



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE

Misc Civil Appli 72 of 2006

CHARLES M. SOO.....APPLICANT

AND

ALLAN KARANJA WATHIGO.....RESPONDENT

RULING

This is an application which has been brought pursuant to the provisions of Section 79 G of the Civil Procedure Act, as read together with Order 49 rule 5 of the Civil Procedure Rules.

The applicant is seeking an extension of time to lodge his intended appeal.

The basic facts leading up to this application were, firstly, that the applicant was the defendant in Kitale SPMCC NO. 520 of 1997, whilst, the respondent was the plaintiff. After a full trial, the learned trial magistrate gave her judgment on 18th July 2002, holding that the plaintiff had proved his case on a balance of probabilities. The defendant was thus ordered to liaise with the Estate Manager of Kenya Railways, to effect the assignment of the suit property to the plaintiff. The defendant was also ordered to pay costs to the plaintiff.

Following the judgment, the defendant filed an application for the certified copy of the proceedings and the judgment, on 25th July, 2002.

The said proceedings and judgment were supplied to the defendant on 4th September 2002. Thereafter, on 2nd October 2002, the court issued a Certificate of Delay, and the defendant proceeded to lodge an appeal on the same day.

According to the applicant, as at the time he filed the appeal, on 2nd October 2002, he was under the impression that having been issued with a Certificate of Delay, he did not need to obtain leave of the court to appeal out of time.

He explains that he only became wiser after the appeal was struck out on 23rd May 2006, on the grounds that the said appeal was incompetent.

As far as the applicant was concerned, the mistake which he had made constituted a sufficient cause to warrant the exercise of the court's discretion in his favour.

He also expressed the view that the intended appeal raises very weighty issues of both law and fact.

The advocate for the applicant took full responsibility for the mistake in question, and he requested the court not to punish the applicant for the said mistake.

Finally, the applicant submitted that if the application was granted, it would not prejudice the respondent as he continued to be in occupation of the property which was the subject matter of the intended appeal.

In answer to the application, the respondent contended that the applicant had misinterpreted the provisions of Section 79 G of the Civil Procedure Act.

It is the understanding of the respondent that an appeal from the subordinate court to the High Court was to be filed within 30 days of the date of the decree or order appealed against, but excluding from such period, any period which the lower court may certify as being requisite

for the preparation of the decree or order.

That understanding of the respondent is actually a summary of the wording of Section 79 G of the Civil Procedure Act. Therefore, it is an accurate restatement of that statutory provision.

Bearing in mind that legal position, the respondent then pointed out that as the lower court had supplied the certified proceedings and judgment, to the applicant, on 3rd September 2002, the applicant still had 23 more days, from that date, to lodge his appeal.

The said 23 days are said to be the balance of the 30 days stipulated in Section 79 G, as some seven days had already been lost between the date of judgment and the date when the applicant applied to the lower court for the certified copy of the proceedings and of the judgment.

Therefore, the respondent holds the view that as at the date when the lower court provided the applicant with the proceedings and judgment, the applicant did not need leave of the court, to appeal.

In the circumstances, the respondent submitted that the applicant had failed to after any explanation for his failure to file the appeal between 3rd September 2002 and 30th September 2002, when by his calculations, the 30 days' period allowed for lodging an appeal, lapsed.

It was the respondent's contention that an explanation from the applicant would have been a pre-requisite to the court to determine whether or not to extend time. But, as there was no such explanation, the respondent submitted that the application herein ought to be dismissed.

That is even more so, said the respondent, in the light of the fact that it was almost 10 years since the judgment was read. Therefore, as litigation needs to come to an end, in the interests of justice, the respondent was of the view that a ten years period was too long to re-open a matter, as that would prejudice him.

However, the applicant explained that without a Certificate of Delay, he could not have lodged the appeal. Therefore, as the said Certificate of Delay was only provided by the lower court on 2nd October 2002, the applicant believes that he cannot be faulted for filing the appeal some three days later.

In my considered opinion, the applicant is correct to have stated that without the Certificate of Delay, he could not have lodged the earlier appeal. I say so because, pursuant to Section 2 of the Civil Procedure Act, a decree is defined as follows: -

“‘decree’ means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final, it includes the striking out of a plaint and the determination of any question within Section 34 or Section 91, but does not include –

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default;

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of the judgment may not have been drawn up or may not be capable of being drawn up.”

