

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL MISC APPL 199 OF 2006

LYDIA WAMBUI MAINA(*Suing and on behalf of the estate of*

SIMON KAMAU MAINA – DECEASED).....PLAINTIFF

VERSUS

CATHOLIC DIOCESE OF NAKURU.....1ST DEFENDANT

ERICK KIPRONO KOSKEI.....2ND DEFENDANT

RULING

The applicant, Lydia Wambui Maina, brought a notice of motion under the provisions of **Section 79G of the Civil Procedure Act** and **Order XLI Rule 5 of the Civil Procedure Rules** seeking an order of this court to grant him leave to appeal out of time from the judgment of the subordinate court delivered on the 18th August, 2005 in Nakuru CMCC No.2496 of 2003 Lydia Wambui Maina vs Catholice Diocese of Nakuru and Eric Kiprono Koskei. The grounds in support of the application are on the face of the application. The applicant states, *inter alia*, that she was prevented from filing the appeal in time due to financial constraints. She further stated that she was ignorant of the legal procedures involved, and was unaware that an appeal should have been filed within a certain period of time. The application is supported by the annexed affidavit of the applicant. The application is opposed. The respondents filed grounds in opposition to the application. They stated, *inter alia*, that there were no good reasons advanced by the application for the court to exercise its discretion and allow the application. The respondents further stated that the applicant had been indolent and had failed to give sufficient explanation for the delay. The respondents urged the court to dismiss the application with costs.

At the hearing of the application, Mr. Karanja for the applicant reiterated the contents of the application and the supporting affidavit. He submitted that although the applicant was notified of the judgment of the subordinate court in time, by the time she instructed her advocate to file the appeal, time had expired. He explained that the applicant was unable to file the appeal in time due to lack of sufficient funds. He urged the court to consider that the respondents would not be prejudice if the application is allowed as they would adequately be compensated by an award of costs. Mr. Karanja submitted that the reasons advanced by the applicant were sufficient to enable this court grant the application for extension of time sought. He urged the court to allow the application.

The application is opposed. Mr. Murimi for the respondents reiterated the contents of the grounds of opposition filed. He submitted that the application was defective since it lacked an endorsement a provided by **Order L rule 15(2) of the Civil Procedure Rules**. He maintained that the applicant had not satisfied the requirements of **Section 79G of the Civil Procedure Act** to enable the court grant her extension of time sought. He submitted that the court should disbelieve the reason advanced by the applicant that she was prevented from filing the appeal in time due to financial constraints. He explained that the applicant was able to file the suit in the subordinate court without any difficulty. He submitted that the applicant had not given sufficient reasons why she delayed for a period of over eight months before she filed the application for extension of time. Mr. Murimi urged the court to decline to exercise its discretion in favour of the applicant and dismiss the application with costs.

I have considered the rival submissions made by the parties to this application. I have also read the pleadings filed by the parties to this application in support of their respective positions. The issue for

determination by this court is whether the applicant has established sufficient grounds to enable this court grant her extension of time to file appeal out of time. **Section 79G of the Civil Procedure Act** grants this court discretion to extend time for a party who is appealing against decision of the subordinate court provided such an applicant satisfies the court that he had a good and sufficient cause for not filing the appeal in time. The discretion of the court to extend time will, of course, be exercised judicially. It is now generally accepted that the court would not extend time to file an appeal out of time unless the applicant give acceptable reasons for the delay. The court will also take into account the length of the delay and consider if the respondent would be prejudiced if the application is allowed.

In the present application, the applicant stated that she was prevented from filing the appeal in time due to financial constraints. She explained that she was unable to file the appeal in time because she was unaware of the legal requirement that mandates an appellant to file an appeal within a certain specified period. The respondents argued that the reasons advanced by the applicant were not sufficient to persuade this court to exercise its discretion in favour of the applicant. I have considered the fact that the suit which was dismissed by the subordinate court was in respect of an accident claim. The son of the applicant was killed in the said accident. The applicant was dissatisfied with the decision of the subordinate court which dismissed the said suit. She desires this court to give a second opinion. The applicant delayed for a period of eight months before she filed the present application for extension of time. She explained that she was unable to file the appeal in time due to financial constraints. This court accepts the reason given by the applicant for her delay in filing the appeal in time. The right of a litigant to appeal against the decision of a court is enshrined in the constitution. Such a right can only be deprived a litigant if sufficient reasons are established.

In the present application, there are no grounds to persuade this court not to exercise its discretion in favour of the applicant. The respondents would not be prejudiced. They would be adequately compensated by an award of costs. In premises therefore, I do allow the application for extension of time filed by the applicant. The time in which the applicant shall file the appeal is extended. The applicant shall file and served the appeal within fourteen (14) days of today's date. The respondents shall have the costs of this application.

DATED at NAKURU this 23rd day of November 2007

L. KIMARU

JUDGE