



**REPUBLIC OF KENYA**

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

**Misc Civ Appli 595 of 2006**

**DAVID WAITHAKA KAGURU ..... APPLICANT**

**VERSUS**

**IBRAHIM TANUI ..... RESPONDENT**

**RULING**

This is an application under the provisions of Order 49, Rule 5 and 9 of the Civil Procedure Rules seeking an order for the Plaintiff to file an appeal out of time. The Senior Resident Magistrate's Court at Eldoret delivered its Judgment in Civil Case No. 1206 of 2000 on 7<sup>th</sup> April, 2005.

The Plaintiff/Applicant stated that on the date of judgment he applied for certified copies of the proceedings. The same was not received until 6<sup>th</sup> July, 2006. It is contended that the delay was not occasioned by the Applicant and the application was brought within a reasonable time. The Plaintiff in a subsequent affidavit told the Court that he made an application for review of the judgment which was decided on 29<sup>th</sup> May, 2005 when the same was dismissed.

The defendant subsequently set down the matter for assessment of costs which was concluded on 26<sup>th</sup> November, 2005.

I have considered the application, the rival affidavits and submissions by counsel.

It is clear that certified copies of proceedings and judgment were not ready for collection until 29<sup>th</sup> May, 2006. This was well over one year since the date of judgment. The Applicant chose to apply for review of the application on 13<sup>th</sup> April, 2005. He decided to appeal after the application for review was rejected by the trial Court.

In the Subordinate Court's there is no provision that a Notice of Appeal be filed as in the High Court. However, the requirement is that an Appeal may be filed within 28 days. It is rare for proceedings and judgment to be ready within this period. Parties intending to appeal to the High Court invariably lodge their Memorandum of Appeal based on the judgment read out. If the Court does not avail a party with written copy of the judgment, then there is nothing which stops the aggrieved party or his Lawyer to peruse the Court file and lodge the Memorandum within the prescribed period. If the Memorandum of Appeal needs to be improved upon after receiving the entire proceedings and judgment, a party is entitled to apply for amendment of the Memorandum of Appeal.

If Parliament put much significance to availability of the typed proceedings and judgment before preparation and the Memorandum of Appeal from Subordinate Courts then it surely would have said so

and made provisions for a Certificate of Delay as happens in the High Court.

I do hereby hold that the delay of typing of proceedings and judgment may be a justification for the delay in filing of the Record of Appeal but not perse, for the filing of a Memorandum of Appeal in the High Court from the Subordinate Courts.

The Court has also taken into account that the Applicant did not rush to file the Appeal once he received notification as to the availability of the proceedings and judgment on 5<sup>th</sup> July, 2006 (see Ex. No. AMN 2 in the Further Affidavit of the Applicant). He waited for one month to file the application herein. The affidavits are sworn by counsel.

It is my view that a delay of one year to file an appeal in the circumstances of this case is ordinate. However, from the proceedings and the Memorandum of Appeal, it would appear that the Applicant intends to raise a very fundamental issue or point of law that the trial court knew it had no jurisdiction before it delivered its judgment. The Applicant contends in effect that since this issue was raised by the Court, it should have referred the matter to a Magistrate or Court with competent jurisdiction.

It would appear that it is a contestable issue whether a Subordinate Court which finds that it had no jurisdiction in respect of one or some prayers in a plaint could make any findings on any issue of facts on the merits or to grant any other prayers in the plaint.

Because of the importance of the question and that the Applicant may have been removed from the seat of justice, I think that this Court is willing to excuse the delay in the filing of the Appeal. The Appeal appears to have a lot of merit. While it is possible that the Applicant could have the right to institute fresh proceedings, yet it is possible that some of the findings by the trial Court could prejudice any subsequent suit.

I therefore do hereby grant prayer 1 of the Application. The Appeal shall be filed within the next fourteen (14) days. Costs of the application shall be paid to the Respondent.

DATED AND DELIVERED AT ELDORET ON THIS 13<sup>TH</sup> MARCH, 2007.

M. K. IBRAHIM

JUDGE