



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
MISCELLANEOUS CIVIL APPLICATION 200 OF 2019

ERNEST SHILOYA.....APPLICANT

VERSUS

JUSTUS WANYAMA..... RESPONDENT

RULING

The applicant filed this application on 13th November 2019 seeking leave to appeal out of time.

APPLICANT'S CASE

The applicant was the defendant in Eldoret CMCC 418 of 2007 wherein judgment was delivered on 19th July 2019. The applicant's advocate on record was not served with the new judgment date since judgment had been set in court to be delivered on 16th July 2019.

The applicant was served with a notice to show cause why execution should not issue. Upon inquiry, he learned that judgment has since been delivered. He was served on 22nd October 2019. The delay to lodge the appeal was occasioned by factors beyond his control.

RESPONDENT'S CASE

The respondent filed a replying affidavit on 27th November 2019. He deponed that the applicant has not explained the steps he took after realizing that judgment was not delivered on 16th July 2019. On 4th September 2019 the 2nd defendant was served with a notice of entry of judgment and also judgment on costs vide a copy of letter dated 3rd September 2019. The same was annexed and marked JKW1.

The 2nd defendant is guilty of laches as he has brought this application after a long time and no explanation has been given for the same. The issue of filing an appeal is an afterthought.

ISSUES FOR DETERMINATION

- a. Whether the applicant should be granted leave to file the appeal out of time

In *Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] EKLR* the court of appeal held;

“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are

well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.”

The school of thought is that the powers of the court in such a scenario are discretionary.

The applicant claims that he was not issued with a notice for the judgment date. However, the applicant has not explained what he did after the judgment was not delivered on 16th July 2019. Were there steps taken to enquire when the judgment would be delivered? He also claimed to have been served with a Notice to Show cause on 3rd October 2019 yet he had already been served with the letter notifying him of the entry of judgment on 4th September 2019 through his advocates. There were no steps taken after that save for the application presently before

court which was filed a month and a half after he was aware of a notice to show cause and the judgment having been entered.

The application is an afterthought and a delaying tactic. It lacks merit and is hereby dismissed with costs to the respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 16th day of December, 2019.

In the presence of;

Mr. Juma holding brief for Miss Tum for the Applicant

Mr. Chesoni holding brief for Mr. Onyinkwa for the Respondent

Ms Abigael - Court assistant