



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

MISC CIVIL APPLICATION NO 22 OF 2019

TERESIAH NDILO KIMANI.....APPLICANT

VERSUS

1. CHARLES MUSYIMI

2. HOMEGROWN (K) LTD

3. BRAVIN MOTORS LTD.....RESPONDENTS

R U L I N G

1. This ruling concerns the application herein by **notice of motion dated 25/10/2019**, which is seeking leave of court to file appeal out of time against the decree of the lower court in *Nanyuki CM Civil Case No 84 of 2005* passed on 20/12/2018. By that decree the Applicant's (plaintiff's) suit against the Respondents (defendants) was dismissed with costs. A draft memorandum of appeal is annexed to the affidavit sworn in support of the application.

2. On 10/12/2019 the Applicant's learned counsel informed this court that they no longer wished to proceed against the 3rd Respondent, who had not been served with the application.

3. The 1st Respondent, CHARLES MUSYIMI, filed a replying affidavit on 10/12/2019. The 2nd Respondent, HOMEGROWN (K) LIMITED, filed grounds of objection to the application on 23/01/2020.

4. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 05/03/2020. The 1st Respondent filed his submissions on 18/03/2020, while the 2nd Respondent's submissions were filed on 06/07/2020. I have considered all those submissions. I have also read through the Applicant's supporting affidavit, the 1st Respondent's replying affidavit and the 2nd Respondent's grounds of objection.

5. The present application was filed on 08/11/2019. As already seen, the decree sought to be appealed against was passed on 20/12/2018; so, by dint of **section 79G of the Civil Procedure Act, Cap 21**, an appeal against that decree should have been filed within 30 days of passing of the decree, after taking into account any period certified by the trial court as having been requisite for the preparation and delivery of a copy of the decree. There is such certificate of delay by the lower court dated 24/09/2019 which is annexed to the supporting affidavit. It states that the proceedings were applied for on 07/02/2019 and were ready on 24/07/2019.

6. It is thus apparent that there was delay in applying for the proceedings and in filing the present application on 08/11/2019. In any event, if you take into account the period certified by the lower court (07/02/2019 to 24/07/2019 – 170 days), the appeal should have been filed on or before 28th June 2019. That date falls before the date when the proceedings were certified to be ready (24/07/2019) because there was delay in applying for them!

7. Anyways, the delay we are dealing with here is from 28th June 2019 to 8th November 2019 (when this present application was filed) – that is 133 days. How is that delay explained in the supporting affidavit? Although the letter applying for proceedings (which is annexed to the supporting affidavit) is dated 10/01/2019, it was not received at the registry until 07/02/2019! There is no credible explanation why it was delivered so late. There is also no explanation at all why the present application was filed on 08/11/2019 yet the proceedings were ready on 24/07/2019 – about three-and-a-half months before!

8. The Respondents are thus justified in complaining that there has been inordinate delay occasioned by the Applicant, which delay has not been properly explained.

9. The discretion of this court under the *proviso* to section 79G aforesaid can be exercised in favour of the Applicant only if she satisfies the court that she had –

“...good and sufficient cause for not filing the appeal in time”.

I do not find such good and sufficient cause in this application.

10. The application has no merit is therefore refused. It is hereby dismissed with costs to the 1st and 2nd Respondents. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 2ND DAY OF JUNE 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 3RD DAY OF JUNE 2021