

REPUBLIC OF KENYA

HIGH COURT AT NYERI

Misc Appli 25 of 2007

NELSON NDERITU GITHUA.....APPLICANT

Versus

JANE WANGUI GICHERU

GRACE WAMBUI [Suing as the Legal Representative

of the Estate of JOHN NJOROGE NJUGUNA (DECEASED)]

.....RESPONDENTS

RULING

The application by Notice of Motion dated 8th March 2007 is brought on behalf of the proposed Appellant who seeks leave to file an appeal out of time against the judgment of CMCC NO. 617 of 2005. The Applicant in the supporting affidavit deponed that the action in the Chief Magistrate's court arose out of a road traffic accident whereby the applicant collided with the deceased who is represented by the Respondent. The Chief Magistrate found the Applicant 100% to blame for the accident and the Applicant is of the view that the court did not consider the evidence adduced by him and his witnesses in apportioning blame. Further the Applicant stated that the deceased earnings were miscalculated by the Chief Magistrate. For those two reasons the Applicant stated that he desires to file an appeal. The applicant stated in the affidavit that the delay herein is not inordinate. The application was opposed by the Respondent.

The Respondent took issue with criticism of calculation of loss of earning and stated that the deceased pay slip was produced in court. The Respondent stated that the Applicant had failed to sufficiently explain the delay in filing the appeal, which was a delay of six months. She therefore concluded that the present application is an afterthought. The Respondent also faulted the Applicant for failing to annex the Chief Magistrates Court's judgment.

I have considered the present application. The same seeks the exercise of this court's discretion in favour of the Applicant. The Applicant has in my mind very flippantly dealt with the issue of the delay in filing the appeal. Indeed it is only one paragraph of the affidavit in support where the Applicant stated that "the delay in filing this application is not inordinate and the same is excusable". That is all the Applicant has to offer to this court in seeking the exercise of the court's discretion. The discretion of the court is to be exercised judicially that is to say, on sound reason rather than whim, caprice or sympathy. Those words are not mine but rather are borrowed from the case of **GITHIAKA -V- NDURIRI KLR [2004], 2 KLR 67**. If then discretion is to be exercised judicially, the Applicant had a responsibility to inform the court the reason for the delay. The Defendant did not and accordingly the application on that ground alone must and does fail. The Notice of Motion dated 8th March 2007 is therefore dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 6th day of July 2007.

MARY KASANGO

JUDGE