



IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CIVIL APPLICATION NO.275 OF 2012

JOHN CYPRUS KAMAU

KINGSHOLME LIMITED.....APPLICANTS

VERSUS

AMOS WAFULA WAFWAFWA.....RESPONDENT

RULING

1. The application is brought by way of Notice of Motion under the provisions of **Section 79(G)** of the **Civil Procedure Act 2010**,
2. The applicant's are seeking the following orders *inter alias*:
 - i) That this Honourable court be pleased to grant leave to the applicants to file an appeal against the judgment dated 28/3/2012 out of time or upon such conditions as are fair and just in the circumstances of this case.
 - ii) The costs of the application be provided for.
3. That applicants rely on the grounds on the face of the application and the supporting affidavit made by P. Kamau Njuguna and is dated 24th July, 2012.
4. The applicants submit that the application has been made in good faith and are willing to abide with the conditions set down by this court.
5. That the only issue that was contentious and is the genesis of the appeal is that of quantum. The applicants had been directed to deposit half of the decretal sum into court and they duly complied with the courts order.
6. That the applicants submitted further that they would be great prejudice if the orders sought were not granted.
7. Therefore the applicants prayed that the application be allowed and costs be provided for.
8. The application was opposed by counsel for the respondent who argued that the application was bare as there were no supporting annextures to support the application.

9. That there was no draft Memorandum of Appeal annexed to enable the court to evaluate the appeal.
10. The applicants had not given any reason explaining the delay in filing of the appeal.
11. The court was urged to dismiss the application with costs.

ISSUES FOR DETERMINATION:

12. After considering the submissions made by counsel for the applicants and the respondent the only issue for determination is:

- (a) whether the applicants have satisfied the court on reasons for the delay in not filing the appeal in time.

ANALYSIS

13. It is trite law that a party must file an appeal after thirty (30) days from the date of judgment.
14. The judgment that is sought to be appealed against was entered on the 28th March, 2012 and then time started running
15. This court makes reference to the **Section 79(G)** which reads as follows:

“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.”

16. This court notes that the applicants have not annexed any application letter requesting for the decree and or the typed proceedings. Nevertheless it is not necessary for the proceedings to be annexed to the Memorandum of Appeal and a party also does not need to wait for proceedings to be typed in order to file an appeal.
17. The above notwithstanding, even whilst the negotiations on quantum were ongoing, the applicants ought to have filed a “*holding*” Memorandum of Appeal pending the outcome of the negotiations.
18. This court concurs with submissions of counsel for the respondent that the application is bare and that a draft Memorandum of Appeal ought to have been annexed to the application to enable the court to evaluate the appeal.
19. This court also takes cognizance of the fact that that judgment was delivered on 28/3/2012 and the application herein was filed on the 3/8/2012. This translates to a period of four (4) months. A period of delay of four(4) months has been held by the courts to be inordinate.
20. The applicants filed the application for leave to appeal out of time on the 3/8/2012 and prosecuted the same on 4/3/2012 which translates to a period of over two (2) years. The applicants have also not given any explanation as to the delay in prosecuting the current application.
21. This court opines that there has been an inordinate delay and no reasons have been adduced by the Applicants to address and explain the delay in filing the application, the delay in prosecuting the application and delay in not filing the appeal in time, to the satisfaction of the court.

FINDINGS

22. For the reasons stated above, this court finds that the applicants have not satisfied it and have not shown good and sufficient cause for not filing the appeal in time.

CONCLUSION

23. The application is found lacking in merit and it hereby dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 5th day of May, 2014.

A. MSHILA

JUDGE