



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

CIVIL APPEAL NO. 93 OF 2018

HENRY MOMANYI MACHINI.....APPELLANT

-VERSUS-

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

PATRICK GOCHOHI.....2ND RESPONDENT

BENARD SIMIYU.....3RD RESPONDENT

B.O.G CHRIST THE KING ACADEMY.....4TH RESPONDENT

CATHOLIC DIOCESE OF NAKURU.....5TH RESPONDENT

RULING

1. This is a ruling on application dated **11th November 2019** brought under **Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Rules** and all enabling provisions of the law seeking the following orders: -

a) spent

b) This honourable court be pleased to review, vary, vacate, rescind and/or set aside the orders of Hon. Rachel Ngetich Judge herein issued on the 9th day of October, 2019 dismissing the appellant's application for leave to file an appeal out of time;

c) This honourable court upon granting prayer (1) above be pleased to allow the appellant to lodge an appeal out of time and have the Memorandum of Appeal lodged herein be deemed as duly filed;

d) Costs of the application be provided for.

2. The application is supported by affidavit sworn by **Henry Momanyi Machini** the applicant herein. He averred that he instructed the firm of **Odhiambo & Odhiambo Advocates** to file an application for appeal out of time and despite him availing all the necessary documents and an application dated 13th July 2018 being filed on 17th July 2018, the said advocate failed to attach all the relevant documents that would justify the appellant's reason for delay.

3. The applicant averred that he wished to appeal against the judgement that was delivered on 14th April 2016 since he had initially instructed the firm of **Konosi Advocates** and with the innocent believe a memorandum of appeal had been filed, he awaited the firm to prosecute his appeal.

4. He averred that he ought to be allowed to produce the documents that were inadvertently left out by the firm of **Odhiambo & Odhiambo** annexed as HMM2 to show that indeed he made a follow up of the status of his appeal. He averred that at the time of the pendency of the appeal he had a sick child who unfortunately passed on as per the annexure HMM3.

5. He urged Court to review its orders issued on 9th October 2019 as he was advised by his advocate that the Court made its orders premised on judgement being appealed was delivered on 14th April, 2010 as opposed to 14th April, 2016.

6. In response the respondent filed a replying affidavit sworn on 27th November 2019 by **Fr. Bernard Ngaruiya** who averred that the application has been brought in bad faith and an abuse of the Court process. He averred that the appellant's advocates are not properly on record as they ought to seek Court's leave to come on record thus they have no audience in Court.

7. The respondent averred that the ruling delivered on 9th October 2019 which the applicant seeks to review has not been annexed to this application, making the application defective. Further that despite the firm of **Odhiambo & Odhiambo advocates** and that of **Wamaasa, Masese & Nyamwenge Advocates** filing a consent to take over the matter on behalf of the appellant, the firm is not properly on record as no leave was sought after delivery of judgement.

8. The respondent further averred that the appellant filed the application seeking leave to file an appeal out of time after two years, this was indolent and inexcusable delay; and the documents the appellant is purporting to file were within his knowing when the application for extension of time was being sought and he could have availed them before the ruling was delivered therefore there are no viable grounds raised by the appellant for review of the Court's ruling.

9. The respondent averred that the applicant cannot rely on mistake and/or neglect of his advocate to absorb his duties as a litigant; that it took him 5 months after the delivery of judgment to make a follow up on the appeal and time for appeal had already lapsed; and even after not getting a feedback from his advocate he stayed for a period of over 8 months before making another follow up.

APPELLANT'S SUBMISSIONS

10. The appellant restated averments in the replying affidavit and submitted that he has a right to legal representation by counsel of his choice and the delay and omissions by his advocates should not be visited on the applicant and the explanation is sufficient to warrant the orders sought.

11. The applicant submitted that there is an error on the face of record as the Court was on the false impression that the judgment being appealed on was delivered on 14/4/14th April, 2010 whilst it was delivered on 14th April, 2016. Applicant further submitted that the application was brought with the full recognition that the right to be heard is a constitutional right and a cornerstone of the rule of law. The Court should exercise its discretionary powers expeditiously to allow the application for extension of time to file appeal.

4TH & 5TH RESPONDENT'S SUBMISSIONS

12. The Respondent's submits the appellant's advocate is not properly on record for failing to comply with **Order 9 Rule 9 of the Civil Procedure Rules** to seek leave of Court to come on record for the appellant as judgment had already been delivered and the appellant further failed to annex the consent his advocate has relied on to come on record.

13. The respondent further submitted that the appellant is not entitled to the orders sought in the application as the review orders are on the basis that some documents were excluded by his former advocates in his application seeking to file appeal out of time; that the appellant was the deponent of the supporting affidavit in support of the application seeking leave to file an appeal out of time and he must have had the opportunity to read through the application and the affidavit before appending his signature. Further that the documents were within the appellant's knowledge and he could have pointed out to his advocate that the same have been left out. The respondent submitted that the appellant cannot claim to rely on the mistake/negligent of his advocates to relief himself off the obligations as a litigant and even if the documents were to be admitted for review, there is no justified reasons for the delay in filing the appeal for a period of 2 years; that it is indolence and inexcusable.

ANALYSIS AND DETERMINATION

14. I have considered averments by parties herein; I have also considered submissions filed and perused documents annexed to the supporting affidavit and consider the following to be in issue: On whether the firm of Odhiambo and Odhiambo Advocates are properly on record, I adopt my finding in my ruling delivered on 9th October 2019.

15. What I wish to consider is whether sufficient reasons have been advanced to warrant setting aside and/or vary orders issued on 11th November 2019. The applicant contends that he instructed the firm of Konosi Advocate to file appeal and averred that during the period he was bereaved and was not able to follow up progress of appeal.

16. On the argument that the Court was of the impression that judgment was delivered on 14th April, 2010 whilst it was delivered on 14th April, 2016, I have perused the ruling and at paragraph 17, I stated as follows:

"...judgment was delivered on 14th April 2010 and not 14th April 2016

... from the averments judgment was delivered on 14th June 2016

...Even if I take 14th April 2016 as correct date, a period of 2 years 3 months had lapsed before filing this application..."

17. I noted that even though the date of delivery indicated in the judgment attached to the Applicant's supplementary affidavit was correct, there was still delay which was not sufficiently explained.

18. From the foregoing, it is clear that my finding in the ruling was not based on false impression that judgment was delivered on 14th April 2010 as alleged by the applicant herein.

19. Further to the above, the applicant's letter dated 20th September 2016 show that the applicant was aware of delivery of judgment from the

date of delivery. Even if he states that he had a sickly child who passed on 13th March 2017 as shown by copy of the burial permit introduced herein, the application for leave was filed on 17th July 2018 a period over one year after the alleged death of his son. In my view, with the added document, explanation for delay up to 17th July 2018 is still not sufficient. I see no merit in this application.

20. FINAL ORDERS

1. Application dated 11th November 2019 is hereby dismissed.
2. Costs to the Respondents.

Ruling dated, signed and delivered via zoom at Nakuru this 10th day of December, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Mr. Leting holding brief for Ondieki for AG

Ms. Mungai holding brief for Orege for 4th & 5th Respondent