



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

(NAIROBI LAW COURTS)

MISC APPLI 809 OF 2006

JOSEPH OLOLCHOKIAPPLICANT

VERSUS

**ANATASIA SELEMPO & GERALD SELEMPO (suing as the legal representatives of the
Estate of the ROBERT SELEMPO (DECEASED)).....RESPONDENTS**

RULING

This is an application by way of Notice of Motion in which the applicant seeks leave to file appeal out of time. The application is based on the ground that leave was granted to the applicant by the subordinate court to appeal, that instructions to appeal were delayed by the defendant/applicant, and that by the time instructions were received the time to file appeal had expired.

The application is also supported by an affidavit sworn by the applicant in which he avers that the application filed by the applicant to strike out the plaintiff's suit was dismissed by the court and no reasons were given.

The plaintiff had sued the defendants for damages in the Chief Magistrate's Court in CC NO. 846 OF 2002. The claim arose as a result of a traffic road accident which had occurred along MAI MAHIU – NAROK ROAD on or about the 17th December 2000 involving motor vehicles registration No. KAJ 346K which collided with motor vehicle registration NO. KAL 414Q. The deceased ROBERT SELEMPO was traveling in motor vehicle registration NO.KAJ 346K as a lawful passenger.

The plaintiff brought this suit against the defendants as the legal representatives of the estate of the deceased. This suit was filed on 17th May 2002. The 1st defendant who was the registered owner of motor vehicle registration NO. KAJ 346K brought an application by Chamber Summons dated 26th July 2006 seeking orders to dismiss the plaintiff's suit dated 6th May 2002. The application was based on the ground that the verifying affidavit and that the suit was filed out of time without leave of the court.

There were two issues raised by the applicant in the application before the trial magistrate in the application which was dismissed and is now the subject of this intended appeal. First that the verifying affidavit was defective in that it was sworn by the plaintiff's jointly. The provisions of the Civil Procedure Rules are very clear on this issue.

This is a defect which is curable. Order 18 R 7 provides thus:-

“7” The court may receive any affidavit for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularities in the form thereof.”

The other issue which was raised was that the suit was filed out of time without leave of the court. The cause of action arose on or about the 17th December 2000 and the suit was filed on 17th May 2002. This is a period less than 3 years and therefore the suit was filed within time and leave was not necessary.

The application to strike out the suit was dismissed by the trial magistrate and the hearing proceeded. After the plaintiff had closed his case, and the defendant required to lead evidence in his defence he preferred to come to this court with the instance application for leave to file appeal out of time and in the meantime stay the proceedings before the Chief Magistrate’s Court.

Miss Kamau for the Applicant submitted that immediately the trial Magistrate delivered his ruling, the applicant applied for leave to appeal against that ruling but appeal could not be filed on time because the applicant did not give his instructions to appeal in time. She further submitted that the intended appeal has high chances of success. Mr. Mbugua for the respondent opposed the application and submitted that the intended appeal has no chances of success and the intended appeal is just meant to delay the hearing of the suit. The suit was filed about 4 years ago and when it came up for hearing, the applicant participated until the plaintiff closed his case and when the defendant was asked to give evidence in his defence, he decided to resort to these tactics of delay. The grounds he gave for the striking out of the suit were not tenable and the application was properly dismissed.

Further this application was filed over 4 months after the ruling was delivered.

I agree that there was inordinate delay in bringing this application which is not explained and as I had stated earlier the applicant has not shown that he has arguable appeal.

For the above reason the applicant’s Notice of Motion dated 23rd October 2006 is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 1st day of November 2006.

J.L.A. OSIEMO

JUDGE