

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Misc Civil 24 of 2007

MWAURA WAWERUPLAINTIFF

versus

JOSEPH KINYANJUI WAWERUDEFENDANT

RULING

Before me is an application dated 28th September, 2006 in which the applicant seeks leave to appeal out of time. The application is premised on the grounds that certified copies of the judgment and proceedings which the applicant had applied for to enable him lodge an appeal were supplied to him late and secondly that the applicant is a sickly person a condition which prevented him from filing the appeal in time.

The application was opposed. In his relying affidavit, the respondent averred that the proceedings and judgment were typed and certified well within time. The proceedings and judgment were therefore ready for collection by the applicant in good time. Secondly, the respondent averred that he knew the applicant very well as he was his brother and he was certain that he had not been sick as claimed in his affidavit in support of the application.

I have carefully considered and pondered over the application. I have also taken into account the affidavit in support and in opposition to the application and the annexures thereto. Much as the applicant claims to be sickly, he did not tender any evidence documentary or otherwise to support this claim. If indeed the applicant was sickly and therefore in and out of hospital severally, what could have been easier than for him to annex medical records in verification of the fact. There is no explanation for that failure. That being the case I am inclined to believe the averment by the respondent that the applicant has not at all been sick.

From the record, it is clear that the judgment of the lower court was delivered on 28th January 2005. Immediately after the delivery of the judgment, the applicant applied for certified true copies of the proceedings and judgment. It would appear that the proceedings and judgment were typed and certified on 14th February 2005, well within the period which the applicant ought to have filed his appeal in time. It does appear to me that the applicant is less than candid in his averments. He has not told us when he collected the proceedings and judgment. It is however clear to me that it took the applicant over eighteen months to bring the instant application. That delay is certainly inordinate and has not been explained away. The applicant is therefore underserving of the discretion of this court. The applicant has therefore not satisfied me that there were genuine reasons for his failure to file appeal within time. Accordingly the application is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 9th July 2007.

.....

M.S.A. MAKHANDIA

JUDGE