



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CIVIL APPLICATION NO. 2 OF 2013

SIMON CHERUIYOT TARUS.....APPLICANT

VERSUS

LOCHAB BROTHERS LIMITED.....1ST RESPONDENT

ERIC SIFUNA MASINDE.....2ND RESPONDENT

RULING

1. The applicant prays for extension of time to lodge an appeal. The intended appeal is against the judgment and decree of the lower court delivered on 3rd June 2011 in Eldoret Chief Magistrates Civil Case 70 of 2008.

2. The applicant presented this notice of motion on 29th January 2013. The gravamen of the motion is that the applicant failed to inform other family members of the judgment; that the suit was filed on behalf of the estate of the deceased; and, that the other family members are aggrieved by the decree. Those matters are set out in the supporting affidavit of the applicant sworn on 28th January 2013.

3. The motion is contested. There is a replying affidavit sworn by Narinder Lochab, a director of the 1st respondent. The pith of the deposition is that there has been substantial and unexplained delay; and, that the respondents' insurers paid the decretal sum of Kshs 582,737 way back on 26th July 2011. They also settled the costs of Kshs 62,613. It is also averred that the alleged family members aggrieved by the decree are not named; that there is no draft memorandum of appeal; and, that the motion does not meet the threshold of section 79G of the Civil Procedure Act.

4. On 27th May 2015, I heard brief submissions from learned counsel for both parties. I have considered the application, depositions and the rival submissions.

5. The legal parameters in a matter of this nature are well settled. This court has wide and unfettered discretion. The discretion must however be exercised judiciously. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See generally, *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported).

6. The Court must also pay heed to the overriding objective to do justice to the parties. See Article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act. See also *Harit Sheth T/a Harit*

Sheth Advocate v Shamas Charania, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.

7. There is no dispute that the impugned judgment was delivered on 3rd June 2011. That is about four years ago. It is not also disputed that the decretal sum of Kshs 582,737 was *paid* by the respondents' underwriter way back on 26th July 2011; and, that the costs of Kshs 62,613 were also settled. Doubt is completely removed by the letters dated 26th July 2011 and 7th September 2011 from the respondents' counsel forwarding the payment to the plaintiff's advocates. The letters are annexed to the replying affidavit of Narinder Lochab.

8. The motion for leave to appeal out of time was not presented to this court until 29th January 2013, *one and a half* years after the judgment and receipt of the decretal sum. There is *no* explanation *at all* for the delay. The supporting affidavit is completely silent on the matter. It is also mute on the identities of the "*other family members*" said to be aggrieved by the decree.

9. I have reached the inescapable conclusion that there has been *inordinate* and *unreasonable* delay in seeking leave to appeal out of time. As a general rule, when delay is established, unless it is well explained, it is deemed to be inexcusable. See Ivita v Kyumbu [1984] KLR 441. In this case the delay is not explained at all. Granted those circumstances, I am unable to exercise my discretion under section 79G of the Civil Procedure Act in favour of the applicant. See Leo Sila Mutiso v Rose Mwangi, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported). I find that the entire motion is an *afterthought*. It is not also lost on me either that *no* draft memorandum of appeal has been annexed. It remains remains a guess what aggrieves the applicant.

10. The upshot is that the notice of motion dated 28th January 2013 is completely devoid of merit. It is dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 7th day of July 2015

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Miyienda for the applicant.

No appearance for the respondents.

Mr. J. Kemboi, Court clerk.