

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Misc Civil Appli 57 of 2004

ELIJAH SIMIYU MURENGA APPLICANT

VERSUS

NICHOLAS M. SHISUNDI RESPONDENT

RULING

The applicant, Elijah Simiyu Murenga, seeks in his application by Notice of Motion dated 18-8-2004 orders that

(1) “Leave be granted to file and serve a Notice of Appeal and Memorandum of Appeal out of time and that

(2) the notice of Appeal and Memorandum of Appeal be deemed properly filed as annexed.”

The application is premised on Order 41 Rule 5 of the Civil Procedure Rules (which is not relevant) and is supported by the Applicant’s affidavit sworn on 18-8-2004. The correct provision is the Proviso to Section 79G of the Civil Procedure Act Cap.21.

The Respondent filed grounds of opposition dated 9.9.2004 in which he contended that the application was bad in law due to laches, and that delay was not explained and that no sufficient cause had been shown for the orders sought.

The intended appeal is from the Ruling delivered on 24-9-2003 by the Chief Magistrate court at Kakamega in civil suit No.589 of 2000. That ruling determined an application brought under order XLIV of the Civil Procedure Rules in which orders had been sought for variation, setting aside, or review of orders of that court dated 24-3-2003 which had dismissed the suit for want of prosecution. Under Order XLII Rule 1(1) (aa) of the Civil Procedure Rules, the Applicant was entitled to appeal against the decision contained in the Ruling of the Chief Magistrate as of right. He did not. His application for leave to appeal is therefore misplaced. Can he be granted an order to appeal out of time?

In his affidavit in support of the application, the applicant does not state if he was present in court when the Ruling was delivered on 24-9-2003. He does not disclose in his affidavit when he came to learn that the ruling had been delivered. He does not disclose also who his advocate was and why he or his advocate did not file appeal within 30 days as required by Section 79G of the Civil Procedure Act, Cap 21. The Applicant does not also disclose when he instructed his present advocates nor does he state when they informed him that the time for filing appeal had elapsed. The applicant is silent too on the date when the ruling applied for on 1-7-2004 by his present advocates was received. When he argued the application on 12-4-2004 before me, Mr. Kuloba, learned counsel for the Applicant, stated from the Bar that the applicant instructed his firm sometime in December 2003. He did not explain why it took a whole eight months to make the application (on 19-8-2004) nor did the applicant allude to the cause of this delay in his supporting affidavit. I agree with the learned counsel for the Respondent, Mr. Nyikuli, that the applicant failed to show sufficient cause why appeal should be allowed out of time. The application hopelessly lacks merit. I observe that although the Civil Procedure Rules, unlike the Court of Appeal Rules, do not provide for or require the giving of Notice of Appeal, Counsel for the Applicant was under a misapprehension that there is such requirement in the High Court hence the prayers in the Applicant’s

Notice of Motion. Ostensibly the Applicant was in a slumber for a long time and woke up too late and his decision to appeal seems to be an afterthought. There is absolutely no merit in the application and I cannot but dismiss it with costs to the Respondent. It is so ordered.

Dated at Kakamega this 24th day of June, 2005.

G. B. M. KARIUKI

J U D G E