



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISCELLANEOUS CIVIL CASE NO. E192 OF 2021

BETWEEN

1. CHANIA TRAVELLERS SACCO LTD

2. SAMWEL MAINA.....APPLICANTS/INTENDED APPELLANTS

VS

1. MERCYLINE BOSIBORI AKEYA

2. JOHN MOMANYI CHANGE

(suing in their capacity as legal representatives of the estate of

SAMEUL ORENGE MARUBI (DECEASED).....RESPONDENTS

RULING

1. The Senior Principal Magistrate Court at Ruiru in Civil case No. 237 of 2020 delivered a judgment on 19th July, 2021 against which the applicants hereof seeks leave to file an appeal out of time and stay of execution.
2. The applicants should have filed the appeal within 30 days of the judgment. This is what is provided under Section 79G of the Civil Procedure Act. That Section is in the following terms:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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.’” (underlining mine)

3. That Section does afford the court discretion to admit an appeal filed out of time. In other words the section does not provide that leave would be granted to a non-existent appeal as in this case. This is the jurisprudence of that Section which was articulated in the case **GENERAL M’LIMBINE VS. JOSEPH KANGANGI (2008) eKLR.**

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court’s process under Section 79B which says:-

‘Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily’.

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the Civil Procedure Act except upon the existence and perusal of the appeal to be “admitted” not to be “filed out of time.” Admission

presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under Section 79B that there is “sufficient” ground for interfering with the decree part of a decree or order appealed against.”

4. It follows that since the applicant has not filed an appeal, there can be no admission of an appeal filed out of time as envisioned in Section 79G.

5. But even if there was an appeal filed, the application would fail because the applicant seems to seek to have this Court act on whim. There is no reason offered by the applicants on why they failed to file an appeal within the prescribed period. The Court of Appeal stated that a court where it is afforded discretion must be given reason why it should exercise that discretion. This is what Court of Appeal in the case HENRY GATURA 23 OTHER VS. CHARLES GINA & 4 OTHERS (2011) eKLR stated:-

“The law is now well settled, that though the Court has discretion in such an application but that discretion must be exercised upon reasons and not on the whims of the Court nor capriciously. The guidelines that would help the Court in the exercise of such discretion are that the Court needs to know the period of delay; the applicant needs to offer explanation for such delay; the Court needs to see if the applicants’ intended appeal is arguable (but without delving into the main appeal itself), the Court needs to consider whether granting of the application will result into prejudice to the other party.”

6. The Notice of Motion dated 1st September, 2021 is misconceived and is accordingly dismissed with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 11TH DAY OF NOVEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Maurice

For Applicants: Mr. Njuguna Lawrence H/B Miss Onacha

For Respondents : Mr. Makwere

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE