REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 234 OF 1996

LOLDIA LIMITED…….……..PLAINTIFF

VERSUS

KARIUKI WAITHAKA……...……DEFENDANT

RULING

The Defendant filed an application dated 21st January, 2004 which had several prayers which included a prayer for leave to file a Notice of Appeal to the Court of Appeal out of time and to have the Notice of Appeal already filed deemed as having been filed timeously. The advocates for the parties agreed that the aforesaid prayer be argued first because all the other prayers were depended on the grant or refusal of the said prayer which was prayer No. 5 as per the Defendant's application.

As grounds for the said application, it was stated that the applicant lodged a notice of appeal on 6th December, 1999 but the same was struck out on 1st October, 2003 thereafter the applicant filed, without any leave of the court, a Notice of Appeal on 4th November, 2003 but the application for leave to file the said Notice out of time was not made until 22nd December, 2003. The applicant now prays that the said Notice of Appeal be deemed to have been filed timeously.

Mr. Karanja for the applicant agreed that from the date when the Court of Appeal struck out the said Notice of Appeal until the date when the present application for leave to file another one was made 56 days and stated that the reason for that delay was that the applicant did not have sufficient funds to instruct his advocate. He urged the court to look at the interests of the parties and the reason for the delay. He cited the decision of the Court of Appeal in Civil Application Number *NAI 356 OF 1996 MUCHUGI KIRAGU VS JAMES MUCHUGI KIRAGU & ANOTHER.*

He submitted that the delay was not inordinate and was excusable. He further submitted that the applicant had been in occupation of the parcel of land for over 30 years and the respondent was not going to be prejudiced if the application was granted.

Mr. Karanja also stated that an application for leave to file a Notice of Appeal to the Court of Appeal had first to be made to the High Court and he cited ***Civil Application Number NAI 95 of 1997 AFRO MEAT COMPANY LTD VS SYPROSE AGEKE OWUOR.***

He lamented that he had been writing letters to the Deputy Registrar requesting for typed proceedings but the same had not been supplied and so the applicant had not been able to prepare his appeal. I perused the court filed and noted only two letters written to the Deputy Registrar by the applicant's advocates requesting for certified copies of proceedings, one is dated 2/12/99 and the reminder is dated 27th October, 2003, the date when the Notice of Appeal sought to be admitted out of time was drawn

Mr. Mbeche for the respondent opposed the aforesaid application. He said that there had been inordinate delay on the part of applicant in making the application after the Court of Appeal struck out the first notice of appeal on 1st October, 2003. He stated that it had taken 113 days before the present application was filed, that is from 1st October, 2003 to 21st January, 2004 although I must say the initial application was made on 22nd December, 2003 which would be 82 days from 1st October, 2003. Mr. Mbeche further stated that the applicant had delayed by 1279 days in preparing the first notice of appeal which was struck

out that is from 22nd November, 1999 when the judgment was issued. He submitted that there was no good reason why the application was not filed immediately after the Court of Appeal ruling.

He reminded the court of the old maxim that "Delay defeats equity" or put another way, "Equity aids the vigilant and not the dormant". As the applicant was seeking an equitable order, he should have acted in an equitable manner by being vigilant, he submitted.

Mr. Mbeche also argued that the application had not been brought under Section 7 of the Appellate Jurisdiction Act but was brought under Order XLI Rule 4 which was inapplicable. To this argument, Mr. Karanja sought refuge in the provisions of Order L Rule 12 of the Civil Procedure Rules. In ***BOYER VS GALLOURE (1969) E.A. 385*** it was held that "*a wrong procedure does not invalidate proceedings where it does not go to the jurisdiction and causes no prejudice to the other party's case*" . Mr. Karanja verbally referred to Section 7 of the Appellate Jurisdiction Act but did not quote it in his client's application. In the interests of justice, I will treat the application as though it was properly brought under that provisions of the law.

The applicant's main argument in this application is that he did not have money to engage an advocate to file the application for leave to file an appeal out of time since he is a peasant farmer. He also stated that he believed his intended appeal had overwhelming chances of success. With regard to the first argument in an attempt to justify the delay, I am not convinced that the applicant was prevented by lack of money from filing the application in time. After the Court of Appeal struck out the first notice of appeal on 1st October, 2003 he gave instructions to his advocates who had been acting for him since December 1999 to file another notice of appeal. They prepared and dated it 27th October 2003 and lodged it in the registry the same day. The advocates knew that they required leave of the court to file the notice but did not bother to file the application for leave until 22nd December, 2003. And this was only after eviction proceedings were commenced against the applicant by the respondent on 20th December, 2003 when the respondent's Managing Director sent one of his drivers to inform the applicant to vacate the suit premises for else he would be evicted on 22nd December, 2003. This is as per paragraph 5 of the applicant's affidavit sworn on 19th January, 2004. It would appear that the primary concern of the applicant at the time was to obtain some interim orders of stay of execution; otherwise the notice of appeal had already been lodged though without leave of the court and it was of no help to the applicant at the time in so far as stopping the eviction was concerned. The first notice of appeal having been struck out for filing it out of time, the applicant should have been very vigilant to ensure that he did not slip up again. The applicant cannot explain how he suddenly had money to instruct his advocate within two days if truly he did not have funds to do so since the date when the Court of Appeal struck out his notice of appeal. It therefore appears that lack of money was the pretext rather than the reason for delay in filing the said application. I hold that the applicant has not given any satisfactory reason for his inordinate delay in filing the notice of appeal.

Secondly, the applicant has not demonstrated that his intended appeal has overwhelming chances of success or is arguable, he has only alleged so. In my view, the applicant should have annexed a draft memorandum of appeal and use it point out to the court the salient issues which would prima facie show that he has an arguable appeal. The applicant has not been diligent in pursuing the typed proceedings and the judgment because since November, 1999 todate he has written only two letters to the Deputy Registrar requesting for the said documents.

For these reasons, I decline to grant the applicant the leave to file a Notice of Appeal out of time and the interim order of stay of execution which had been granted is hereby vacated.

DATED, SIGNED & DELIVERED at Nakuru this 1st day of March, 2004.

DANIEL K. MUSINGA

AG. JUDGE

1/3/2004