



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI.

MILIMANI LAW COURTS

MISC APPLICATION NO. 847 OF 2013

FREDS ACADEMY LIMITED.....APPLICANT

VERSUS

EMMA KINYA MUGAMBI.....1ST RESPONDENT

JOHNSON MBURU KINYANJUI.....2ND RESPONDENT

STEPHEN MWIYORO MUCEGE.....3RD RESPONDENT

RULING

Before me is a Notice of Motion dated the 4/9/13. It is brought under rule 1(3) of the High Court (Practice and procedure Rules) Section 1A, 1B, 3A & 6G of the Civil Procedure Act Order 42 rule 6 of the Civil Procedure Rules 2010. The applicant seeks to be granted leave to file an appeal out of time against the ruling and consequential orders of Hon. Ole Keiwa delivered on the 14/6/13. The applicant has 8 grounds on the face of the application. The application is supported by the affidavit of Lydia Gutu.

The background of this application is that the parties to this application had a suit in the Lower Court CMCC 8311 of 2004. On the 23/11/13 a judgment was entered in favour of the 1st respondent for general damages were assessed at Kshs. 500,000/- and costs of future medical expenses at Kshs. 1.6 million plus interest on general damages from date of judgment and interest on specials from the date of filing the suit. Being dissatisfied with learned Magistrate's decision to award interest on costs of future medical expenses from the date of filing suit in the lower Court the applicant sought to have the court judgment reviewed. The application was heard in the Lower Court and the applicant's application was rejected.

The applicant thereafter sought to file an appeal against the ruling and orders given on the 14/6/13. The 30 days period within which they were to file the appeal has since lapsed. According to the applicant the delay in not filing the appeal on time was occasioned by a delay in obtaining a copy of the ruling and order. The applicant argues that the delay is an excusable delay and was occasioned by circumstances beyond the applicant's control; that the respondent has initiated execution proceedings and there is a threat to attach and sell the applicants property; that they are ready to deposit the entire decretal sum in court should the order of stay be granted.

The application was opposed. The 1st respondent filed grounds of opposition dated the 9/9/13 together with a replying affidavit sworn by Emma Kinya Mugambi dated the 9/9/12. She argues that the applicant has not given any good and sufficient cause for not filing the appeal in time; that the excuse for the delay has not been substantiated and backed by any cogent and probable evidence; that the accident the subject

matter in the Chief Magistrate's Court occurred on the 4/8/01 which is 12 years ago; that the application has been filed to stall the hearing of the Notice to Show Cause (NTSC). The respondent attached the NTSC filed in Court on the 31/7/13 which shows that the decretal sum stand at Kshs.1,896,638.70/-.

In a supplementary affidavit filed in Court on the 12/11/13 M/s Lydia Gutu depones that the ruling the subject of the intended appeal was delivered on the 14/6/13 but the typed and certified copy of the ruling was made available for collection on the 21/11/13 and that their intended appeal has overwhelming chances of success.

Parties made oral submissions in court which I have carefully considered. The applicant relied on 2 cases namey ***Abok James Odera T/A A. J Odera & Associates Vs. John Patrick Machari T/A Machira & Co. Advocates (2013) eKLR*** and ***Keziah Stella Pyman & 2 others Vs. Paul Mwololo Mutevu & 8 others (2013) eKLR***. The 1st respondent relied on the case of ***Jane Wanjiru Gitau Vs. the Kenya Power & Lighting Co. Limited HCC No. 1208 of 1997 (2006) eKLR*** and the case of ***Origo & another Vs. Mungala (2005) 2KLR page 307*** plus the Civil Procedure Act Cap 21.

In the case of ***Leo Sila Mutiso Vs. Rosehelia Wangri Mwangi Civil Application No. 251 of 1997*** which was cited by Justice Ouko in the case of ***Keziah Stella Pyman & 2 others and Paul Mwololo Mutevu and 8 others*** the Court held that:

“it is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matter which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibility) the chances of the appeal succeeding if the application granted and the degree of prejudice for the resident if the application is granted”.

I am guided by this authority. I have considered the reasons given by the applicant. The Lower Court's judgment was delivered on 23/11/11 Ruling on the applicant's application to review the judgment was delivered on the 14/6/13. The typed ruling was made available on the 21/11/13. The application was filed in September 2013. I note that there is no letter annexed to show when they applied for the ruling and order but the certified ruling has been attached and it bears the date 22/11/13. It is evident that the applicant moved to this court when the respondent moved to execute. I note the provisions of section 79G.

The delay is for about 2 months despite the fact that the delay is for 2 months I will exercise my discretion in favour of the applicant. I find that no prejudice will be occasioned to the respondent. Though I do note that the accident happened in the year 2001. I therefore grant the applicant leave to file an appeal out of time against the ruling and consequential orders of Hon. Ole Keiwa delivered on the 14/6/13. The applicant shall file the appeal within 14 days from the date of this ruling. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this **14th** day of **March** 2014.

R. E OUGO

JUDGE