



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 30 OF 2002**

**ELDORET STEEL MILLS LIMITED.....APPELLANT**

**-VERSUS-**

**JACOB O. NDAMBUORO.....RESPONDENT**

**RULING**

[1] This is one of those matters that have been pending needlessly before the court. The appeal was filed out of time on **27 April 2002** by the firm of **M/s R.L. Aggarwal, Advocate**, from the decision of the Senior Resident Magistrate Eldoret, **Hon. Mary Kiptoo**, dated **27 February 2002**. It was not until **6 December 2004** that this anomaly was drawn to the attention of the Court. Consequently, a decision was taken by the Court to not admit the appeal for hearing for purposes of **Section 79G** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya**; the same having been filed out of time without leave.

[2] The said decision was conveyed to the parties vide the letter dated **15 February 2002**; and in reaction thereto, Counsel for the Appellants filed the Notice of Motion dated **7 March 2005** for orders that the appeal be admitted out of time and that the Memorandum of Appeal and the Record of Appeal filed herein be deemed properly filed; and that the appeal be listed for hearing. It was likewise prayed that the costs of the application be in the appeal. The main ground proffered in support of the application was that the failure to file the appeal within time was not a deliberate act, but was an error or inadvertence on the part of the erstwhile Advocate for the Appellant; who passed away thereafter.

[3] The application was filed on behalf of the Appellant by the firm of **Nyairo & Co. Advocates**; and in the Supporting Affidavit, sworn by **Mr. Isaac Simiyu Kuloba**, Advocate, it was deposed that **Mr. R.L. Aggarwal** passed away around **April 2003** and that the firm of **Nyairo & Co. Advocates** was appointed on **7 August 2003** to take over the conduct of this matter. He further deposed that their firm then engaged the Respondent's Advocates over this matter while trying to confirm whether the appeal was admitted, but could not, for some time, access the court file. **Mr. Kuloba** further averred that, on **7 March 2005**, their firm received the letter from the Court dated **15 February 2005** advising them that the appeal could not be admitted as it had been lodged out of time without leave.

[4] Thus, **Mr. Kuloba** posited that, if there was any neglect by the previous Advocate for the Appellant, the same ought not to be visited upon the Appellant. He also urged that consideration be given to the fact that the instant application was filed as soon as the anomaly was brought to the attention of **M/s Nyairo & Co. Advocates**. It was on the basis of those averments that **Ms. Odwa** urged the Court to allow the application in the interest of justice. She relied on **Civil Application No. NAI 249 of 1998: George Roine Titus & Another vs. John P. Nangurai (UR)** to buttress her arguments.

[5] **Mr. Ndinya Omollo**, Advocate for the Respondent, was opposed to the application. He relied on the averments set out in his Replying Affidavit filed on **20 June 2005**, contending that the instant application is bad in law, incurably defective and an abuse of the court process as it was filed after an inordinate delay. He further took the view that no cogent reasons have been advanced to warrant the exercise of the Court's discretion in favour of the Appellant.

[6] One of the enabling provisions cited in the application is **Section 79G** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya**. It provides as follows:

**"Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period any time which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:**

**Provided 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."**

[7] Hence, whereas the Court does have the discretion to admit an appeal out of time, it is imperative that good and sufficient cause be shown to warrant the exercise of discretion under the aforementioned provision. And, it is now settled that some of the guiding principles are:

[a] That there be a good and reasonable explanation for the delay;

[b] That the application be brought without undue delay;

[c] That no prejudice will be suffered by Respondent.

[8] There can be no denying that, although the lower court Judgment was delivered on **27 February 2002** and notice thereof given to the Appellant, the appeal was not filed within the 30 days as by law required. The Appellant proceeded to not only file an appeal way out of time and without leave, but to also file a Record of Appeal in disregard of the applicable rules of procedure. It is further noteworthy that even after the instant application was filed on **7 March 2005**, no action was taken to expedite its disposal. There is absolutely no explanation proffered herein for this inordinate delay, though I see a copy of an order on the file for the reconstruction of the file, presumably on the basis that the original file may have gone missing. Nevertheless, the question as to why it took so long to have the file reconstructed, if indeed the file went missing, remains unanswered; and therefore it cannot be said that a good and reasonable explanation has been made for the delay.

[9] On the question of prejudice, it is imperative for the Court to weigh the competing interests and rights of the parties; and having done so, I take the view that the party that has had to suffer prejudice is, not the Appellant, but the Respondent, who has been unable to realize the fruits of his Judgment for about 17 years now.

[10] In the result, I am far from convinced that the Appellant is deserving of the Court's discretion. I would, in the premises, dismiss the application date **7 March 2005** with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 4<sup>TH</sup> DAY OF DECEMBER, 2019**

**OLGA SEWE**

**JUDGE**