



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Case 161 of 1991**

**TARACISIO N. KATHIGA ..... PLAINTIFF**

**VERSUS**

**VACU-LUG TRACTION TYRES LTD ..... DEFENDANT**

**RULING OF THE COURT**

The application before me is the Notice of Motion dated 7.5.2003 brought under Order 42 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and all other enabling provisions of the law. The application is for orders:-

- (a) That this honourable court do grant the applicant herein leave to appeal against its ruling dated 4th December 2000.
- (b) That costs of this application be provided for.

The application is premised on the grounds that:-

- (a) The application upon which the ruling dated 4th December 2000 as based, was an application brought under Order 44 Rule 1 of the Civil Procedure Rules –

which application sought review of this court's prior orders of 24th February 1997.

- (b) The said application was dismissed and the applicant being aggrieved by the same seeks to appeal against it but under the Civil Procedure Rules, an appeal does not lie as of right against a ruling based on the said order.

- (c) The interests of justice demand that the applicant be granted leave to appeal against the said ruling.

The application is also supported by the affidavit made and sworn by Joe Kathungu, advocate for the plaintiff/applicant dated 7.5.2003. the deponent has deposed that the applicant's earlier application dated 11.12.1999 which application sought a review of the court's orders dated 24.2.1999 which dismissed this suit for want of prosecution was dismissed. That the application dated 11.12.1999 had been brought under Order 44 Rule 1 of the Civil Procedure Rules. That upon receipt of instructions from the plaintiff/applicant to appeal against the court's order of 24.2.1999, the court file went missing and the same was not confirmed available until 13.2.2004 as evidenced by annexures "JKI" and "JK2" to the supporting affidavit. That an appeal under Order 42 of the Civil Procedure Rules does not lie as of right

hence this application. The defendant/respondent has opposed the application on the basis of six (6) grounds of opposition filed in court on 3.9.2003. The main grounds are that the application does not comply with the mandatory provisions of the Civil Procedure Rules in general and in particular the provisions of Order 42 Rule 1 (4) relating to the making of such applications and secondly that there has been inordinate delay on the part of the applicant in bringing this application. The application is also opposed on the grounds that the court ought not to be used as a vehicle to aid the indolent and that the applicant does not have a prima facie case with a probability of success. And finally, the application is opposed on the ground that the same is an abuse of the process of the court.

The facts of this case can be given briefly. The plaintiff/applicant filed his plaint on 9.5.1991 seeking compensation under the Law Reform Act for fatal injuries sustained by Kathiga Kanyaki (deceased) in a road traffic accident which took place on 17.6.1988 involving the deceased and the defendant's motor vehicle registration number KZA 490. As the second page of the plaint is missing from the court file, this court is unable to establish the particulars of the reliefs sought. Issues were agreed and duly filed in court on 15.5.1992. Earlier, on 14.11.1991, the defendant filed its defence in which it denied that an accident occurred on 17.6.1988 and in the alternative, averred that if the alleged accident occurred, then it did so due to the sole negligence of the deceased Kathiga Kanyaki as particularised therein.

For reasons that are not clear from the court file, the plaintiff's suit was dismissed on 24.2.1997 for want of prosecution. Although there is an order dated 24.11.99 referring to the order of 24.2.97, the court record does not contain the order of 24.2.97. On 15.12.99 the plaintiff/applicant filed a Notice of Motion application under Order 44 Rule 1 (b) of the Civil Procedure Rules in which the applicant sought the following orders:-

1. That this honourable court be pleased to review its order of 24th February 1997.
2. That the applicant's suit be reinstated.
3. That costs of the application be provided for.

The application for review was premised on the grounds:-

- (a) That the order dated 24th February 1997 dismissing the plaintiff's suit was erroneously made.
- (b) That the parties herein were never served with any notice of such dismissal.
- (c) That this file has been missing in the registry for a long time.

That application was also supported by an affidavit made and sworn by Joe Kathungu, advocate for the plaintiff/applicant in which it was deposed that he only learnt of the order dismissing this suit on 9.1.98 when they filed their application dated 22.5.1997. That they had made efforts on several occasions to have the matter fixed for hearing to no avail in the years 1994 and 1995,. That following the establishment of the High Court Registry in Embu in 1995, he sought to have the file transferred to Embu but that instead of responding to their letter requesting for transfer of the case to Embu the court file herein got lost and only resurfaced on 9.1.98 when they were now able to file the application dated 22.5.1997. That despite all diligent efforts to have the case fixed for hearing the same never took off.

The application for review was opposed vide the replying affidavit made and sworn by Haron Muchiri Gathoni, advocate for the defendant/ respondent. It was averred therein that the suit herein was dismissed for want of prosecution on 24.7.97 and that it took the applicant nearly two years to decide what action to take, and that whatever action was allegedly taken was taken way back in 1995. That even if the court file had truly gone missing, the applicant should have made efforts to reconstruct the court file to enable him move on with the case. It was also deposed that the application was brought in bad faith and only intended to harass the respondent.

That application was of course refused by the court's ruling dated 4.12.2000 hence the present application. The issue for determination is whether the applicant has made out a case for the reliefs

sought.

I have carefully considered the reasons advanced in favour of the application, the grounds of opposition thereto and the law. I have also carefully perused the court record and all the circumstances surrounding this case. At the outset, I note that both the plaintiff and the defendant have not been the most vigilant litigants. I also note that there are gaps in the court record which make it difficult for me at this time to confirm under what circumstances certain orders were made and particularly the order dismissing this suit for want of prosecution. I have not seen anything on the record to confirm that the parties were duly notified to show cause why the suit should not be dismissed. In the case of **Kirtee B. Patel V. Fredrick Waweru and 2 others** Nairobi Court of Appeal Civil appeal Application No. 247 of 2002, the Court of Appeal, relying on their earlier decision in the case of **Leo Sila Mutiso V. Helen Wangari Mwangi** Civil Application No. NAI.251 of 1997 (unreported) restated the principles applicable when a judge is called upon to exercise his discretion on an application for extension of time for appealing in the following passage:-

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly, (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”**

Mr. Kathungu for the applicant urged this court to find that the above authority cited to the court by Mr. Mugambi for the respondent was irrelevant, but with respect to Mr. Kathungu this case law is not only important but is also relevant to the facts before me.

It is not in dispute that it took the applicant a long time before bringing this application. It is however clear to me that the applicant has placed enough material before me to explain what would otherwise amount to an inordinate delay. The court file went missing for a long time between the year 1999 and 2003. In the circumstances, I am persuaded that the applicant should not be shut out unheard.

What are the chances of the intended appeal succeeding? I have already stated that the court record is not clear as to the circumstances under which the dismissal order was made. It is also on record that while the suit was already ordered dismissed, the court still proceeded to hear certain applications, to wit an application for substitution of the plaintiff. All these factors put together would amount to what I consider arguable grounds on appeal.

In this case therefore, I find that the delay on the part of the applicant can be attributable to the absence of the court file as I have stated earlier. I have also considered the degree, if any, of prejudice to the respondent if the application is granted. In my considered view, the respondent will not be prejudiced by an order granting the applicant's application. It will be upon the applicant to prove every allegation that he makes. If he fails to do so, the respondent will be paid its costs, which I believe would be sufficient compensation in the circumstances.

For the reasons I have given above, the applicant's application is allowed. And so that the applicant does not go into some slumber again, he shall have fourteen (14) days from today to file his appeal. The respondent shall have the costs of this application.

It is so ordered.

Dated and delivered at Meru this 28th day of July 2005.

**RUTH N. SITATI**

**JUDGE**

28.7.2005