



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT NAKURU

Misc Civ Appli 541 of 2004

MAURICE OBONYO ODIDA .....APPLICANT

VERSUS

VALLEY BAKERY LIMITED ..... RESPONDENT

RULING

This is an application for leave to file an appeal out of time. It was made on the grounds that:

1. *the time for its filing has passed by about twenty days.*
2. *the delay in filing the appeal was occasioned by breakdown in communication between the applicant and his counsel.*
3. *the applicant has applied for certified copies of proceedings and judgment.*
4. *the applicant has a sound appeal with high chances of success.*
5. *the applicant stands to suffer great prejudice if the order is now allowed.*

The application was supported by an affidavit sworn by the applicant. As per his depositions therein, the judgment sought to be appealed against was delivered on 7<sup>th</sup> October, 2004 and his advocate informed him about it two weeks thereafter and he informed his advocate that he intended to appeal against the same. He said that they “*were speaking on phone and could not conclude the matter.*” He did not state where each one of them was at that time, he only said that his village had no network and had to travel to Homabay to make calls to his advocate. The applicant’s postal address is P.O. Box 144 Ndhwa and perhaps that is the place he was referring to as having no network.

He further stated that it took him some time to raise money to file the intended appeal and by the time he got the money time had run out.

The application was opposed by the respondent who filed grounds of opposition thereto. It was stated that no good reasons had been given as to why the appeal was not filed within the prescribed period of time. It was further stated that the applicant was not diligent and that the intended appeal was a mere after thought and an mischievous attempt by the applicant to procrastinate the respondent from the enjoyment of the fruits of its success at the trial.

In an application of this nature, the applicant has to satisfy the court that he had a good and sufficient cause for not filing the appeal in time.

Mr. Gai for the applicant cited a Court of Appeal decision in **WASIKE VS SWALA [1984] KLR 591** where it was held that a person applying for an extension of time within which to serve or institute an appeal had to account satisfactorily for the delay in filing his appeal.

Mr. Musangi cited several authorities in his submissions in opposition to the said application.

Having carefully considered the grounds that were advanced by the applicant in seeking extension of time, I am not satisfied that good and sufficient cause has been shown as would entitle this court to exercise its discretion in favour of the applicant. The issue of communication break down due to poor telephone network is unacceptable. It was not stated that the applicant was prevented by anything from travelling to his advocate's office to give him instructions to file an appeal, if at all he was a diligent litigant. The decision as to whether one is to file an appeal or not is taken after perusing the judgment and assessing the chances of success of an intended appeal based on the contents of the judgments and the reasoning of the trial court and this cannot adequately be done through telephone, the intended applicant may have to discuss the issue with his advocate in a more elaborate manner.

Secondly, the argument that the applicant was looking for money so as to instruct his counsel to file an appeal is not good enough. It is common knowledge that one has to spend some money in filing an appeal and a diligent litigant will not wait for the out come of a matter before he starts looking for funds to file an appeal. And in any event, this is an issue which could have been explained in greater details if indeed the applicant sought to rely upon it. For example, he should have stated how much was required for filing the intended appeal and explained his financial status so that the court can assess whether the amount that was required was so high compared to the applicant's financial standing such that it can be determined whether it was truly an uphill task for him to raise the same within the limited period of time. The applicant in this case said that he was notified of the judgment two weeks after its delivery, presumably there were two more weeks to go before the statutory period of thirty days expired. What efforts did the applicant make to raise sufficient funds for filing the appeal within that time? A party who desires the court to exercise its discretion in his favour has to be open and candid to the court without withholding such information and/or details as may cause the scales of justice to tip in his favour.

In the circumstances of this case, I find that there was inordinate delay that was not sufficiently explained. I therefore dismiss with costs the applicant's application dated 30/11/2004.

DATED, SIGNED & DELIVERED AT Nakuru this 29<sup>th</sup> day of July, 2005.

D. MUSINGA

JUDGE

29/7/2005