

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Misc Appli 241 of 2005

SULMAC KENYA LIMITED.....APPLICANT

VERSUS

ANTHONY OWINO.....RESPONDENT

RULING

The applicant, Sulmac Kenya Limited has filed a notice of motion under **Section 79G and Section 3A of the Civil Procedure Act** seeking this court's order to grant it leave to appeal out of time. The grounds in support of the application are that the applicant contends that the failure to file the appeal within time was not deliberate but was occasioned by the fault on the part of the counsel who was holding brief on behalf of the applicant. The applicant states that the intended appeal has a high chance of success. The application is supported by the annexed affidavit of Njeri Kariuki, the advocate for the applicant. The application is opposed. Mr. Kamau Muthanwa, the advocate for the respondent has sworn an affidavit in opposition to the said application. In essence he depones that the applicant has been guilty of laches in that he filed the application to extend time eight years after the judgment which it is seeking to appeal was entered in favour of the respondent. He deponed that the application therefore was meant to deny the respondent the fruits of his judgment and should be dismissed.

At the hearing of the application, I heard the rival submissions which were made by Mr. Wamaasa, learned counsel for the applicant and Mr. Gathaiya, learned counsel for the respondent. 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 Civil Procedure 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...*".

In the instant application, it is not disputed that the subordinate court delivered its judgment on the 23rd of May 1997. Immediately after the delivery of the judgment, the applicant indicated that it was dissatisfied with the said judgment and applied to have the said sum of money deposited in court pending the hearing and determination of the intended appeal. The respondent did not oppose the application and the said sum was deposited in court. However it is apparent that after depositing the said sum in court, the applicant went to sleep. It is not until when the respondent indicated to the applicant that he would make an appropriate application before the subordinate court to have the said sum of money deposited in court released to him, that the applicant was galvanized into action. It was then that the applicant filed the present application on the 19th of April 2005. This was eight years after the delivery of the judgment by the subordinate court.

Whereas I agree with the applicant that this court has unfettered discretion to enlarge time for a party to appeal out of time, this court can only exercise its discretion if the applicant satisfies the court that it had a good and sufficient cause for its failure to appeal on time. This court will further exercise its discretion if it meets the ends of justice. In the instant case, the applicant has explained that it was prevented from filing the appeal on time because of the break down in communication between the applicant's counsel of record, and a firm of advocates based at Nakuru who were then holding their brief.

I have considered the explanation given by the applicant and I must confess that I am at loss of what to make of it. Can it surely take eight years for an advocate to peruse a file, read the proceedings and the judgment, and file a memorandum of appeal? Surely not. Can it take eight years for two firms of advocates to communicate about whether or not an appeal should be filed or ought to have been filed? Surely not. In my considered view the delay of eight years in filing an application for extension of time is not justifiable for whatever circumstances. The submission by the respondent that the applicant had filed this application to prevent him from enjoying the fruits of his judgment is therefore not without merit. The merits of the intended appeal notwithstanding, the applicant has disentitled itself from exercising its right of appeal by its indolence. This court cannot exercise its discretion in favour of such an indolent applicant. The justice of this case demands that this court exercises jurisdiction in favour of putting a close to the dispute between the applicant and the respondent by dismissing this application.

The application for extension of time lacks merit. It is dismissed with costs to the respondent.

DATED at NAKURU this 19th day of May 2006.

L. KIMARU

JUDGE