

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC APPLICATION NO. 420 OF 2015

EMMY KEINO (suing through her

attorney Stephen Mbogo Nyaga).....APPLICANT

VERSUS

BOARD OF TRUSTEES TELEPOSTA PENSION SCHEME.....RESPONDENT

RULING

In this application by Notice of Motion dated 16th September 2015 the Applicant seeks the main order that he be granted leave to appeal out of time against a decree of the lower court passed on 30th July 2015. Stay of execution is also sought pending hearing and determination of the intended appeal. The application is brought under Sections 3 and 3A of the Civil Procedure Act (the Act); Order 50 rule 6, Order 42 rule 6 of the Civil Procedure Rules (the Rules). None of the grounds for the application appearing on the face thereof address the issue of delay in filing appeal for 47 days. It is deponed in the supporting affidavit sworn by the Applicant, that the delay in filing the application was occasioned by the lower court's delay in making its ruling available to his Advocates which they did not receive on time.

The Respondents have opposed the application by a replying affidavit filed on 6th November 2015. The affidavit is sworn by the Administrator/Trust Secretary of the Respondent, one Peter Rotich. The only relevant grounds of opposition emerging from this document are that there is no explanation given for not filing the Appeal within the time stipulated by the law; that the Applicant will suffer no prejudice if this application is dismissed; that there is no order capable of being executed against; that the letter requesting for a copy of the ruling without the order, proceedings and copy to them is in vain as no appeal can stand without the order and proceedings.

I have considered the submissions of the learned counsels appearing. Section 79G of the Civil Procedure Act, Cap 21 (the Act) provides -

“79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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 the 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 in time.”

An applicant for leave to appeal out of time must demonstrate to the court's satisfaction good and sufficient cause for not filing his appeal within the time stipulated by the law. The applicant's attempt to state in his supporting affidavit that delay in obtaining copy of the ruling does not suffice as Order 42 rule 2 states –

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether

to reject the appeal summarily under [section 79B](#) of the Act until such certified copy is filed.”

This means that the copy of ruling alluded to is not necessary for filing appeal as long as there is a plan to file it as soon as possible as the Court does not need such copy in order to consider whether to reject the appeal summarily or not. I don't find it a genuine reason for not filing the memorandum of appeal on time.

In the event I find no merit in the Applicant's application. The same is dismissed with costs to the Respondent. The interim stay of execution now in place is hereby vacated. Those will be the orders of the court.

Dated and delivered at Nairobi this 10th Day of March, 2016.

A.MBOGHOLI MSAGHA

JUDGE