

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Misc Appli 58 of 2005

ISAAC ANYULA KHATETE.....APPLICANT

VERSUS

1. WILSON FRANCIS ONJUNJI

2. JOSEPH KHALWENYI OMWALO.....RESPONDENTS

RULING

The Applicant, Isaac Anyula Khatete, made an application to this court on 17th July 2005 by way of Notice of Motion dated 13th August 2005 seeking leave of this court to appeal out of time against the judgement of the Chief Magistrate's Court at Kakamega (S. M. Kibunja Esq.) delivered on 26th June 2005 in suit Number Kakamega CMCC No. 38 of 1998 in which the applicant was the 1st Plaintiff and the two Respondents the 2nd and 3rd Defendants while the Attorney General was the first Defendant. It emerges from the application that the trial magistrate entered judgement in that suit against the 1st Defendant and dismissed the Applicant's case against the Respondents herein on the ground that it was time-barred against them.

The application for leave to appeal out of time was supported by an affidavit sworn by the Applicant on 13.8.2005. This is what emerges from the application. First, that after the judgement on 26-06-2005, the Applicant applied for the proceedings on 07/06/2005 and paid Shs.1,200/= as evidenced by receipt No.0100976 of that date; that the proceedings were not availed and have not upto now inspite of numerous visits to the court registry by the applicant to check for the same.

Although the 2nd Respondent did file grounds of opposition, he did not attend the hearing of the application. The averments made by the applicant were not controverted.

The period for lodging appeal is 30 days from the date of the judgement. That period elapsed on 27.7.05. However, the court has discretionary power to admit an appeal out of time if the appellat satisfies the court that he had good and sufficient cause for not filing the appeal in time. The applicant herein applied for the proceedings in good time. The lower court has failed up to now to furnish him with the proceedings. I am satisfied that the applicant had good and sufficient cause for not filing the appeal in time and the criterion set in the proviso to section 79G of the Civil Procedure Act, Cap 21, has been satisfied.

It is important to pay attention to rule 1A of Order XLI of the Civil Procedure Rules which clearly allows filing of Memorandum of Appeal without a copy of the decree or order appealed against. It also allows the filing of such decree or order as soon as possible thereafter and in any event within such time as the court may order. I allow the application and grant the applicant leave to file appeal within seven days from today by lodging in the civil registry of this court a Memorandum of Appeal together with the requisite court filing fees. A copy of the decree appealed against shall be filed within seven days of receipt of same by the Applicant from the court registry.

There shall be no order as to costs.

Dated at Kakamega this 30th day of November, 2006.

G. B. M. KARIUKI

J U D G E