



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

**Misc Civ Appli 178 of 2003**

**EUGENE WASWA.....APPLICANT**

**VS**

**CHRISTOPHER SIMIYU.....RESPONDENT**

**RULING**

On the 27th day of September 2002 the learned Senior Resident magistrate sitting at Webuye gave judgment in favour of Eugene Waswa, the applicant herein as against Christopher Simiyu, the Respondent in this matter. He was awarded a sum of Ksh.260,000/= as general damages and Ksh.1,500/= being special damages for injuries the applicant suffered when motor vehicle registration number KYS 067 registered in the name of the Respondent knocked him down while walking as a pedestrian along the road between Bungoma and Kanduyi on 17.7.2000. The applicant was however found by the trial Court to be 80% liable for contributory negligence.

The applicant is aggrieved and is now before this Court seeking for leave to appeal out of time under section 79 G of the Civil Procedure Act and under Order XLIX rule 5 of the Civil Procedure Rules. The applicant's advocate argues that it took time to get instructions from the applicant because he was not notified of the judgment date. It is also alleged that the trial Court did not provide the applicant with the proceedings within time.

On his part, Mr. Ocharo who appeared for the Respondent resisted these grounds as lacking in merit. He invited this court to peruse the record which in his view revealed that the applicant's counsel was represented at the time of delivery of judgment by Mr. Kraido. Mr. Ocharo further pointed out that the applicant and his counsel were aware of the existence judgment, because a bill of taxation was filed within 17 days after the delivery of the judgment.

I have considered the grounds argued by both learned counsels. The discretion to extent time donated to this court under section 79 G of the Civil Procedure Act is wide and unfettered. However a party must show that he has good and sufficient cause for not filing an appeal in time. I have perused the material placed before me. It shows that Mr. Wanyama, the applicant's advocate was present in court on 13.5.2002 when the trial Senior Resident magistrate fixed a judgment date for 27.9.2002. It is admitted that Mr. Kraido advocate held brief for Mr. Wanyama for the applicant when judgment was delivered on 14.3.2003. It cannot therefore be true that the applicant's advocate was not aware of the judgment. In fact the plaintiff (Applicant) filed a bill of costs dated 1st April 2003 about 17 days after the delivery of judgment. By a consent letter dated 5.5.2003 costs was taxed at Ksh.24,000/= and a stay of execution of 30 days was given by consent.

The plaintiff to say the least is not candid to this Court. His advocate has sworn a false affidavit which conduct, a Court of law cannot countenance in an attempt to obtain leave to file an appeal out of time. Such a practice must be discouraged in order to uphold the rule of law. The truth will always set free all law abiding citizens. Mr. Peter Wanyama wanyonyi has attempted to change his story contained in his affidavit sworn on 18th August 2003. He contradicted himself in his supplementary affidavit sworn on 16th July 2004.

In the end, I see no merit in the motion. It is dismissed with costs to the Respondent. Mr. Peter Wanyama Wanyonyi should personally pay the costs for engaging himself in double speak and for breaking professional rules and etiquette requiring advocates to speak the truth all the time. His client cannot shoulder his mistake which was intentionally committed.

**Dated and delivered this 16th day of November, 2005.**

**J. K. SERGON**

**JUDGE**

In the presence of Mr. Ocharo for the Respondent.  
NA Wanyama for the applicant