



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**MSC. CIVIL APP NO.274 OF 2010**

**MOSES KAMAU NJUGUNA.....APPLICANT**

**-VERSUS-**

**DUNCAN KAMAU MWANGI.....1<sup>ST</sup> RESPONDENT**

**PETER MULILI GATERI.....2<sup>ND</sup> RESPONDENT**

**BROOKSIDE DAIRY LIMITED.....3<sup>RD</sup> RESPONDENT**

(Appeal from the Ruling of Nakuru Chief magistrate Hon. Gilbert Mutembei

dated 27<sup>th</sup> February 2006, in CMCC 1750 of 2006)

**RULING**

**1. Before me is a Notice of Motion application dated the 4<sup>th</sup> June 2010.** The applicant Moses Kamau Njuguna seeks orders for leave to file an appeal out of time against the judgment in Nakuru CMCC No.1750 of 2006 delivered on the 27<sup>th</sup> February 2008.

In the said lower court case, the applicant had sued as the legal representative of the Estate of James Njiriri Kamau, who died in a road traffic accident on the 9<sup>th</sup> December 2002, seeking compensation for the loss and damage from the owners of the accident vehicle.

The application is based on grounds that the delay in filing the appeal was caused by events beyond his control, being displacement by the 2008 post-election violence as well as illness.

2. The respondents oppose the application strenuously by a replying Affidavit sworn by W.G Nasimiyu, advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

The applicant filed a further affidavit in support of his application on the 22<sup>nd</sup> May 2018.

I have considered the affidavit evidence on record as well as filed submissions by all the respondents, and the applicant.

3. At the date this application was filed, there was a delay of slightly over four years.

**Section 79G of the Civil Procedure Act** provides for statutory period of thirty days upon which an appeal may be filed against a decision, order or judgment of the lower courts.

It further provides that an appeal may be admitted out of time if the appellant **satisfies the Court that he had good and sufficient cause of not filing the appeal in time.**

4. Two reasons are advanced by the applicant for the failure

1. Displacement by 2008 post-election violence

2. Illness

It is within common and public domain that the post election violence erupted in December 2007 and continued into 2008.

Judgment in the lower court was delivered on the 27<sup>th</sup> February 2006, a year before the above events.

**Issues for determination**

1. Whether the delay was inordinate
2. Whether the applicant can be availed the orders he seeks, in the circumstances.

6. In his submissions, the applicant address the court on what would be grounds of appeal but fails to justify the delay of over four years to bring this application and which was actually served upon the respondents in 2016, six years after filing the application.

He alluded to have been displaced, but gives no particulars or any evidence of such displacement.

7. I have stated above that the judgment was delivered over a year before the post-election disturbances. No explanation has been given for, at least, this one year delay.

Further, after filing the application, the applicant has failed to offer any explanation why the same was not served upon the respondents, for one year, upto 28<sup>th</sup> April 2016, when by an order of the court, the application was served.

8. While to enlarge time or not is at the court's discretion the said discretion must be exercised judiciously, upon reason, and not arbitrarily – **Mutiso –vs- Rose Wangari Mwangi, CA No. Nai 255/1997.**

In **Mwangi N. –vs- Kenya Airways Ltd (2003) e KLR**, the factors that a court ought to consider in an application for enlargement of time are:

- a. Period of delay
- b. Reasons for delay
- c. Arguability of appeal
- d. Decree of prejudice to the respondents.

9. Having carefully considered the entirety of the applicant's arguments by his submissions, I find no reasonable explanation at all over the inordinate delay in filing the appeal within the statutory period.

To grant the prayers would without a doubt prejudice the respondents, by resurrecting a matter that closed over seven years ago.

There would be no justice to the respondents at all – **Ivita Vs. Kyumbu (1984), Article 48 and 50 Constitution.**

10. A party is bound to prosecute its claim without undue delay, and a court will not shy away from declaring an attempt to revive a matter, without plausible reasons, an abuse of the court process.

It is a principle of equity that equity aids the vigilant not the indolent and delay defeats equities.

Having rendered as above, I find no merit at all in the application dated 4<sup>th</sup> June 2010. It is dismissed, with no orders as to costs.

**Delivered, signed and dated at Nakuru this 6<sup>th</sup> Day of February 2020.**

.....

**J.N. MULWA**

**JUDGE**