

6. Since therefore the reasons why the Appeal has not been filed in time and the period of delay is clearly inordinate plus the clear prejudice to the Respondent, the Application finds no favour in my sight. Having so said, one will sympathize with the Applicant and this court will not easily shut a willing party out of a hearing but where the focus for the exercise of discretion is not towards the Applicant, sadly the law must take its course.

7. The Application dated 8/6/2006 is dismissed with costs to the Respondent.

8. Orders accordingly.

Dated and delivered at Machakos this **14th** day of **October** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Makau h/b for Mr Mung’ata for Applicant**

Mr Mutia h/b for Mr Maleche for Respondent

ISAAC LENAOLA

JUDGE

