

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Misc Civ Appli 492 of 2005

EGERTON UNIVERSITY.....APPLICANT

VERSUS

DIANA LUGANJE (*suing as the administratrix of the estate of RAPHAEL NYALE LUGANJE*).....RESPONDENT

RULING

By a notice of motion dated the 12th of July 2005, the applicant has moved this court under the provisions of **Section 79G of the Civil Procedure Act and Order L rule 1 of the Civil Procedure Rules** seeking the order of this court for extension of time to appeal from the decision of the subordinate court in *Nakuru Chief Magistrate's Court Civil Case No. 1038 of 1999* delivered on the 16th of October 2002. The application is based on the grounds that the applicant contends that it was prevented from filing the appeal in time due to a communication breakdown between the applicant's and the respondent's counsels that resulted in the entire decretal sum of Kshs 468,135/= not being deposited in a joint interest earning account as ordered by the subordinate court. The applicant further states that it was prevented from filing the appeal in time because the certified copies of the proceedings were not availed to it in time to enable it file a memorandum of appeal. The applicant contends that it has a good appeal and should be allowed to ventilate it as they have always been desirous of pursuing the appeal. The application is supported by the annexed affidavit of Otieno Olola, learned counsel for the applicants.

The application is opposed. The respondent has filed grounds in opposition to the said application. Ezekiel Wanjama, learned counsel for the respondent has sworn a replying affidavit in opposition to the application. He has deponed that there was no justifiable reason why the applicant had not filed the appeal on time, and further why it had failed to deposit the decretal amount in a joint interest earning account as ordered by the subordinate court. He deponed that there was no legal requirement for a party who is seeking to appeal to be supplied with certified copies of the proceedings and the judgment of the lower court before such a party could file an appeal. In his view, the applicant had not been candid and given a proper explanation why it failed to file the appeal in time. He deponed that the appellant had filed this application to deny the respondent from enjoying the fruits of her judgment. He urged this court to disallow the application.

At the hearing of the application, I heard the submissions made by Mr. Olola, learned counsel for the applicant and by Mr. Wanjama, learned counsel for the respondent. Mr. Olola, apart from reiterating the contents of the application and the supporting affidavit, referred this court to several decided cases in support of the applicant's application for extension of time. Mr. Wanjama similarly relied on the grounds of opposition and the replying affidavit filed. He also referred this court to several authorities in support of his submission that the application should be dismissed with costs.

The issue for determination by this court is whether the applicant has established a case to enable this court grant it leave to appeal out of time. **Section 79G of the Civil Procedure Act** grants this court jurisdiction to extend time for filing appeals from subordinate courts "... *if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal on time.*" **Order XLIX rule 5 of the Civil Procedure Rules** amplifies the **said Section of the Act** by stating that this court has power to extend time "... *upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time*

appointed or allowed...”.

All the decided cases, apart from that of **Paul Kigaya Noru –vs- Nancy Wanjiku Kubaria Nairobi HC Misc Appl No. 785 of 1996 (unreported)** refer to cases which were decided by the court of appeal when deciding whether or not to allow extension of time for an applicant to file appeal out time in an application made to the said court under **rule 4 of the Court of Appeal Rules**. The said principles unfortunately are not applicable when this court is considering whether or not to grant extension of time for an applicant to file an appeal from the subordinate court to this court. The said principles can only be of general guide to this court in view of the fact that there are rules by which this court is guided when deciding whether or not to extend time for a party to appeal out of time.

In the instant application, the judgment was delivered by the subordinate court on the 6th of October 2002. From the submissions made before this court, it is clear that the two firms of advocates who are canvassing this application acted for the applicant and the respondent respectively in the suit before the subordinate court. The applicant’s counsel was therefore properly seized of the applicant’s case and when the judgment was delivered, he was not therefore at sea as to the grounds which the applicant would seek to challenge the decision of the subordinate court. As Mr. Wanjama has stated in his affidavit, there is no legal requirement for a party to be availed with certified copies of the proceedings and judgment of a subordinate court before such party launches an appeal to the High Court. The explanation therefore given by the applicant that it was prevented from filing an appeal because it had not received the certified copies of the proceedings from the court does not therefore hold water. Further, the applicant waited a whole three years before it filed this application seeking to extend time to appeal out of time. The contention by the respondent that this application was purposely filed to prevent her from enjoying the fruits of her judgment is therefore not without merit.

The applicant has exhibited an indolent behaviour in its conduct leading up to the filing of this application for extension of time. It failed to deposit the decretal sum that it was ordered to by the subordinate court within the requisite period. The applicant has a convenient excuse for its failure to deposit the said decretal sum; it blames a breakdown in communication between its counsel and the counsel for the respondent. In this era of e-mail and mobile telephony, it is inconceivable and mind boggling that there could be a breakdown of communication between two firms of advocates in two towns which are only 150 km apart! In this application, it is apparent that the applicant is prepared to blame all and sundry, except itself for the predicament it has found itself in.

The merit of the appeal notwithstanding, this court cannot exercise its discretion in favour of a litigant who sleeps on its rights of appeal, and when the other party seeks to move the court to enforce its judgment, such a litigant then suddenly wakes up and discovers that ‘*kumbe*’ it had a right of appeal which ought to have been exercised. The reasons stated hereinabove clearly points to the fact that this court finds no merit with the application filed by the applicant. The said application is dismissed with costs to the respondent.

DATED at NAKURU this 19th day of May 2006.

L. KIMARU

JUDGE