



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL MISC. APPLICATION NO. 415 OF 2016**

**JAMES KAMAU KIMANI.....APPLICANT**

**VERSUS**

**CORPORATE INSURANCE CO. LTD.....RESPONDENT**

**RULING**

1) The subject matter of this ruling is the motion dated 12<sup>th</sup> August, 2016 taken out by **James Kamau Kimani**, the applicant herein, in which he sought for inter alia leave to file an appeal out of time against the decision of the trial court delivered on 23<sup>rd</sup> March 2015. The motion is supported by the affidavit sworn by Dominic Njuguna Mbigi.

2) When served **Corporate Insurance Co. Ltd**, the respondent herein, filed grounds of opposition to resist the motion. When the motion came up for hearing, learned counsels appearing in this matter recorded a consent order to have the application disposed of by written submissions. At the time of writing this ruling, the applicant was the only party who had filed his submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support of the motion and the grounds of opposition together with the rival submissions.

4) The background of the motion can easily be deduced from the supporting affidavit. The applicant had filed a material damage claim in the sum of ksh.630,000/= against the respondent vide Milimani C.M.C.C no. 4716 of 2009.

5) The applicant had alleged that he had obtained a comprehensive insurance cover from the Respondent in respect of motor vehicle registration no. KAX 649S. The aforesaid motor vehicle is said to have collided with motor vehicle registration no. KAJ 419N along Moi Avenue at the junction of Mama Ngina Street, Nairobi on 11.10.2008 and as a result the applicant's motor vehicle was extensively damaged.

6) The insurance risk having attached, the applicant filed a material damage claim against the respondent when the respondent failed to compensate the applicant despite the respondent receiving a demand notice.

7) The respondent filed a defence to deny the applicant's claim.

The suit was heard and was eventually dismissed on 2.12.2015. The applicant being aggrieved by the dismissal order now seeks for leave to appeal against decision before this court.

8) It is the applicant's submission that the trial court delivered its judgment without giving him a judgment notice. It was pointed out that the decision was read by another magistrate who did not hear the case. It was stated that the judgment was initially fixed for delivery on 23.3.2015 but the same was put off and there was no indication as to when it would be read since the magistrate handling the case had been transferred.

9) The applicant's advocate averred that he wrote several letters inquiring on when the judgment would be delivered and was informed that the same would be on notice. It is only upon getting the audience of the court's executive officer in July 2016 that the file was retrieved and that is when the advocate found that judgment was delivered on 2/12/2016 in the absence of the parties. The facts deponed in the supporting affidavit of the applicant's advocate are not controverted.

10) The respondent filed grounds of oppositions arguing that the motion was filed after an inordinate delay. The respondent also argued that there was no plausible explanation given for the long delay.

11) Having considered the arguments made in favour and against the motion, it is not in dispute that the decision of the trial court to dismiss

the suit was delivered in the absence of the parties. It is also not dispute that no judgment notice was given to the parties. It is also not in dispute that the applicant discovered in the month of July 2016 that judgment was delivered on 2.12.2015 and that the applicant filed the current motion on 12<sup>th</sup> August 2016.

12) I find that the motion was timeously filed. I am also satisfied that the applicant gave plausible reasons to explain the delay to file an appeal within time allowed by law.

13) In the end, I find the motion dated 12.8.2016 be meritorious therefore it is allowed. Consequently, the applicant is given leave of 14 days to file an appeal out of time. Costs of the motion to abide the outcome of the intended appeal.

**Dated, Signed and Delivered in open court this 14<sup>th</sup> day of December, 2015.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Applicant

.....for the Respondent