

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC CIV APPLI 180 OF 2006

JOSEPH MAYODI ADENYA:.....APPLICANT

VERSUS

HERMAN DENNIS LUSULI:.....RESPONDENT

RULING

This an application for leave to file an appeal out of time. It is made under the provisions of Section 79 G of the Civil Procedure Act and Section 3A of the Civil Procedure Act.

The Judgement in Eldoret CM.CC.No.359 of 2003 was delivered on 8th March,2004. It was in favour of the present applicant against the Respondent. The Applicant claims that by the time he learnt of the judgement it was outside the time limited to file any appeal. He said that he was dissatisfied with the award on general damages which he felt was on the lower side. He instructed his advocates, M/S Kitiwa & Company to lodge an appeal against the said judgement.

The Applicant does not disclose when he learnt of the judgement and when he instructed his advocates to file the appeal. What is clear is that the said advocates lodged an appeal out of time. It was subsequently withdrawn.

The respondent opposed the application on the grounds that the application has been brought after an inordinate delay of two years after judgement.

I have considered the application, the replying affidavit and submissions by counsel.

A delay of two years to file the application for leave to file the appeal is certainly an inordinate delay. Was there a good and sufficient cause for not filing the appeal in time to warrant this court exercising its discretion in favour of the Applicant?

First and foremost, the Applicant does not disclose the circumstances and dates to justify the delay. Secondly, the Applicant has deliberately attempted to suppress material facts which are evident from the face of the record. The truth is that the Memorandum of Appeal which he filed was dated 30th March,2004. It was dated well within the requisite period and the Applicant could have filed the same on or before 8th April,2004. His advocates who drew the memorandum of Appeal did not lodge the appeal within the requisite 30 days. They filed the appeal,(civil Appeal No.60 of 2004) outside the requisite period. This was conceded by the Applicant's counsel during submissions. The same was withdrawn when faced with an application to strike it out.

The Applicant has not been candid. He should have been sincere and sought the indulgence of the Court. He did not and attempted to achieve his desire by non-disclosure and suppression of the true facts.

For the said reasons, the application herein has no merits whatsoever. It is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF NOVEMBER,2006

M.K.IBRAHIM

JUDGE