



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 19 of 2005

RGNAPPLICANT

VERSUS

JRKNRESPONDENT

RULING

The applicant **RGN**, sought leave to appeal out of time from a decision of the Senior Resident Magistrate, Mrs. P. Gachohi, of Milimani Magistrate's Court, ordering him to pay Kshs.150,000/= p.m. **“from 30th April, 2004, and on 30th day of each succeeding month until final determination of the suit”**.

The application and indeed the whole file was referred to me from the Civil Division by the then Duty Judge Visram. I was then the Presiding Judge in the Family Division of the High Court.

I was not able to hear the application on the same day and directed the parties to take dates in the registry. However, the advocates representing the parties herein got into discussion and subsequently recorded the following consent order on 26.6.2005

- 1. “That the applicant (husband) do pay to the respondent wife a sum of Kshs.30,000/= p.m. with effect from 30th June, 2005, and thereafter on 30th day of each succeeding month, pending the hearing and determination of the application dated 17.6.2005”.**
- 2. “In default of any one payment as stated above, the respondent wife to be at liberty to execute the warrants issued in Divorce Cause No. 30 of 2004, Milimani Commercial (Magistrate's) Court.**
- 3. In the meantime, such warrants are hereby STAYED, till further orders of the court.**

The application was finally heard by me subsequently on a date which I gave to the parties. These details are in the court file.

Counsel for the applicant filed grounds of opposition stating that Richard who filed application seeking leave to appeal out of time has not shown sufficient cause to seek extension of time to file appeal out of time. That there had been inordinate delay, in him wanting to appeal against the Magistrate's order directing him to pay his wife maintenance of Kshs.150,000/= p.m. That the order was made on 20.4.2004, and since then he has not filed the appeal, so he is guilty of laches as he has demonstrated that

he is not interested in this matter. He has not been diligent in pursuing this matter. That he only came to appeal when his wife sought to execute the decree. Counsel prayed the court to have the application dismissed.

Mrs. Gakeri for RG submitted that the Magistrate in the lower court awarded JRKN maintenance of Kshs.150,000/= p.m., with no affidavit of means of either party being filed and scrutinized by the court. That this meant that the court had no evidence on which to base the sum it awarded of Kshs.150,000/= p.m.

That the matter in the lower court proceeded ex parte owing to the mistakes of M/s Betty Mwenesi, advocate who was representing Richard in the lower court. That the advocate filed a replying affidavit on the day of the hearing of the application for maintenance, and the court refused to accept it, and expunged it from the record. That Richard thereafter instructed this same advocate to appeal against the Magistrate's order awarding maintenance, but the advocate instead filed an application for Judicial Review in the High Court which was the wrong procedure. That the court nevertheless granted leave which it directed to operate as the "stay" and the substantive application was to be filed within 21 days i.e. on or before 5.6.2005 by the same advocates, Betty Mwenesi, but this was not done and "stay" order lapsed on 9.6.2005.

The advocate submitted further that her firm took over the matter in June 2005, after the stay order had lapsed. That on perusal of the court file, they discovered that there was now an accrued balance of maintenance over Kshs.1 million. He moved the court for leave to appeal out of time on 17.6.2005.

RGN's affidavit in support of the application for leave to appeal out of time is dated 17th June, 2005, filed in court the same day. It has 64 paragraphs and gives details of what happened in the case filed by his wife in the Magistrate's court which led to him being ordered to pay maintenance to his wife at a monthly sum of Kshs.150,000/= p.m.

Richard blamed his previous counsel for the predicament he found himself in. See paragraphs 36,37,38 and 39 particularly, of the said affidavit.

From paragraphs 42,43, 44 Richard denies owning a list of properties which his wife averred in her affidavit that he owns, and at para 45, he discloses what he refers to as his "**only source of income**", i.e. Themis Investment Ltd which he owns "partially" and which according to him is presently running at a loss.

In paragraph 47, 48, 49 and 50, Richard avers that he pays school fees for all his children who are in high costs schools. He also avers that his properties are mortgaged and he has to pay banks monthly. At para 53, he avers,

"That I sincerely cannot afford to pay Kshs.150,000/= p.m. or at all and if the order is not set aside, I will not be able to continue supporting my children whom I love and am trying my best to educate".

Finally at para 58 he avers,

"That the delay herein was caused by numerous mistakes and misapprehension of the law by my previous advocates whose mistaken should not be visited on me..."

Jane's replying affidavit supported the award of maintenance granted to her by the Magistrate. Her lawyer Ndungu submitted in reply to the submission's of Richard's lawyer, Mrs. Gakeri, that, Richard was aware of the Magistrate's ruling, and did nothing about it, so he is guilty of laches, as he should have instructed a lawyer to appeal from the Magistrate's order.

Mr. Ndung'u submitted that on two occasions in the lower court, Richard's lawyer made mistakes – i.e. the day she filed the replying affidavit out of time, causing it to be expunged from the record, by the

Magistrate, and again, the day that same advocate sent a letter to court to say that she assumed she filed the Notice of Motion in the Judicial Review case on time i.e. within 21 days as ordered by Nyamu, J.

Mr. Ndung'u said Richard was aware of all these and should have acted appropriately. He urged the court to dismiss with costs the application for leave to file appeal out of time, as no good cause has been shown why the appeal was not filed on time.

I have read the pleadings on the court file so far. Part of these are annexures of the lower court's proceedings which include the Notice of Motion application seeking maintenance of Kshs.256,000/= p.m., plus the affidavit in support thereof, as well as a replying affidavit of Richard, plus various annexures to that application, as well as the Magistrates Ruling.

I did not however, find Richard's affidavit of means, though Jane's supporting affidavit quantified her claim for maintenance.

I have also considered the affidavits the parties filed in this court, together with the submissions of both learned advocates.

From the submissions of Mrs. Gakeri, and the averments in Richard's affidavit, the reasons for the delay in filing the appeal is attributed to Richard's previous counsel.

Mr. Ndungu for Jane, admitted as much in his submissions when he said,

“On 2 occasions in the lower court, this advocate made 2 mistakes.....”

This being so, can the delay in filing the appeal on time be attributed solely to Richard? I would say no because his affidavit, as confirmed by submissions of both advocates show what his previous lawyer did and or failed to do.

I want to take Judicial Notice of the fact that there are sufficient legal decisions to the effect that a party cannot be punished for the mistakes of his/her lawyer. Mrs. Gakeri did not quote any such authority, but they do exist.

I note that Richard had given his lawyer instructions to proceed against the award of Kshs.150,000/= by the Magistrate. He thereafter had no control on how the lawyer handled the matter, he not being a lawyer himself.

I find that the circumstances of this case deserves intervention by this court and for that reason, I proceed to grant leave to Richard, the applicant in the application for leave, to file appeal out of time against the Magistrate's award of Kshs.150,000/= maintenance to his wife Jane.

The appeal must be filed and served within 21 days from today, and secondly and most important, the consent orders one to three recorded by the parties before me on 26.6.2005, will continue to remain in force, till further orders of the court.

This file to be transferred to the Family Division of the High Court, where the appeal if filed, will be heard by the Judges in that Division.

Dated at Nairobi this 9th day of June, 2006.

JOYCE ALUOCH

JUDGE