In this case, the judgment was delivered on 18/7/2002. Thirty days lapsed thereafter, on 17/8/2002. But, as the trial court had not made available, to the applicant, the proceedings and judgment, the applicant was not able to lodge his appeal.

By 3/8/2002, when the proceedings and judgment were provided to the applicant, the time for lodging an appeal had lapsed.

According to the respondent, the appeal ought to have been lodged by 30th September 2002. However, it was only filed on 2/10/2002.

Granted, the appeal was filed late. But I do not share the respondent's contention that the appeal ***“was well outside the period allowed.”***

In my considered view, the delay was minimal, and thus excusable. A delay of about three days cannot be described as being well outside the period prescribed.

Secondly, I find that the applicant did tender an explanation for the failure to file the appeal between the 3rd of September 2002 and the 30th of September 2002. The explanation was to the effect that he needed to first obtain a Certificate of Delay before he could lodge the appeal.

To my mind that was a reasonable explanation.

But then, the respondent reminded me that it was now almost ten years since the judgment was delivered. I am afraid that by my calculations, I was unable to comprehend how the respondent was able to arrive at the figure of 10 years, for the period between 18th July 2002 and 30th May 2006, when this application was made.

By my calculations, that period is just under four years. Of course, four years is a substantial length of time. The question that must therefore be addressed is whether or not that was too long a period to warrant the re-opening of a case in respect of which the court has granted judgment.

At this point it is perhaps necessary to point out that the word “**re-open**” was introduced by the respondent.

To my mind, when a party chooses to challenge a ruling or a judgment through an appeal, that exercise ought not to be deemed as constituting the re-opening of the case. I say so because an appeal process ordinarily only re-evaluates the evidence already adduced, with the aim of ascertaining whether or not the court whose verdict was being challenged arrived at the correct decision, based on such evidence and on the law.

If the applicant is granted an extension of time, will the respondent be prejudiced, as he has contended?

In this case, the respondent has all along been aware of the applicant’s desire to challenge the judgment, by way of an appeal. I say so because by early October 2002, the applicant had already lodged an appeal. The respondent filed an application dated 11th October 2005, seeking the dismissal of that appeal, and his said application was granted on 23rd May 2006.

Two days after the first appeal was dismissed, the applicant brought the current application. To my mind, that application was brought timorously. Indeed, even the respondent did not raise any complaints regarding the speed with which the application herein was brought.

As the earlier appeal was dismissed with costs to the respondent herein, I hold the considered view that the applicant has already been punished for the error earlier made. I therefore find no reason to further punish the applicant by dismissing the current application, on the basis of factors for which he has already been punished.

In the circumstances, I hold that there is nothing from the facts before me, or from the applicable law, which would preclude the extension of time.

The advocate for the applicant did make a mistake. The said mistake was “**a blunder on a point of law**”, if I be permitted to borrow the phrase of the Hon. Madan JA in **BELINDA MURAI & OTHERS V AMOS WAINAINA CIVIL APPLICATION NO. NAI.9 OF 1978**, wherein the learned Judge said;

***“ A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel, the court might feel compassionate more readily.*”**

A blunder on a point of law can be a mistake. The door to justice is not closed because a mistake has been made by a person of experience who ought to have known better.”

In this case, although the respondent intimated that the applicant’s advocate ought to have known better, and thus to have brought the appeal by 30th September 2002, that would not be reason enough to close the door of justice on his client.

In my considered view, the justice of this case dictates that the application be granted, so that the applicant is accorded an opportunity to pursue his right of appeal, on its merits. Accordingly, the time for filing an appeal from the judgment in **Kitale SPMCC NO.520 of 1997** is hereby extended, with the result that the applicant is granted leave to his intended appeal within the next 10 days from to day.

As regards costs, the same shall be borne by the applicant in any event. I so rule because the applicant readily admitted that this application was necessitated by the error of his advocate, in not appreciating the law, at the outset.

Of course, even if the advocate did appreciate, at the time, that there was need to obtain an extension of time to lodge an appeal, it would have been necessary for the application of this kind to have been brought before the court. But that does not alter the fact that the applicant’s advocate concedes having made a mistake, which he then says, should not be visited on his client. In the light of that concession, I find no good reasons to order that costs be in the intended appeal. It is for that reason that the applicant shall bear the costs of the application.

Dated and Delivered at Kitale, this 9th day of July, 2007.

FRED A. OCHIENG

JUDGE