



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT ELDORET

Misc Civil Appli 87 of 2004

**SAINA CHERUIYOT ..... APPLICANT**

**-VERSUS**

**FREDRICK OUMA OMONDE .....RESPONDENT**

**RULING**

This is an application by way of Notice of Motion by Messrs. Kalya and Company Advocates on behalf of the applicant. It is purported to be brought under Section 3 and 3A as well as section 63e and 79G of the Civil Procedure Act (Cap.21); and under Order XLIX rule 5 and Order XXI rule 25 of the Civil Procedure Rules. It is dated and filed on 19th May 2004. It seeks for four orders two of which have been spent -

- a) (Spent)
- b) (Spent)
- c) **This honourable court be pleased to enlarge time within which the applicant can lodge an appeal in Eldoret CMCC. No. 69 of 2001.**
- d) **Costs be provided for.**

The application has grounds on the face of the Notice of Motion and is supported by an affidavit sworn by Saina Cheruiyot, the applicant, on 19th May 2004. The application is opposed and a replying affidavit sworn by William Ndinya Omollo advocate for the respondent on 22nd September 2004 was filed. The grounds of the application are that the applicant did not lodge the appeal within 30 days from the decree, that the applicant was not notified of the judgement immediately after delivery; that the court has jurisdiction to make the orders sought; and the applicant has an arguable appeal which raises triable issues.

At the hearing of the application Mr. Shivaji for the applicant submitted that the applicant has explained the reasons for the failure to appeal within time, which was because of two factors. Firstly, he was not aware that judgement had been delivered. Secondly, after knowing that judgement had been delivered he instructed a new advocate to represent him for purposes of appeal. At that time, he was not able to pay instruction fees to the new advocate, and the advocate declined to take up the matter unless the fees was paid. He submitted that the draft memorandum of appeal, which was annexed to the supporting affidavit as annexure SC3, showed that the applicant was challenging both the liability and quantum of damages. Therefore, the applicant had an arguable appeal. The applicant was also willing to abide by any conditions of the court, including depositing the decretal amount in a secure account as security.

Mr. Esikuri for the respondent opposed the application. He submitted that the applicant was all along aware of the subject judgement. The applicant or his counsel should have attended court to take judgement on 22nd November 2004. He submitted that this court had discretion to enlarge time for filing an appeal, but that discretion must be exercised on sound reasons. He sought to rely on the case of **Jayantkumar Shah –vs- Midco Holdings Limited – Nairobi Civil Application No.63 of 2000 (unreported)**. He also sought to rely on the case of **Municipal Council of Thika –vs- Local Government Union – Nairobi Civil Application No.41 of 2001 (unreported)**. that litigation must be conducted seriously. He also sought to rely on the ruling in the case of **Joseph Musili Kamuti –vs- Collins Karani Soyo – Eldoret High Court Misc. Application No.204 of 2003**. He further stated that

the applicant had not yet applied for copies of the proceedings to show his seriousness in the appeal.

This court has discretion to grant enlargement of time to file appeal. However, that discretion is to be exercised on sound judicial reasons not on caprice or sympathy. In an application such as the one before me, the reasons given for the delay in filing appeal are very important in convincing the court to grant the extension of time to file an appeal. The burden is on the applicant to give the explanations for the delay (See **Joseph Musili Kamuti –vs- Collins Karani Soyo – Eldoret High Court Misc. Civil Application No.204 of 2003.**

In our present application, the applicant swore a supporting affidavit dated 19th May 2004. The reasons given for delay are that judgement was delivered on 28th October 2003 without his counsel's advocate. He depones that there was a letter from Messrs. Nyairo and Company Advocates dated 9th December 2003 informing him that judgement was delivered without the counsel's notice; and in their absence. That he approached Messrs. Kalya and Company Advocates and was informed that time for filing appeal had lapsed and that Messrs. Kalya and Company Advocates needed to be put them in funds first before filing this application. That it was on 18th March 2004 that he managed to pay the advocates Kshs.30,000/=.

I have perused the letter from Messrs. Nyairo and Company Advocates dated 9th December 2003 and annexed to the supporting affidavit as "SC1". That letter does not indicate whether judgement was to be on notice to the parties or their counsel. It also does not indicate the date when Messrs. Nyairo and Company Advocates became aware of the judgement. Therefore, in my view, there is no satisfactory explanation for the delay of the period between 28th October 2003 to 9th December 2003, which is more than 30 days. Secondly, the affidavit does not indicate when the applicant approached the new advocates Messrs. Kalya and Company Advocates and was advised to put them in funds. The only date that is mentioned is 30th March 2004 when Messrs. Kalya and Company Advocates acknowledged receipt of Kshs.30,000/= vide a receipt annexed to the supporting affidavit as "SC2". The applicant depones in his supporting affidavit that he received the letter dated 9th December 2003 from Messrs. Nyairo and Company Advocates on 30th January 2004. Therefore, in my view, there is no explanation for the period between 30th January 2004 to 12th March 2004, which is another period of more than 30 days. This application was also filed on 19th May 2004 which is another delay of more than two months from 12th March 2004 when fees was paid and receipted. No explanation has been given for that inordinate delay.

I have seen the draft memorandum of appeal which challenges both liability and quantum of damages. However, in my view the applicant has not discharged his burden of explaining the delay between the date of judgement to the date that Messrs. Nyairo and Company Advocates became aware of the judgement, the delay between 30th January 2004 to 12th March 2004 when payment was made to Messrs. Kalya and Company Advocates and the delay between 30th March 2004 to 19th May 2004 when the application was filed. That delay, cumulatively, amounts to more than 3 months. In my view, that is an inordinate delay, for which no explanation was given.

In the circumstances of this case, I find that the applicant has not been able to explain the inordinate delay of more than three months, and I therefore dismiss this application with costs to the respondent.

**Dated and delivered at Eldoret this 25th day of July 2005.**

**George Dulu**  
Ag. Judge

**In the Presence of: Mr. Simiyu for the applicant**