



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO.165 OF 2014

[CONSOLIDATED WITH MISC. APPLICATION NO.166 OF 2014]

LEONIDA NYANCHAMA.....PLAINTIFF

VERSUS

JACKSON OGINDA.....1ST DEFENDANT

STEPHEN OBEGI OMBOGA.....2ND DEFENDANT

RULING

This application is made by way of Notice of Motion dated the 16th July, 2014 and is premised under the provisions of Sections 79(G), 3 and 3A of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Code**;

The Applicants seek the following orders:

1. **Spent.**
2. **Spent.**
3. **That this Honourable Court be pleased to grant leave to appeal out of time against the judgment of the Hon. Senior Principal Magistrate delivered on 6th May, 2014 in SPMCC No. 194 of 2011.**
4. **That the costs of this application be provided for.**

THE APPLICANTS SUBMISSIONS

The Applicant relies on the grounds on the face of the application and the supporting affidavit of Judith Onyango the Chief Legal Officer of Gateway Insurance and made on the 16th July, 2014.

The judgments in SPMCC No.194/2011 and SPMCC No.193/2011 were delivered on the 6th May, 2014. The defendants being dissatisfied with the judgments wish to appeal against the quantum awarded to the Plaintiffs. The appeal is arguable and has a likelihood of success as the injuries are not consistent with the award. Annexed to the application are drafts of the Memorandum of Appeals.

The time to file the appeals expired on the 6th June, 2014 and the applications herein were filed on the

18th July, 2014. The reason for the delay in filing the appeals is attributed to misfiling of the instruction letter by the insurers to their advocates instructing them to proceed to file the appeals. It was only after an audit was done that the insurer realized that no instructions had been given to the advocates.

That the filing of the applications was done within one month after the expiry of the period for filing the appeals and therefore the delay is not inordinate.

The Applicants prayed for leave to file the appeals out of time as the delay was excusable.

THE RESPONDENTS SUBMISSIONS

That judgment was delivered on the 6/05/2014 and a letter dated 8/05/2014 was written to the Applicants followed by an email dated the 28/05/2014 requesting it to remit payment. Letters were written by the Applicants advocates to the insurer followed by numerous telephone calls but to no avail. Nowhere in the letters to the insurer is it indicated that the applicant's advocates were seeking instructions to lodge appeals. The letters were requesting for the remittance of the decretal sums.

When the application for execution was made by the Respondents on the 25/06/2014 is when the insurer woke up and then wanted to now file the appeals.

The letter of instruction to appeal is dated the 27/06/2014 and the applicants filed the applications herein twenty (20) days thereafter. No explanation is given by the applicants on the delay.

Reference is made to the decision in Misc.Appl. No.28/2013 (Muranga) where the facts were similar in nature to this case and the same was dismissed.

The Respondents urge this court to dismiss the applications with costs.

ISSUES FOR DETERMINATION

- i. Whether the application(s) are properly made before this court;
- ii. Whether the applicants have demonstrated that there was sufficient cause for failing to file the appeals in time;

ANALYSIS

The parties agreed that the applications in the two files (Misc. No.165/2014 and Misc. No.166/2014) being similar in nature, that both the applications be canvassed as one and that the Orders granted herein be applicable to both applications.

The application is brought under the provisions of **Section 79(G)** of the **Civil Procedure Act** which provides as set out hereunder;

“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.”

From the reading of the above section, I envisage a situation when an application as the one herein is filed it must be brought accompanied with supporting documents such as; a draft Memorandum of Appeal; a letter requesting the subordinate court to provide certified copies of the proceedings; a decree or order; and a Certificate of Delay.

These documents assist the court to carefully consider and compute the time from when the proceedings were requested for and the time of delivery and thereafter consider whether the explanation given for the delay in filing the appeal within the limited period of thirty (30) days is satisfactory and whether the order for extension of time is merited.

The above mentioned documents are all essential for the filing of any appeal. I have perused the supporting affidavit to the application extensively and find that none of the documents are annexed nor is there any mention of steps taken either by the Applicants or their advocates to secure the documents.

My understanding of the wording of the section is that the appellant must demonstrate steps taken to obtain the documents and then show that the documents were not delivered by the subordinate court within the limited period of thirty (30) days provided for the filing of an appeal.

Indeed this court had even ordered the Applicants to file a Supplementary Affidavit and to annex thereto a copy of the decree appealed against before the inter-partes hearing. I note from the record that this was not done.

It is this court's considered view that the applications are not properly brought under the provisions of this section.

Moving on to the proviso to the section, the intended appellant must satisfy the court that he had good and sufficient cause for not filing the appeal in time.

Firstly, the application(s) are not supported by any affidavit(s) made by the applicants themselves nor is there any supporting affidavit made by the advocates seized of the matter explaining and outlining the delay in obtaining instructions. Instead the supporting affidavit(s) are made by an employee of the insurer, both of whom are not parties to the proceedings.

The explanation given for the delay in filing the appeal is that there was an inadvertent error of misfiling letter(s) of instruction to the advocates seized of the matter instructing them to proceed to file the appeals. The delay is attributable to the insurer and this court states categorically that any explanation given must be to the courts satisfaction.

It is this court's considered view that the explanation given of misfiling a letter of instruction does not obtain. A mis-posting or misdirection of such letters would have been a more plausible excuse or explanation.

The explanation of inadvertent error in misfiling of the letter of instruction is therefore found not to be satisfactory.

Going by the chronology of the letters written to the insurer by its own advocates, the responses thereto were made after the statutory period for the filing of the appeals. Such acts of omission clearly demonstrate that the insurer did not exercise due diligence. From the submissions made it is apparent that the instructions only emanated when the threat of execution was imminent.

I reiterate that both the insurer and the employee are not parties to the suit and this court is of the view that the applications were made at the behest of the insurer and not by the applicants and made as an after-thought and with procrastination in mind.

FINDINGS

For the reasons set out above this court finds that;

The applications are not properly brought under the provisions of **Section 79(G)** of the **Civil Procedure Act**.

The explanations given by the Applicants in both applications are unsatisfactory and the Applicants have failed to demonstrate that they have good and sufficient reasons for not filing the appeals in time.

DETERMINATION

The applications, herein and in Misc. No.166 of 2014 are lacking in merit and are both hereby dismissed.

The Respondents shall have costs in both applications.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 10th day of February, 2015.

A. MSHILA

JUDGE