



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

Misc Appli 343 of 2004

DAVID PIUS MUGAMBI & OTHERS.....PLAINTIFFS

V E R S U S

K.L.M. ROYAL AIRLINES & ANOTHER.....DEFENDANTS

R U L I N G

This Notice of Motion, dated 19/3/04 under Section 79G of Cap. 21, Laws of Kenya and Order 49 Rule 5 of the Civil Procedure Rules seeks this court's leave to appeal out of time, then costs.

It is supported by an Affidavit by Pius D. Mugambi and on the ground that the delay in filing the appeal was caused by the failure to obtain the proceedings and the judgment on time.

The Respondent opposed the application vide the Replying Affidavit of Esther Mukenye Ndosu, dated 24/4/04 and the submissions by the Respondent's counsel, Mr. Ogude.

Upon perusal of the pleadings herein and the submissions by Learned Counsel for both sides, on 21/6/06, this court dismissed the application with costs, but reserved the reasons to today.

The following are the reasons for the court's Ruling on 21/6/06.

The facts behind this application are critical for proper grasp of the court's Ruling on 21/6/06.

The applicants – David Pius Mugambi and Terry Kigetu Mugambi are husband and wife. David P. Mugambi is also an Advocate of the High Court of Kenya.

In March 2001, the Respondents instructed Meenye & Kirima Advocates to act for them and sue the Respondents herein. The Advocates carried out the instruction and filed Civil Case No. 1678 of 2001, which suit was heard on 14/5/02 and judgment delivered, in favour of the applicants on 27/6/02, awarding general damages of K.Shs.80,000/- in favour of the 2nd Applicant. The 2nd Applicant, Mr. Mugambi, avers that on that same day he told his advocates to file an appeal and not to accept the general damages awarded to the 2nd Applicant – his wife.

The applicant's Advocates applied for copies of the proceedings and judgment which were ready for collection on 23/12/02. IN July 2003, the 1st applicant discovered that their Advocates had demanded from the Advocates of the 1st Respondent the amount awarded to the 2nd applicant and had been paid the said sum in fully in July 2002. On 24/7/03, the 1st Applicant complained to the Police of what had happened and he was paid 93,000/- in full and final settlement of the claim and the sum awarded the 2nd applicant as general damages in the suit.

Then the Advocates filed Misc. Application 749 of 2003 to tax Advocates/Client Bill of Costs.

On 21/11/03 the 1st applicant applied for proceedings and judgment. Again on 16/2/04 the 1st applicant applied to be supplied such the pleadings to enable him file an appeal; he then collected the proceedings and judgment in February 2004 then filed the application herein for leave to appeal out of time, stating, as per his Supporting Affidavit that the delay in filing the appeal is due to the conduct of his former Advocates and the delay in obtaining the proceedings and judgment.

From the above facts, pleadings, and the submissions of counsel for both sides, I have no doubt in my mind that if there ever was an abuse of the court process, this ranks highest on such list.

Granted that order 49 Rule 5 of the Civil Procedure Rules gives this court the power to enlarge time; even when the prescribed time to appeal has long lapsed, that is where the applicant has a sufficient cause to warrant such grant. Here, that is not the case.

The applicant had accepted the decretal sum as final settlement of the claim -- the general damages -- awarded. The Respondent had fully paid and the appellant had accepted the payment as full and final settlement of the matter. I have no doubt in my mind that the moment the applicant accepted the said sum, the matter was closed and cannot be re-opened. Litigation must come to an end. I must also add that it would be highly prejudicial to the Respondent if the court were to re-open such a matter at this late hour. It would be manifestly unjust to the Respondent who paid in full and the money was accepted without any qualifications or conditions, not only by the Counsel for the applicants, but also by the applicant's themselves.

The judgment to be appealed against was delivered on 27/6/02. This application was filed almost two years down the line. That delay is by all standards inordinate, and in my view, unexplained. This is keeping in mind the following factors.

Extension of time within which to file and serve Notice of Appeal is discretionary to the Court.

The factors to be considered by the court before granting leave to appeal out of time, as held by the Court of Appeal in LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI -- Civil Application No. NAI 251 of 1997, cited with approval in Civil Application No. NAI 155 of 2002, CHARLES ORWE VS. JUSTUS MUNYINYI MACHARIA include the length of the delay and the reason for the delay, and lastly the chances of the appeal succeeding if the application is granted.

On the length of the delay, three months delay has been held to be long -- see SAMKEN LTD & ANOTHER V. MERCEDES SANCHEZ REV. TUSSEL & ANOTHER Civil Application No. 21 of 1999.

On the reasons for delay, the applicant falsely lays the delay on the doorsteps of the court when the truth, even by the applicants own affidavit, is that the proceedings and judgment were ready for collection on 23/12/2002. Yet this application was not made or filed till 19/3/04. That is over 1½ years.

On the chances of success of the appeal sought to be filed out of time, I see no way that such an appeal can ever succeed. In the first place, there should be, and there cant be, an appeal under the circumstances of the application before me.

Upon judgment by the Subordinate Court, the Plaintiff/applicant, and his counsel, demanded execution and the Defendant/Respondent paid the full decretal sum, which was accepted by both the Plaintiff and his Counsel. Under those facts, what would an appeal achieve even if this court were to grant leave to appeal out of time?

This court must not encourage the applicant in the belief that he can mislead other litigants that the case is all wrapped up, collected the decretal sum then turn round to file, not only a worthless appeal, but aided by the court in an endless chain of litigations on the same issue and facts.

All in all, and for the foregoing reasons, the Notice of Motion herein is dismissed with costs to the Respondent and against the applicant.

DATED and delivered in Nairobi, this 31st day of October, 2006.

O.K. MUTUNGI

JUDGE