



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Appeal 41 of 2006

STEPHEN GITAU 1ST APPELLANT

BENSON KIARIE KARANJA 2ND APPELLANT

VERSUS

MURAGURI NDUGIRE RESPONDENT

RULING

The applicant in this Notice of Motion is Benson Kiarie Karanja was one of the defendants in Nakuru CMCC No. 585 of 2003. The applicant's application is expressed to have been brought under the provisions of order XLIX rule 5, order L rule 1 of the Civil Procedure Rules and section 79(a) of the Civil Procedure Act.

The applicant has sought for an order of enlargement of time within which to file the appeal and or the appeal filed herein be admitted out of time.

The grounds upon which this application is premised are highlighted in the body of the application and the same grounds are elaborated in further details in the applicant's supporting affidavit.

The gist of the matters deposed to in the said affidavit can be summarized as thus: The judgment in Nakuru CMCC No. 585/2003 was delivered on 19th December, 2005 and at that time the applicant states that he was out of the country on business and came back on 28th February, 2006.

The applicant depones that he was informed by his advocate that there was correspondence with counsel for the plaintiff regarding the cost of the suit up to February, 2006 but due to the fact that the award made was high, he intends to appeal and he has instructed his advocates to appeal but given the date of the judgment the leave of this court is necessary to enlarge the time.

This application was opposed by the respondent who raised the following principle issues in objection thereto:

Firstly, counsel for the respondent argued that the application is unmerited and judgment was delivered on 19th December, 2005 in the presence of counsel for the respondent and subsequent thereto various correspondence were exchanged between counsel for the applicant and the respondent as per the copies annexed to the application.

Secondly, the applicant who alleges to have been out of the country has not provided to this court any material to support his assertion. The applicant was blamed for failure to disclose the country he was

visiting, the travel document or ticket to enable this court exercise its discretion from an informed position.

Moreover counsel for the respondent submitted that a decision to file an appeal is usually made by the advocate, the application does not disclose good and sufficient cause to warrant the enlargement of time.

I am able to discern two issues from the application and arguments by counsel in support of the application namely;

1) *The applicant was out of the country until sometimes towards the end of February, 2006.*

2) *The applicant has an arguable appeal as the submissions by the defence were not considered and the award was too high.*

Time within which every appeal from a subordinate court to the High Court can be filed is provided for under section 79g of the Civil Procedure Act which is within a period of 30 days from the date of the decree. "Provided"

"That an appeal may be admitted out of time if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time"

The test to be applied and to be satisfied is that "good and sufficient cause" must be shown to entitle this court exercise its discretion in favour to the applicant (**see Nakuru Misc CA No. 541 of 2004, Murara Odidi vs Valley Bakery Ltd**).

In the present case, the applicant alleges he was out of the country when the judgment was delivered. The applicant has not brought any material to support this allegation by way of travel documents, or tickets. This is particularly important because this allegation is disputed by the respondent especially paragraph 10 of the replying affidavit. On paragraph 10 and 11 which states:

"That I have been advised by an auctioneer known as Kangethe Trading as Direct O. Auctioneers that at the request of my advocates he had embarked on tracing the properties of the applicant and that he did find that he was around, all along after delivery of the judgment."

The applicant had a duty to be candid and to assist this court by presenting all the relevant materials to show good and sufficient cause to entitle him to the orders sought.

On the last issue of the appeal being arguable, what is on record is only a memorandum of appeal. There is no copy of judgment or proceedings to enable this court establish whether there was a breach of the rules of natural justice as the applicant alleges his defence submissions were ignored by the lower court. Similarly on the award being high this court has no information upon which to make a determination of whether the award of damage were high.

In view of the above analysis, I find no merit with this application for extension of time and I hereby dismiss it with costs.

Dated at Nakuru this 7th day of July, 2006.

M. KOOME

JUDGE