REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

MISC APPLI 50 OF 2005

CLEMENT R. NJUE …….. APPLICANT

VERSUS

HENRY NJERU GACOGO ……...…….. RESPONDENT

RU L I N G

Before me is an application by way of Notice of Motion dated 5th May, 2005 and filed in court on 18th May, 2005 expressed to be brought under section 79G of the Civil Procedure Act. The application seeks that **Clement, R. N. Njue**, hereinafter referred to as "the applicant" be granted leave to appeal out of time. The grounds given for the application are that the ruling which is the subject of the intended appeal was delivered on 22nd February 2005 and the application for certified copies of the proceedings and ruling was made on 26th February 2005. That the said proceedings and ruling were supplied on 1st April 2005 by which time, the period limited for the filing of the appeal had lapsed. The application was further supported by the affidavit of the applicant in which in the main he reiterated and expounded on the foregoing grounds. The only addition being that the delay in filing the appeal was occasioned by the court's failure to type the proceedings in time hence this application.

The application was opposed. The respondent in his replying affidavit dated 13th July 2005 and filed in court on 24th November 2005 deponed that the intended appeal has no chances at all of success as the arbitration proceedings, the fulcram on which the intended appeal will be hoisted were a nullity as they were conducted on the basis of a suit which had already been dismissed.

In his oral submissions in support of the application, **Mr. Gacheru**, learned counsel for the applicant reiterated that failure to file appeal in time was occasioned by the failure by court to supply to the applicant in time the proceedings and ruling. In support of this submission counsel referred the court to the certificate of delay issued by the trial court. Counsel did not see anything worth his comment in the replying affidavit sworn by the Respondent.

Mr. Okwaro, learned counsel for the respondent submitted that the proceedings and ruling were supplied within time as the period between 26th February, 2005 to 1st April, 2005 was excluded from the computation of time as it was the period required to certify the proceedings. Accordingly, to learned counsel, the applicant had upto 28th April 2005 to file the appeal. Counsel further submitted that it took the applicant 48 days to file this application which delay is inordinate and unexplained. Finally counsel submitted that the applicant had not demonstrated that the intended appeal was arguable as the proceedings culminating in the intended appeal were deemed to have been a nullity.

I have carefully considered the application, the supporting and replying affidavits with the annextures thereto, rival oral submissions and the law.

Section 79G of the Civil Procedure Act provides for time for filing appeals from subordinate court. It is in terms that every appeal from subordinate court to the high court is to be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

The right of appeal having been created by statute, the requirements prescribed for appealing must be strictly complied with. Every appeal from a subordinate court should be filed within 30 days of the decree or order appealed against, excluding such time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order. However by the proviso to section 79G aforesaid, an appeal may admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. See **Vallabhdas Damoda t/a D. Jamnadas & Sons v/s Ismail & Misando, court of appeal for Eastern Africa at Nairobi, Civil Appeal number 21 of 1975 (unreported).** The power of the court to extend time under this provision is very wide limited only by the words "**good and sufficient cause."** As a general rule however the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal and or the granting of the application.

What happened in this case? The decision which the applicant intends to lodge an appeal against was rendered on 22nd February, 2005. Four days later, the applicant applied for copies of the proceedings and certified copy of the ruling. The same were supplied to the applicant on 1st April 2005. According to the certificate of delay the period between 28th February 2005 and 1st April 2005 was taken up typing the proceedings. Time within which to file the appeal therefore started to run from 1st April 2005 if my interpretation and understanding of the entire section 79G of the Civil Procedure Act is anything to go by. The applicant had therefore 30 days from 1st April 2005 to lodge the appeal. He did not. There is absolutely no explanation as to why he was unable to do so. It is clear to me that perhaps the applicant misapprehended the purport and effect of section 79G of the Civil Procedure Act. It is a hallowed principle of law that ignorance of the law is no defence at all. The applicant may have been ignorant as to the effect and purport of the certificate of delay and perhaps what the words "**excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order meant."** However he has himself to blame. The blame cannot be passed to or shared by the respondent.

Further even assuming that the applicant genuinely believed that time for filing the appeal started to run on the day of the ruling; he was nonetheless supplied with the proceedings on 1st April 2005, why then did it take him another 48 days to lodge the instant application. That period is certainly inordinate if all that was required of the applicant was to file an application for extension of time. Once again no explanation has been forthcoming from the applicant for his failure to immediately lodge the instant application immediately he was supplied with the proceedings, Ruling and certificate of delay.

Has the applicant demonstrated that the intended appeal has any chances of success? Counsel for the applicant takes the view that, that is not a consideration in applications of this nature. He takes the view that all that is required of the applicant is to explain the delay. Nothing can be far from the truth. There may be good and sufficient cause which would justify an appeal court from refusing to enlarge time although the application for extension is based solely on failure of the lower court's registry to produce the requisite documents in time. One such good and sufficient cause would be if the respondent can show that the intended appeal has absolutely no chance of success, and that to allow such an appeal to go forward would be an abuse of process, vexations and oppressive towards the decree holder. See **Hamilton Harrison and Mathews v/s Cyril Herbert Mayers** and **Hazel Margaret Mayers, court of appeal for East Africa at Nairobi; Civil application No. NAI 3 of 1971**. Based on the foregoing I would agree with **Mr. Okwaro** that for the applicant to endear himself to this court, he must also demonstrate that the intended appeal is arguable. I am therefore unable to buy the applicant's argument that all that I should be concerned with at this stage is an explanation for delay. The applicant has not been able to discharge that onerous task of persuading me that the intended appeal is arguable with some chances of success. From the record, it appears that the applicant's suit in the subordinate court was struck out on 22nd January, 1992. On 18th October, 1996 the applicant without alerting the court that the suit had been dismissed and or struck out purportedly moved the court to have the "**suit"** referred to arbitration. The court obliged. The "**award"** was subsequently filed in court on 22nd January 1999 and was made the judgment of the court on 26th July 1999 again on the application of the applicant. Subsequent thereto the applicant made an application to enforce the judgment and sought that the executive officer in the senior principal magistrate's court, Embu be authorised to sign all the necessary

forms to effect the transfer of 2 acres out of the respondent's land parcel number **Gaturi/Nembure/ 1578** to him. When these goings on came to the attention of the respondent he moved the court vide an application dated 27th July 2001, in which he sought to have the judgment entered on 26th July 1999 as aforesaid set aside together with all the consequential orders. The prayers sought in the application were eventually granted on 22nd February 2005. These orders are now the subject of the intended appeal. The arbitration proceedings, the award and subsequent judgment having been premised on an illegality, can it be said that even if the applicant was granted leave to appeal, could such an appeal withstand close scrutiny. I dare say no. That is the furthest I should go.

It is for all the foregoing reasons that I find no merit at all in the application. Accordingly it stands dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 20th day of November 2007

M. S. A. MAKHANDIA

JUDGE