



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

MISCELLANEOUS CIVIL CASE NO. 20 OF 2020

DENNIS ROSANA OROO.....APPLICANT

VERSUS

HEZRON OTOCHI NYAMBANE.....RESPONDENT

RULING

By a ruling delivered on 13th February 2020 this court struck out an appeal - **Nyamira HCCA No. 6 of 2019** filed by the applicant on 8th March 2019 for being filed out of time without leave. The Notice of Motion filed herein on 12th March 2020 seeks among other things to regularize the position by seeking leave to appeal out of time. The Notice of Motion seeks orders as follows: -

“(a) Service of the application be dispensed with in the first instance.

(b) This application be certified as urgent and be fixed for hearing on priority basis.

(c) This Honourable court be pleased to grant leave to the application to lodge an Appeal from Judgement and decree of the Principal Magistrate in Keroka PMCC No 222/2012 out of time same having delivered by the trial court on 18th December 2018.

(d) There be temporary orders of stay of execution of the Judgement and Decree of the court in KEROKA PMCC NO 222 of 2012 pending the hearing of this application generally.

(e) The court pleased to grant temporary orders of stay in terms of prayer (d) above pending the hearing inter-parties and/or pending further orders of this court.

(f) Such orders that be made as are Just and expedient.

(g) Costs be in the cause.”

The gist of the application as can be discerned from the grounds on its face, the supporting affidavit and the written submissions of Counsel for the applicant is that the applicant filed the appeal in person and was ignorant of the period for filing appeals and that this court has discretion to grant leave in appropriate cases provided the discretion is exercised judicially.

The application is vehemently opposed. Counsel for the respondent has submitted that no good or sufficient explanation has been given for the delay; that the applicant cannot plead ignorance when it is clear he was represented by Counsel in the lower court and further that the present application is irregular as no Notice of Change of Advocate was filed in accordance with **Order 9 rule 5 of the Civil Procedure Rules**. Counsel for the respondent therefore prays that the application be dismissed with costs to the respondent.

I have carefully considered the application, the rival submissions and cases cited. Prayers (a), (b), (d) and (e) seek orders for stay of execution pending hearing and determination of this application and are therefore spent and hence this court shall not make a determination on the same.

On the application for leave to appeal out of time, it is trite that the period limited for an appeal to the High Court is thirty days from the date of the decree or order appealed from. However, **Section 79G of the Civil Procedure Act** provides 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. I have carefully considered the grounds set forth by the applicant. Whereas ignorance of the law is not a defence and whereas the applicant was represented by Counsel who ought to have advised him, I am nevertheless persuaded that in this case the interest of justice would best be served by exercising the court's discretion in the applicant's favour rather than in locking him out of the seat of justice.

I have also considered Counsel's submission in regard to the procedural propriety of the application and come to the conclusion that the application is properly before the court. The reason for so saying is that this application is distinct from the matter in the lower court and the advocate although coming in after judgement is not doing so in the manner envisaged by **Order 9 rule 9 of the Civil Procedure Rules**. In my view, the said rule was intended to safeguard the interest of an advocate who acts for a party in the suit but for some reason the client after obtaining judgement proposes to drop him and appoint another advocate without notifying him/her. The proceedings before me are independent of the suit in the lower court and the fact that no notice of change of advocate was filed does not vitiate the application. In the premises the application for leave to appeal out of time is allowed. The memorandum of appeal and the record of appeal shall be filed and served within thirty (30) days of this ruling. While costs follow the event those of this application shall be borne by the applicant. It is so ordered.

Signed, dated and delivered in Nyamira this 9th day of July 2020.

E. N. MAINA

JUDGE

Judgement delivered virtually via Microsoft Teams.