



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**MISC. CIVIL APPLICATION NO. 67 OF 2016**

**CHARLES KAARIBA GITHINJI.....APPLICANT**

**VERSUS**

**CHARLES MAINA WANJAU.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

On the 3<sup>rd</sup> day of September, 2015 the 1<sup>st</sup> respondent obtained judgment in the magistrates' court against the applicant and the 2<sup>nd</sup> respondent, jointly and severally, for the sum of Kshs 400,000/= as general damages and Kshs 21,280/= in special damages. The 1<sup>st</sup> respondent's claim was based on the tort of malicious prosecution.

By a motion dated 17<sup>th</sup> November, 2016, the applicant has sought to file, albeit out of time, an appeal against the judgment. The application is supported by the applicant's own affidavit sworn on 9<sup>th</sup> of November, 2016. He has sworn that he could not file the appeal within the prescribed time because his inability to secure the services of a counsel to represent him. More critically, he is now aware that the respondent is in the process of executing the judgment and the decree despite his impecunity.

The 1<sup>st</sup> respondent opposed the application and in his replying affidavit he swore that since the delivery of the judgment and until he filed the current application, the applicant never took any action suggesting that he wanted to appeal; for instance, he never applied for the proceedings, judgment or the decree he is seeking to appeal against.

The 1<sup>st</sup> respondent also swore that the execution process is already underway and that it is only after the matter came up in court on 29<sup>th</sup> of September 2016, for notice to show cause why execution should not proceed against the applicant that he filed the current application. In the circumstances, the application is only meant to deny the 1<sup>st</sup> respondent the fruits of his judgment.

The power of the court to enlarge time to do any act under **order 50(6)** of the **Civil Procedure Rules** is discretionary and as always, whenever this power has to be exercised, the court has to act judiciously and not at its whims. It is always of help for the applicant seeking the court's intervention to exercise its discretion in his favour to present it with sufficient material upon which the court can act; if such material is lacking, the court is unlikely to act in his favour.

In the present application, judgment was entered against the applicant way back in September, 2015 but it is only on 9<sup>th</sup> November, 2016 that he filed the application to file an appeal against it out of time. As counsel for the 1<sup>st</sup> respondent submitted, the applicant seems to have been nudged into action by proceedings in execution of the decree against him; this is evident from the certificate of urgency filed in court alongside the motion and in which commencement of execution of the decree against the applicant was cited as the sole reason for certification of the motion as urgent. Indeed, when counsel for the applicant appeared in court ex parte on 18<sup>th</sup> November, 2016, he submitted that the applicant had been committed to civil jail.

It is apparent that the applicant had no intention from the very beginning to lodge an appeal against the judgment and the decree against him. Though he claims that he could not instruct counsel to represent him, there is evidence from the judgment exhibited to his affidavit in support of the motion that he was represented and his counsel was present in court when the judgment was delivered. The least his counsel or the applicant himself would have done is to apply for a certified copy of the proceedings, judgment and the decree to demonstrate his intentions to appeal. Such steps would not have caused him much.

In the final analysis, I find that there is no plausible reason given for the delay in filing of the appeal or the lodgment of the application to file it out of time; a delay of one year is, by any standards, inordinate, and the applicant owed this court a better explanation than the excuse he has attempted to put forth. In these circumstances, I am not satisfied that there is sufficient material before me upon which I can exercise discretion in favour of the applicant and extend time to file his appeal. Accordingly, his application is unmerited and it is hereby dismissed with costs.

**Dated signed and delivered in open court this 10<sup>th</sup> day of February, 2017**

Ngaah Jairus

**JUDGE**