

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
MISC APPL. NO. 102 OF 2004**

JOSEPH ODUOR BUSHURU APPLICANT

VS

FRANCIS MASINDE WEKESA RESPONDENT

R U L I N G

The matter before this court is a motion taken out pursuant to the provision of Section 79 G of the Civil Procedure Act and Order XLIX. The applicant seeks for leave to appeal out of time against the order of 27th October 2003 dismissing the applicant's application which application had sought to set-aside the ex-parte Judgment delivered by the same court on 19th June 2002.

The Respondent resisted the application by filing grounds of opposition under order L rule 16 of the civil procedure rules.

The facts of this matter are that the defendant/applicant was served with summons to enter appearance in a suit instituted by the respondent herein in respect of compensation for injuries suffered arising out of an assault on the respondent agreed at Ksh.10, 000 in an agreement duly executed by the parties.

It would appear the Respondent was granted leave to proceed with the case ex parte when the applicant failed to appear for hearing despite having been served with a hearing notice. Judgment was read to the parties on 20th June 2002. The Respondent sought to execute the decree by taking out a notice to show cause. The record reveals that Mr. Angima appeared for the defendant/applicant and sought for a reprieve of 3 weeks for his client to settle the decretal sum which request was granted by the trial court. When the period lapsed the Respondent applied to have the decree executed when the applicant failed to settle the decretal sum. The request was also granted by the trial court. This obviously prompted the applicant to file the motion dated 5th may 2003 in which the applicant sought to have the ex-parte Judgment set aside on various reasons set out in the motion and the supporting affidavit therein. The motion was heard and dismissed on 27.10.2003 by the trial court.

It would appear the applicant did not challenge on appeal the dismissal of that motion dated 5th May 2003 until time allowed for appeal lapsed thus the filing of this motion.

The applicant says that he did not obtain proceedings in time to file the appeal despite having applied for them in good time. He annexed in his affidavit in support of the motion the letter requesting for proceedings and a certified copy of the certificate of delay given by the trial court. The Respondent opposed this ground by accusing the applicant for delaying to apply for proceedings. I have considered the two rivaling submissions. It is clear from the annexures that the applicant applied for the proceedings in a letter dated 28th October 2003, just a day after the ruling was delivered. The certificate of delay issued by trial court acknowledges receiving the application for proceedings on 10.11.2003 but could not supply the same until time to file appeal had lapsed. The trial court regretted the delay as due to back log at the typing pool. I am satisfied that the delay to supply proceedings was not within control of the applicant. It is also a good reason that can entitle this court exercise its discretion to extend time for a litigant to lodge appeal out of time.

The second ground raised by the applicant is that he could not lodge the appeal in time because he did not have funds to do so. I am not convinced that this is a good and sufficient reason to entitle me exercise my discretion in favour of the applicant. I am fortified by the that fact the applicant did not take advantage of order XXXII of the Civil Procedure rules. There is no evidence to show that he made an application under the above provisions and that his request was refused.

The applicant has also annexed to his affidavit a copy of the intended memorandum of appeal to show that he has a good appeal with high chances of success. It would appear this is not one of the considerations which the law allows this court to take into account. I think the law recognises the fact that this court will still consider the strength of the appeal when perusing the same at the time of admission. Consequently it is in my humble view that this ground cannot assist the applicant.

In the end I will allow the motion on the first ground. The applicant should file and serve the appeal within 10 days from the date hereof. He should also pay thrown away costs of the motion assessed at ksh.2,000/= to Respondent.

DATED AND DELIVERED THIS 2nd DAY OF July 2004

J.K. SERGON

JUDGE