



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. CIVIL APPLICATION NUMBER 265 OF 2016

PERPETUAL KARANGU.....PLAINTIFF

VERSUS

1. HARUN GAITHO KAMENJU.....1ST DEFENDANT/RESPONDENT

**(SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE PETER MWANGI
GAITHO (DECEASED))**

2. LEAH MUTHONI MUTAHI.....2ND DEFENDANT/RESPONDENT

3. ELIUD KAMENJU.....3RD DEFENDANT/RESPONDENT

RULING

1. By an application dated the 14th July 2016, the applicant sought an order to extend time within which to file an appeal or appeals out of time against judgments delivered by the trial court on the 9th May 2016 arising from the following cases:

- 1. Nyahururu PMCC No . 180 of 2013**
- 2. Nyahururu PMCC No. 181 of 2013**
- 3., Nyahururu PMCC No. 183 of 2013**

He also sought an order for stay execution of those judgments pending hearing and determination of this application. An interim order of stay of execution was granted on the 14th July 2016.

2. This application is brought under the provisions of **Order 22 Rule (1) Order 51 Rule 1 of the Civil Procedure Rules** and **Section 79G of the Civil Procedure Act**.

By an affidavit in support of application sworn by the applicant on the 14th July 2016 and submissions by her Advocate Mr. Kiburi Kamonjo, the explanation for failure to file the intended appeals was due to the insurance company's failure to give instructions to its Advocates to file the appeal despite his recommendation for an appeal on time. That it was not until the 13th July 2016 that the instructions were received by the Advocates. Mr. Kiburi submitted that failure by the instructing client, UAP Insurance Company was that the legal officer handling the case left the office and the incoming legal officer was not aware of the matter. He stated that the Insurance Company was ready to offer security and abide by terms that the court may impose. He was annexed a draft Memorandum of Appeal and submits that the

intended appeal has great chances of success.

3. The application is opposed by the respondents through their Advocate Mr. Ombui and a Replying affidavit sworn by Harun Gaitho Kamenju, the first Respondent. It is submitted that this application was an afterthought as the applicant since delivery of the judgments conducted herself in a manner that showed that she was satisfied with the judgments and was ready to satisfy the same. This was demonstrated by the applicants request for Bank Accounts where the decretal sums would be deposited and which were duly supplied, and also mutual discussion on costs and assurance by letter dated 29th June 2016 by her advocates that the delay in processing the payment cheques was regretted but would be sent over within a few days. That never happened leading to the Respondent taking out execution proceedings.

4. Mr.Ombui Advocate has urged the court to disallow the application as it was made in bad faith, and the reasons for the delay was not sufficiently explained, and that the application was only made to forestal execution of the decree.

5. I have considered the above submissions by both counsel. The delay in filing the intended appeal was for 35 days.

By her conduct and that of her Insurance Company, the applicant made the Respondents believe that the decretal sums would be paid but that belief was cut short by this application. An advocate has general authority to act for his client and to safeguard the client interests. It is evident from the supporting affidavit and submissions by Mr. Kiburi that he did all he could, and I believe, under express instructions from his client but the client failed to adhere to the instructions that the decretal sum would be paid.

Under Section 79 G of the Civil Procedure Act, an appeal may be admitted out of time if the Appellant satisfies the court that there are good and sufficient cause for not filing the appeal within time.

6. Mr. Ombui suggested to the court that the application as filed without the actual appeal having been filed in the first instance, makes the application incompetent. Different courts have interpreted the provisions of **Section 79G** of the Act differently.

My understanding is that a party may apply for leave to file an appeal out of time without having filed such appeal. The court has discretion to allow such an application if plausible reasons and explanation are tendered. Likewise, it is also proper to file the Appeal out of time, and apply to court to have it deemed duly filed within time if extension to file it out of time is allowed.

7. Having said so, I subscribe to the school of thought that the application as filed is competent. The holding in **HC Misc Appl. No. 179 of 2015 – Joseph Ngigi Ibore -vs- Myori James and Another (2016) e KLR** is only persuasive.

The explanations given by the applicant for the delay in my opinion are not convincing, not after the applicant had shown its satisfaction with the decrees and its readiness to satisfy the same. I am of the opinion that the applicants insurance simply seeks more time to pay, and not to file the intended appeal. Reasons advanced that the legal officer of the insurance company was new and did not know of these matters are not serious reasons. It cannot be that UAP Insurance Company has only one legal officer, being a large Insurance company ,and that for two months, it could not have recruited another office to handle claims!

In the case cited above, I declined to grant leave for extension of time because delay was not sufficiently explained. In the present application, I am minded that the delay of 35 days may not be so inordinate as to cause prejudice to the respondents, and more so if it is sufficiently explained.

8. An order to whether or not to grant extension of time is discretionary. It however should be exercised judicially with a view to doing justice. Each case dependents on its peculiar circumstances. What then is the justice in this application? The court is not persuaded that the application was made in good faith. It was an afterthought, and as I have stated above, it may be for purposes of buying more time to make payments. The Judgment sought to be appealed from was delivered on the 9th May 2016.

It is now over four months. The applicant has had enough time to organise itself. It ought to satisfy the decree.

I find no good reasons to allow the application as I find the explanations and reasons tendered for the delay not persuasive.

I am aware that the applicant has offered to provide security for the performance of the decree should the application be allowed. The respondents expectations of enjoying the fruits of their judgments have been simmered after assurances that they would have been paid through letters by the appellants Advocates, the latest having been on the 29th June 2016. Justice would not be done if the orders sought are granted.

For those reasons, I find the application dated 14th July 2016 unmerited. It is dismissed with costs.

Dated, signed and delivered in open court this 15th day of September 2016

JANET MULWA

JUDGE