



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS

ELC. MISC. CASE NO.353 OF 2016

JOSEPH MAINA NDIGIRIGI.....PLAINTIFF

VERSUS

ESTHER GATHONI MITHAMO.....DEFENDANT

RULING

Coming up before me for determination are two applications, namely the Plaintiff's Notice of Motion dated 13th May 2016 (hereinafter referred to as the "Plaintiff's Application") and the Defendant's Notice of Motion dated 20th July 2016 (hereinafter referred to as the "Defendant's Application").

In the Plaintiff's Application, the Plaintiff is seeking for leave to lodge an appeal against the Judgment of Principal Magistrate Mrs. Kabaria delivered on 24th March 2016 in Chief Magistrates Civil Case Number 5881 of 2010. The Plaintiff's Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff, David Karanja Thuo, sworn on 13th May 2016 in which he averred that he was the Plaintiff in Chief Magistrates Civil Case Number 5881 of 2010 and the Respondent was the Defendant. He further averred that the said suit was heard by Mrs. Kabaria Principal Magistrate and judgment was set for 11th December 2015. He further indicated that come that date, the judgment was not ready and this position obtained on several other occasions. He then averred that on 20th April 2016, his advocates received a letter dated 18th April 2016 enclosing a cheque in part payment of the decretal amount. He stated that this is when he learnt that the said judgment had been delivered as far back as 24th March 2016. He added that he was not notified of the reading of the said judgment. He also added that he intends to lodge an appeal against that judgment but is out of time hence this Application.

The Plaintiff's Application is opposed by the Defendant, Esther Gathoni Mithamo, who filed her Replying Affidavit sworn on 10th August 2016 in which she averred that it is true that the Judgment was delivered by Mrs. Kabaria on 24th March 2016. She further averred that on 18th April 2016, her advocates wrote to the Plaintiff's advocates seeking to pay part of the decretal sum and enclosed a cheque for Kshs. 999,000/- which was rejected by the Plaintiff. She further averred that the Plaintiff did not immediately lodge an appeal and only filed this Application as an afterthought. She added that this Application is time barred and is only intended to frustrate her efforts to put this matter to closure. She also stated that she stands to suffer prejudice because the decretal sum continues to incur interest yet it is the Plaintiff who is not vigilant in following up this matter.

The issue that I am required to determine is whether or not to allow the Plaintiff to lodge an appeal out of time. The applicable law on this issue is section 79G of the Civil Procedure Act which provides 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 satisfied the court that he had good and sufficient cause for not filing the appeal in time.”

Has the Plaintiff demonstrated that he had good and sufficient cause for not filing the appeal on time? To my mind, I consider that the important factor to consider is whether or not the delay in filing the Appeal is unreasonable. Delay was discussed in the case of **Agip (Kenya) Ltd versus Highland Tyres Limited (2001) KLR 630** as follows:

“Delay is a matter to be decided on the circumstances of each case where a reason for the delay is offered. The court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit.”

Having regard to this matter, I note that the Judgment was delivered on 24th March 2016 in the absence of the Plaintiff and his advocates. The Plaintiff informed the court that he was not aware that the Judgment would be delivered on that date, hence his absence. He told the court that after the suit was heard by Mrs. Kabaria Principal Magistrate, judgment was set for delivery on 11th December 2015. He further indicated that come that date, the judgment was not ready and this position obtained on several other occasions. He told the court that he only came to learn that the judgment had been delivered on 20th April 2016 when his advocates received a letter dated 18th April 2016 from the Defendant's advocates enclosing a cheque in part payment of the decretal amount. He stated he was not notified that the judgment would be delivered on 24th March 2016. No evidence has been adduced by the Defendant that the Plaintiff was ever served with a judgment notice. It is also noteworthy that on 20th April 2016 when he came to learn that the judgment had been delivered, he proceeded to file the Plaintiff's Application on 13th May 2016, less than a month later. After full consideration of the explanation given by the Plaintiff as to why he ran out of time to file the appeal, I am satisfied that his reasons are good and sufficient. Immediately the Plaintiff learnt that the Judgment had been delivered, he filed this Application. Accordingly, the Plaintiff's Application is allowed. Costs shall abide the appeal.

The other application to determine is the Defendant's Application in which the Defendant seeks for an order allowing her to pay the decretal sum by depositing a sum of Kshs. 1 million and the balance in 6 monthly installments in court as the Plaintiff has refused to accept payment contrary to the judgment of the lower court. The Plaintiff did not oppose this Application. The Defendant's Application is allowed as prayed. Costs shall abide the appeal.

It is so ordered.

SIGNED AND DATED AT NAIROBI BY LADY JUSTICE MARY M. GITUMBI THIS 19TH DAY OF JUNE 2018

MARY M. GITUMBI

JUDGE

DELIVERED AT NAIROBI BY JUSTICE BERNARD EBOSO THIS 21ST DAY OF JUNE 2018

BERNARD EBOSO

JUDGE