



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.93 OF 2013

HENRY MOMANYI MACHINI.....PLAINTIFF/APPELLANT

-VERSUS-

THE ATTORNEY GENERAL.....1ST DEFENDANT/RESPONDENT

PATRICK GICHOHI.....2ND DEFENDANT/RESPONDENT

BENARD SIMIYU.....3RD DEFENDANT/RESPONDENT

B.O.G CHRIST

THE KING ACADEMY.....4TH DEFENDANT/RESPONDENT

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

RULING

1. This is a ruling on application dated 17th July 2018. It seeks leave to appeal out of time. Grounds on the face of the application are that upon delivery of judgment on 14th April 2016, the applicant instructed the firm of **Konosi & Company Advocates** to file appeal but failed to file notice of appeal in time.

2. The application is supported by the affidavit of **Henry Momanyi Machini** sworn on 17th July 2017. He averred that this matter emanated from the Chief Magistrate's Court where the plaintiff/appellant was charged in Criminal Case No.295 of 2004 for the offence of **stealing by servant** contrary to **Section 281** of the **Penal Code**; that after being declared innocent, the 4th defendant failed to reinstate him to his job, he filed a civil suit seeking special and general damages for malicious prosecution and loss of earnings.

3. He averred that upon learning that the firm of **Konosi** failed to file notice of appeal as instructed, he instructed the firm of **Odhiambo and Odhiambo Advocates** to lodge appeal but had to start by filing this application as time for filing appeal had lapsed. He attached draft memorandum of appeal

4. Applicant later filed supplementary affidavit sworn on 5th October 2019 in which he attached the judgment of the trial court and averred that contrary to the fact that this matter is registered as civil appeal, he has not filed notice of appeal nor record of appeal without the leave of this court. He further averred that he should not be made to suffer for wrongs of counsel previously on record.

5. In response, the respondent filed replying affidavit 28th August 2018. The respondent's Advocate submitted that the firm of Odhiambo & Odhiambo Advocates are not properly on record on ground that they were not on record for the appellant in the lower court; that **Order 9 Rule 9** require a party who wants to change Advocate or act in person to seek leave of the court or consent from the Advocate who was on record in the trial court and there is no consent filed between the firm of Konosi & Company Advocates and the Odhiambo & Odhiambo & Company Advocates.

6. Further that there is no explanation given as to what happened between the date judgment was delivered and filing of the application herein; that despite the fact counsel was instructed on 3rd May 2018, this application was filed on 17th July' 2018 which is in excess of 6 weeks after instructions. Counsel submitted that the length of delay is inexcusable and application should not be allowed.

7. In response, counsel for the applicant submitted that the delay in filing this application after the Advocates now is on record were instructed is not their making as they initially had a problem assessing the file from Konosi and Company Advocates.

ANALYSIS AND DETERMINATION

8. From the Advocates submissions two issues come up:

- 1. Whether the firm of Odhiambo & Odhiambo are properly on record.**
- 2. Whether delay in filing appeal has been explained.**

9. On whether the firm of Odhiambo & Odhiambo are properly on record, the question that arise is should an appeal to be treated as separate suit or continuation of from original suit filed in the lower court?

10. Ordinarily an Advocate who has been on record in original suit will not file appeal without instructions from his client. Instructions initially given are to file original suit. If a party is aggrieved with court’s determination in original suit, he/she will decide as to whether to appeal or not. An advocate cannot just file an appeal on behalf of his former client without his instructions.

11. My understanding is that **Order 9 Rule 9** of the **Civil Procedure Rules 2010**, is intended to prevent mischievous litigants from denying costs entitled to Advocates who have acted to conclusion of the suit. Costs are awarded to parties in both the lower court and appeal if they succeed. Instruction fee is one of the items to be assessed in a bill of costs in both original suit and appeal.

12. The fact that instruction must be given by the client for appeal to be filed and the fact that court makes orders for courts for the appeal, the client should not be barred from instructing a new Advocate for purposes of appeal. Award of costs in the two courts address mischief the **Order 9 Rule 9** was intended to address.

13. The fact that instructions to file suit in original suit and appeal have to be given by the client, it makes them distinct suits; and a party is at liberty to either continue with Advocate who acted in lower suit or engage another lower for the appeal.

14. From the foregoing, I find that the firm of Odhiambo & Odhiambo Advocates are properly on record.

15. On the second issue, the applicant has blamed his previous Advocates for delay in filing notice of appeal and in respect of 6 months delay by the currents; the applicant has explained that it was occasioned by delay in getting the file from Konosi Advocate.

16. I note that judgment was delivered on 14th April 2016. This application was filed on 15th July 2018. The application has been filed 2 years and 3 months after delivery of judgment. There is no doubt that the applicant was aware of delivery of judgment. He averred that he instructed the firm of Konosi & Company Advocates immediately after delivery of judgment. He says upon noticing laxity of his former advocates, he instructed the firm of Odhiambo & Odhiambo to file this application. He does not indicate when he noticed laxity on part of the said firm of Advocates.

17. I have perused judgment attached to the further affidavit and note that it was delivered on 14th April 2010 and not 14th April 2016. If the date in the judgment is correct then it means it has taken the applicant 8 years to file appeal. From the averments the judgment was delivered on 14th April 2016. Even if I was to take 14th April 2016 as correct date, a period of 2 years 3 months lapsed before this application; a period of 2 years 3 months is too long for a litigant to remain in darkness as concern filing of his appeal.

18. My view is that whereas litigants instruct Advocates to act for them, the cases belong to litigants and they have a duty to monitor progress of their cases. I do not see sufficient explanation for such lengthy delay. In the absence of proper explanation, my conclusion is that the intention to file an appeal by the applicant is an afterthought.

19. From the forgoing, I find that the applicant has not demonstrated sufficient reason to warrant granting him leave to file appeal out of time

20. FINAL ORDERS

1. Application dated 17th July 2018 is hereby dismissed
2. Costs of this application to the respondent

Ruling dated, signed and delivered at Nakuru this 9th day of October, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

Biko Counsel for Appellant

Weche Counsel for 1st Respondent

Orege Counsel for 2nd Respondent