

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO 1052 OF 2002

BENEDICT WAKABA KIHU APPLICANT

VERSUS

STEPHEN KARUU MAINA)

JOSPAT NJUGUNA MUGO) RESPONDENT

RULING

This is an application for leave to file appeal out of time brought under Section 79 G of the Civil Procedure Act, Cap 21, which states as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

Judgment in this case was delivered on 29th July, 2002 and the applicant promptly applied for a copy of the Order on 30th July, 2002. This was made available to the Applicant on 31st August, 2002, and he filed this application within 9 days thereafter.

Although he should have filed a Certificate from the Registrar to show that the issue of the Order was delayed, I am satisfied that the application was filed expeditiously – within only 9 days of the expiry of time to file the Memorandum of Appeal. This delay was not inordinate. However, this application was not pursued until after two years because, as Counsel put it, he proceeded with the prosecution of the appeal in the Court of Appeal in the mistaken belief that the appeal was on time and that no leave was required. Needless to say, the Court of Appeal struck it out as being incompetent, and he now returns to the High Court to prosecute his application for enlargement of time and leave.

Clearly, Counsel made a mistake in not prosecuting this application for some two years, although I cannot fault him for filing it late by only 9 days. As this is a sensitive land matter, I do not think his mistake should be visited upon his client who I believe should have every opportunity to be heard. I have read the Replying Affidavit and do not see how the Respondent will be so seriously prejudiced as to deny the Applicant here the opportunity to be heard.

Accordingly, I will allow prayers 1 and 2 of the application dated 9th September, 2002. Costs shall be in the cause.

Dated and delivered at Nairobi this 10th December, 2004.

ALNASHIR VISRAM

JUDGE