



REPUBLIC OF KENYA

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

Civil Suit 4140 of 1990

GEORGE GIKUBU MBUTHIA.....PLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE CO. OF KENYA LTD.... DEFENDANT/RESPONDENT

RULING

The plaintiff's Notice of Motion dated 21st December, 2004, filed on 22nd December, 2004 was brought under Order XLIX, rule 5 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21). The application carries one substantive prayer: *"THAT, this Honourable Court do enlarge time within which the applicant can file and prosecute an application under section 75 of the Civil Procedure Act and Order XLII, rule 1(3) from 14 days."*

The application is premised on the following grounds:

- (a) the Court's ruling on a preliminary point, which was given on 24th November, 2004 was delivered without notice;
- (b) the ruling date indicated had been 19th November, 2004, but on that occasion the ruling was not given;
- (c) the plaintiff had learned of the delivery of the ruling from the defendant's advocates on 3rd December, 2004, and on that very day, and timeously, the plaintiff lodged an appeal;
- (d) the plaintiff's request for a copy of the ruling was not responded to by the Registry until 20th December, 2004;
- (e) enlargement of time will not cause injustice to the defendant.

The plaintiff, on 21st December, 2004 swore a supporting affidavit in which he avers that he had timeously lodged Notice of Appeal on 3rd December, 2004 and on the same day applied for proceedings. The content of the affidavit largely coincides with the grounds that form the basis of the application.

In the submissions, the plaintiff has restated the point that *he was not in Court when the ruling of 24th November, 2005 was delivered; and it is this which has occasioned the need for him to have the time for lodging his appeal enlarged.*

The specific question before me is whether the plaintiff was unable to apply for an order to facilitate his intended appeal because he was not in Court to do it, and he was not in Court because the ruling was delivered without notice. Is that a true fact? **Mr. Mbuthia** has stated so, in his grounds in support of the application, and in his supporting affidavit. It is a matter of fact to be deponed to, rather than to be presented in a generalised manner. I must therefore only look to the depositions, in that regard.

Learned counsel for the respondent, **Mr. Muriithi**, contested the admissibility of **Mr. Mbuthia's** supporting affidavit, for not complying with sections 34 and 35 of the Advocates Act (Cap. 16). It does not state who drew the document, or who filed it.

This point was not at all contested by **Mbuthia**. He did not, I believe, because the law regarding affidavits is quite clear. Although it is possible for the Court to make orders curing a defective affidavit by virtue of Order XVIII rule 7 of the Civil Procedure Rules, this corrective avenue does not apply to affidavits which offend against sections 34 and 35 of the Advocates Act (Cap. 16), for those provisions of the Advocates Act have a specific mischief to circumvent, and indeed their terms are buttressed by criminal sanctions. An affidavit is a solemn document of evidence to enable the Court to arrive at the truth. It must, therefore, comply with the requirements of sections 34 and 35 of the Advocates Act (Cap. 16).

It follows that I must accept the submissions of counsel for the respondent, and strike out the applicant's supporting affidavit sworn on 21st December, 2004. And the moment I strike out that affidavit, as I hereby do, the question is, what is the fate of the plaintiff's Notice of Motion of 21st December, 2004?

Mr. Muriithi has himself sworn a replying affidavit, dated 7th February, 2005 and he says he met the applicant sometime on the day the ruling of 24th November, 2004 was delivered. He goes on to depone (para.6)

“THAT, I said hullo to him; we then exchanged a few pleasantries, and even wished each other luck at the ruling, before he waved me on saying that he would be joining me briefly before the Honourable Judge's Chambers No. 18 where his preliminary objection was heard.”

Mr. Muriithi further avers that the plaintiff did not arrive as expected; but in the meantime the Judge, the **Honourable Lady Justice Mugo**, personally came out of her Chambers and spoke to the advocates there waiting. She excused herself on the delay, and stated that she had stood over the rulings due, till 24th November, 2004, as she had a personal emergency to attend to. All advocates present excused the learned Judge, and agreed to her request. **Mr. Muriithi** deponed that just after he left the foyer of the Judge's Chambers, he met the plaintiff and duly advised him of the changes regarding the delivery of the ruling in question. The deponent avers that the learned judge later, on 24th November, 2004 as earlier arranged, gave her ruling.

What is the factual position? Since I have, on account of the binding law, struck out the applicant's affidavit, it follows that I cannot accept his position regarding the failure to make the necessary application before the Judge, for the lodgement of an appeal. There is no reason, in the circumstances, to doubt the account given by **Mr. Muriithi**, on the events surrounding the delivery of the ruling of 24th November, 2004.

Mr. Mbuthia did argue that since he was acting as the applicant *in person*, the requirements of sections 34 and 35 of the Advocates Act (Cap.16) on the form in which affidavits must be drawn up, had no application to him. Since I have stated that the form in which sections 34 and 35 of the Advocates Act are couched creates mandatory obligations, I am unable to agree that they would have an exception for affidavits sworn by parties acting by and for themselves. I have to note, further, that no authority was cited for the novel construction advanced by **Mr. Mbuthia**; and I saw no cogency in his standpoint. Therefore the position must remain, that the applicant's affidavit cannot be accepted as a valid document in these proceedings.

On the basis of the evidence before the Court, **Mr. Muriithi** for the respondent submitted that the applicant had not acted in good faith, and that his application was merely frivolous and vexatious.

In his response, **Mr. Mbutia** contended that, regard must be had to the content of s.66 of the Civil Procedure Act (Cap. 21); and he stated that this section “allows me to appeal against a decision that is against me.” He then cited the provision of Order XLII, rule 3:

“Applications for leave to appeal under section 75 of the Act shall in the first place be made to the Court making the order sought to be appealed from, either informally at the time when the order is made, or within 14 days from the date of such order.”

He contended that unless the 14-day period is extended, then he, the applicant, will be unable to obtain leave to appeal and so he cannot exercise his right of appeal by virtue of s.66 of the Act.

The Court very well appreciates the importance of the applicant’s desire to appeal, and would not place inappropriate restrictions on his right of pursuing an appeal. But at the same time, the Court must apply the law as duly enacted. The evidence before me shows that the plaintiff would have made an application, had he wished to, before the **Honourable Lady Justice Mugo** on 24th November, 2004; but he elected to miss that opportunity. After he missed that opportunity, he ran out of time allowed by law for seeking leave to appeal. He was time-barred, by law; and the time-bar could only have been reviewed if he made a proper case, founded on cogent evidence. The evidence he sought to rely on, was in the form of inadmissible depositions. Therefore, he has no cogent case placed before the Court; and accordingly, there is no basis for opening up the appellate procedures, to enable him to move the Court and, if allowed, to lodge his appeal. These procedural steps are the essential keys to the legal process, that unlock the doors leading to the Court of Appeal.

The applicant’s Notice of Motion dated 21st December, 2004 is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED and DELIVERED at Nairobi this 4th day of March, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Defendant/Respondent: Mr. Muriithi, instructed by M/s Kibuchi & Co. Advocates

Plaintiff/Applicant in person.