



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, NAMBUYE & MWERA, JJ.A.)**

**CIVIL APPEAL NO. 101 OF 2006**

**BETWEEN**

**BERNARD KARURU MBUGUA.....APPELLANT**

**AND**

**ASHA ASIKO MUHAMUDU.....RESPONDENT**

***(An appeal from the Ruling and the Order of the High Court of Kenya at Nairobi (Mugo, J.),  
dated 18<sup>th</sup> November, 2004***

***in***

***Civil Application No.1068 of 2004)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal from the Ruling and Order of the High Court dismissing the appellant's application for leave to lodge an appeal against the decision of the subordinate court out of time.

Sometime in August, 2012, the appellant filed a suit in the Chief Magistrate's Court at Nairobi against the respondent – CMCC No.8071 of 2002, claiming special damages arising from damage to his motor vehicle registration No. KAK 170S when it collided with the respondent's motor vehicle registration No.KZY 232 on 21<sup>st</sup> November, 1999 allegedly due to the negligence of the respondent or of the respondent's driver. The subordinate court issued summons to enter appearance dated 11<sup>th</sup> October, 2002 to the respondent. However, the summons to enter appearance was not served on the respondent within the validity period of 12 months as stipulated by order V Rule 1(1) – (now order 5 Rule 2(1) Civil Procedure Rules. (CPR).

By an application dated 13<sup>th</sup> October, 2003, the appellant applied for extension of the validity of the summons to enter appearance. That application was dismissed by the subordinate court on 19<sup>th</sup> November, 2003.

Being aggrieved by that decision, the appellant filed High Court Misc. Application No.1068 of 2005 on 11<sup>th</sup> August, 2004 whereby he sought leave to file an appeal out of time against the decision of the subordinate court. The application was, however, dismissed by the High Court on 18<sup>th</sup> November, 2004 thereby precipitating this appeal. The appeal has been argued *ex parte* as the respondent has never been

notified of the proceedings or participated in the proceedings.

The Misc. Application No.1068 of 2009 which the High Court dismissed was supported by the affidavit of **Richard Musyoki Kioko**, counsel who was dealing with the suit in the subordinate court. He deposed that the intended appeal had merit; that he was solely to blame for the failure to file the appeal in time; that failure to file the appeal in time was due to his inaction; that the application in the subordinate court was prosecuted by another counsel on his behalf; that he failed to inquire of the date of the reserved ruling as he was overwhelmed with work; that he came to know later in the month of November, 2003 that the subordinate court read the ruling on 19<sup>th</sup> November, 2003; that he had not taken further action as a formal application for leave to appeal against the ruling of the subordinate court was required; that he failed to take steps to save the suit or to discuss the issue with his employer and that the inaction became known when the instructing client M/S Kenya Alliance Insurance Company Ltd made inquiries on the status of the suit.

The learned judge considered the reasons given for delay in filing the appeal and concluded:

***“I do not consider the reasons given herein for not filing the appeal in time satisfactory for the purpose of Section 79G. Notwithstanding the fact that the advocate previously seized of the matter has admitted indolence in dealing with the matter, it seems to me that the instructing client is equally to blame for not inquiring the status of the suit until, I believe immediately prior to the filing of this application.”***

The appeal is against that decision. Although seven grounds of appeal were enumerated in the memorandum of appeal, in reality there are only two substantive grounds of appeal – namely, firstly, the learned judge erred in law in failing to give effect to the provisions of Section 79 G of the Civil Procedure Act (CPA), and secondly, that the learned judge failed to exercise discretion judicially.

**Mr. Kimani**, learned counsel for the appellant submitted amongst other things, that, the appellant satisfied the High Court that he had good and sufficient cause for not filing an appeal in time and further that the appellant should not be punished for the admitted indolence of the counsel who was handling the suit.

We have considered the appeal. By Section 79G of the CPA, an appeal from a subordinate court to the High Court should be filed within 30 days from the date of the decree or order appealed against,

***“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.”***

The question is whether the facts stated in the affidavit of **Richard Musyoki Kioko** which supported the application, disclosed a good and sufficient cause.

The appeal relates to the exercise of discretion by a judge. The principles upon which an appellate court can interfere with judicial discretion of a judge are well settled (see **Mbogo v Shah [1968] EA 93**). On our own, evaluation of the grounds stated by counsel, **Richard Musyoki Kioko** to support the application for extension of time, we respectfully agree with the learned judge that they did not disclose a good and sufficient cause.

Indeed, a court would not be exercising its discretion judicially if it were to extend time on such frivolous grounds and deliberate inaction.

There is another important matter raised by **Richard Musyoki Kioko** in the supporting affidavit. He deposed that the order of the subordinate court dated 19<sup>th</sup> November, 2003 is only appealable with leave. He has correctly stated the legal position. Section 75 of the CPA as read with Order XLII (now Order 43) of CPR, is clear that the order is only appealable with leave of the court and that an application for such leave should, in the first instance, be made to a court which made the order either informally at the time of making the order or within 14 days from the date of such order.

It is apparent from the affidavit of **Richard Musyoka Kioko** that no application for leave to appeal was made in the subordinate court or in the High Court at all.

Before the court can extend time for filing an appeal it is a condition precedent that the right of appeal already subsists. It would have been futile for the High Court to extend time to appeal before leave to appeal had been obtained.

The appellant has not acted with promptitude throughout since the cause of action accrued in 1999. It would be unjust to give an order which would have the effect of allowing the appellant to continue with the suit over 15 years since the cause of action accrued.

For those reasons, the appeal is dismissed with no orders as to costs.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of March, 2015**

***E.M. GITHINJI***

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***JUDGE OF APPEAL***

***R. N. NAMBUYE***

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***JUDGE OF APPEAL***

***J.W. MWERA***

.....

***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**

