



**REPUBLIC OF KENYA**

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

**MISC. APPL. NO. 113 OF 2010**

**RUTH SAWE AND 11 OTHERS.....APPLICANTS**

**=VERSUS=**

**KENYA RAILWAYS CORPORATION.....RESPONDENT**

**RULING**

The application before me is for leave to appeal out of time. The applicant also seeks an order of stay of execution or of enforcement of the Judgment and the Decree issued by the trial court.

The applicant seeks leave to appeal against the Ruling that was delivered on 11th April, 2013.

According to the applicant, she and the “11 others” were aggrieved by the order granted on 11th April, 2013. They therefore wished to challenge the said order.

Although the applicant appreciates that there has been some delay in bringing the application, she believes that the application was made in a timely manner. Any such delay as was there, was attributed to the inadvertence on the part of the advocate who was representing the applicant at the time when the Ruling in issue was delivered.

The affidavit in support of the application was sworn by **DANIEL LAWRENCE WERE**, the learned advocate for the applicant.

He has deponed that his client felt aggrieved because the learned trial magistrate determined the substantive suit, at an interlocutory stage of the case. He ordered the applicant to vacate the suit premises within three (3) months, from 11th April, 2013.

Thereafter, because the applicant felt aggrieved, their lawyer sought a review of the Ruling. The trial court dismissed the application for review on 12th July 2013.

Shortly after the Court declined to review its orders, the applicant decided to change her lawyers. However, the said lawyers could not challenge the ruling dated 11th April, 2013, through an appeal, because the time allowed for lodging an appeal had lapsed.

It is because of that reason that the applicant has now come before this court, seeking leave to appeal out of time.

In her view, the failure to appeal within the time provided by law, was not her mistake. The

mistake was made by her lawyer. Therefore, the applicant asks this court not to visit her lawyer's mistake on her, an innocent litigant.

The applicant informed the court that she was ready to provide reasonable security.

She also expressed the view that if the reliefs sought were granted, the respondent would not be prejudiced.

In answer to the application, the Respondent filed a Replying Affidavit, sworn by **PROTAS OCHIENG OUMA**, who is the Regional Estate Coordinator and Estate Officer of Kenya Railways Corporation.

As far as the Respondent was concerned, the applicant had not given any satisfactory reasons for the inordinate delay in bringing the application.

Secondly, if the orders sought were granted, the Respondent believes that it will be prejudiced. The nature of the prejudice which the Respondent would suffer are attributable to the loss of colossal rental revenues which it could otherwise earn if the houses in issue were renovated.

As far as the Respondent was concerned, the applicant had been aware of the need for the renovations, from November, 2012. Therefore, when the trial court granted a three (3) months moratorium to the applicant, the Respondent deems that to have been very reasonable.

In determining this application, I must begin by looking at the Plaintiff. The suit was filed by "**RUTH J. SAWE AND 11 OTHERS**". The identity of the eleven other persons was not disclosed.

Nonetheless, the Plaintiffs were described as "bona fide tenants of the Defendant", at the Railways Quarters situated at River Bank Location, Eldoret.

The claim is premised on the Notice of termination of tenancy, which the Defendant had issued to the Plaintiff. By that Notice, the Defendant required the plaintiff to vacate her house after one month.

The Plaintiff described the said Notice as illegal, as it was contrary to the tenancy agreement. Therefore, the Plaintiff asked the Court to issue a permanent injunction, to restrain the Defendant from evicting her and the eleven other tenants.

The Plaintiff had also filed an application for an interlocutory injunction, alongside the Plaintiff. The said application was dated 8th January, 2013.

After giving due consideration to that application, the learned magistrate, **Mr. E. A. Obina**, SRM, dismissed it. However, the court, nonetheless, allowed the Plaintiff some 3 months, within which period she should have vacated the premises.

After the application was dismissed, the Plaintiff applied for a review. That application for review was also dismissed.

