

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

CIVIL MISC. NO. 103 OF 2003

SAMUEL T. KYUNGU.....APPLICANT

VERSUS

JONES M. MUTISYA.....RESPONDENT

R U L I N G

The applicant was the plaintiff in RMCC 3/02. He had sued the Defendant/Respondent for damages for defamation. The suit was dismissed. He seeks for leave to file his appeal out of time. The reason he did not file the appeal in time is that the proceedings were not ready till 9.6.2003 though he applied for them on 19.1.2003 after the judgement was delivered on 18.11.2003. The applicant also claims to have good chances of success on appeal. The applicant annexed to the application the plaint in RMCC 3/02 the proceedings and letters requesting for proceedings.

The application was opposed and a replying affidavit filed by Jones Mutisya the respondent herein. It is contended that there was inordinate delay in applying for the proceedings and the applicant did not pursue the issue of being supplied with proceedings with due diligence and even after proceedings were supplied on 9.6.2003 he did not file this application till 10.7.2003. I have considered all submissions by both counsels, affidavits filed and the record.

The applicants counsel claims to have applied for proceedings soon after the judgement was delivered on 18.11.2002 and his application was in the hand written note dated 19.11.2002. There is a stamp on it showing that it was filed on 22.11.2002. The file number indicated to the letter seeking proceedings is RMCC 7/02 whereas the proceedings actually sought were in respect of RMCC 3/02. According to counsel, this was a mistake when he wrote RMCC 7/02 instead of 3/02. I do note that the names of the parties in the letter 'STK 2' are Samuel Kyungu versus Jones Mutisya, which are similar to these in RMCC 3/02. I believe that it is most likely that counsel for applicant made a genuine mistake in writing on the letter 'STK 2' the number 7/02 instead of 3/02.

The respondent raised an objection to the letters that they were not signed and yet they are pleadings. To have any force a letter has to be signed. As regards STK 2, since it was handwritten I do not believe that there was need to sign it counsel had indicated his names. However for the letter reminding the court of the proceedings 'STK' it needed to be signed. It was actually received by the court and stamped though it was not signed. Having been received by court I believe it was acted upon though it was not signed.

The applicant blames the delay in filing appeal on the court for failing to type proceedings in time. If it is true as per annexure STK 2 that proceedings were applied for on 19.11.2002, soon after delivery of judgement, then I do agree with counsel for respondent that the applicant was not diligent and vigilant in following up the typing of the proceedings. From 19.11.2002 applicant only writes one letter to the court on 24.3.2003 over five months since the first letter. He then received proceedings on 9.6.2003 and went and sat back for a full month till 7.7.2002 when this application was filed. If the applicant was serious with the appeal I am sure he would have taken not more than 7 days to file the application. The delay of 1 month is inordinate and has not been explained.

The applicant annexed the plaint and proceedings of the lower court whose judgement they intend to appeal against. I have read the proceedings and judgement as well as the grounds of appeal. I find that the appeal does not have good chances of success and it will be futile allowing this application to have the

appeal filed out of time. The court will not act in vain. For the above reasons and the fact that there was inordinate delay in filing this application, the application is not allowed and is dismissed with costs.

Right of Appeal in 14 days.

Dated, read and delivered at Machakos this 12th day of February, 2004.

R. WENDOH

JUDGE