Following the dismissal of the application for review, the Plaintiff was granted leave to appeal against the order made on 12th July, 2013.

The Plaintiff asserts that it is her lawyer who made a mistake, when he sought a review instead of filing an appeal against the Ruling dated 11th April, 2013. Therefore, she asks this Court not to visit the mistake of her lawyer, upon her.

A perusal of the record of the proceedings reveals that the application for review was dated 25th April, 2013. The said application was supported by the affidavit of **RUTH J. SAWE**. In effect, the

Plaintiff not only knew about the application for review, she even swore an affidavit to support it.

In the circumstances, she cannot be heard to exonerate herself from the actions taken by her lawyer.

It could, possibly, have been different if her lawyers had taken some action without her knowledge, or if the lawyers had taken action which was inconsistent with instructions given by their client.

In this case, the Plaintiff is not asserting that she had instructed her lawyer to lodge an appeal, but that he thereafter filed an application for review.

The Plaintiff was an active participant in the application for review. It is thus not clear to me, why she should now blame her advocate for having taken that action.

If the application for review had succeeded, the plaintiff would not have needed to lodge an appeal. That means that she only came to this court, to seek leave to appeal, because her application for review was dismissed. Effectively, therefore, the Plaintiff is seeking leave to appeal, because the route she had chosen to use earlier, did not lead her to "***the promised land***".

There is no reason given by the Plaintiff to explain the delay in lodging an appeal against the Ruling delivered on 11th April, 2013.

She made a choice, to seek a review. She did not succeed. She could have pursued an appeal, instead of the review. Having made a choice, the Plaintiff must accept the consequences of her said choice. She ought not to blame it on her advocates.

And after the Court declined the Plaintiff's quest for review, she had an opportunity to challenge the Court's decision though an appeal. But she did not do so.

By that conduct, the Plaintiff may be presumed to have accepted the decision on her application for review.

The Plaintiff relied on the authority of ***ELDORET STEEL MILLS COMPANY LIMITED - VRS- ANTHONY SHILEWA KAIDA, MISC. APPLICAITON NO. 4 OF 2013***, for the proposition that it is the duty of the court to administer Justice to all, without paying undue attention to technicalities.

In that case, the applicant filed its application for leave to appeal out of time, on 7th February, 2013. The learned Judge noted that the time within which the appeal should have been filed, had lapsed "**sometime in mid January, 2013**".

In effect, the application was filed about 3 weeks after the lapse of the time for filing the appeal.

In comparison, the delay in this case was for about 10 weeks. The period of delay is only one of the factors to be taken into account.

In ***AFRICAN AIRLINES INTERNATIONAL LTD -VRS- EASTERN AND SOUTHERN TRADE & DEVELOPMENT BANK [2003] E.A. 2***, the Court expressed itself thus:-

***All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal, and the degree of prejudice to the Defendant if time is extended***".

In this case, the Plaintiff, **RUTH J. SAWE**, has not named the other "**11 OTHERS**". The Court did direct her to amend the Plaint to name the other persons who were suing together with her. To date, this Court remains unaware of the identities of the "**OTHERS**". That means that if they were

condemned to pay costs, the Defendant would not know who exactly to pursue.

In the same vein, persons whose identities are undisclosed to the court, cannot benefit from the orders of this court. Therefore, if this court were to grant the relief sought, it can only be for the benefit of the named Plaintiff.

The Plaintiff could have lodged an appeal or, in the alternative, sought a review. She opted to seek a review of the orders made on 11th April, 2013.

As review was only available to a party who did not appeal, I find that when a party chooses to go for review, it cannot thereafter or concurrently be available to him to appeal against the ruling or order in issue.

I therefore find no merit in this application. It is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT ELDORET,**

**THIS 4TH DAY OF FEBRUARY, 2014.**

.....

**FRED A. OCHIENG**

**JUDGE.**