



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 98 OF 2004**

**VINCENT SUNDAY YIER.....RESPONDENT**

**VERSUS**

**FOAM MATTRESS LIMITED.....APPLICANT**

**RULING**

By a notice of motion dated 5th May 2004 M/S Foam Mattresses Ltd the applicant herein seeks an order to admit an appeal out of time. The application is brought under sections 79G and 3A of the Civil Procedure Act and is based on some grounds on the body of the motion and an affidavit of Mr. Jitendra Patel who is one of the Directors of the applicant. The application is opposed by Mr. Vincent Sunday Yier the respondent who relies on grounds of opposition filed on his behalf. Miss Pandit for the applicant submitted in support of this application that as her client was not satisfied with the judgment of the Chief Magistrate's Court in Kisumu CMCC No. 259 of 2001 delivered on 10th January 2002 it appealed to this Court in Kisumu HCC Appeal No. 6 of 2002 within time. She added that subsequently a consent order was recorded in which the parties agreed on a number of issues including that the hearing of the appeal was to be on 30/4/2002.

Miss Pandit added that when the appeal came up the hearing it could not proceed due to the fact that copies of the proceedings and Judgment had not been supplied and that the respondent applied for an order to strike out the appeal which order was granted after a hearing of the application which prompted the applicant to lodge this application. Miss Pandit submitted that this Court has jurisdiction to extend time to enable the applicant lodge a fresh appeal. She added that this application was filed immediately after the first appeal was struck out and that the applicant has demonstrated that it has a good and sufficient cause for not filing the appeal in time.

Mr. Muma Nyagaka for the respondent opposed the application contending that it is misconceived as section 799 is not available to enable the applicant obtain the orders it seeks. He also claimed that the application is res judicata. According to Mr. Nyagaka the applicant has come after a long time without giving reasons for the delay. He also contended that no sufficient cause had been shown to this Court for the orders sought. Mr. Nyagaka contended that the applicant should have appealed to the Court of Appeal against the decision of this Court.

The background facts giving rise to this application are that on 10th January 2002 the Chief Magistrate's Court in Kisumu CMCC No. 259 of 2001 delivered judgment awarding the respondent Kshs. 140,000/- general damages and Kshs. 1,500/- special damages for the injuries the respondent had sustained as a result of an accident which had occurred on 22nd December 1998 along Kisumu-Busia

road. The applicant was aggrieved by the judgment and orders and he therefore immediately appealed to this Court against the decision of the Chief Magistrate's Court in HCC Appeal No. 6 of 2002. Subsequently the parties recorded a consent whose terms included an order for hearing of the appeal on 30/4/2002. Unfortunately the date was reached before the appellant was ready to prosecute the appeal due to the fact that the proceedings and judgment had not been supplied. Upon an application by the respondent the appeal was struck out prompting the applicant to lodge this second appeal.

The first ground of the respondent is that Section 79G of the Civil Procedure Act does not apply to this application as there is no appeal already filed out of time . I do not need the proviso to section 79G as saying that an appeal has to be filed out of time before it being admitted. I think the correct meaning is that the court is empowered to extend time to enable an appeal be filed after 30 days have expired. In any case filing of appeal is a constitutional right of a litigant which the court should readily grant . The fact that the applicant has come under section 79G of the CPA instead of Order XLIX rule 5 of CPR should not invalidate the proceedings as long as the jurisdiction is not affected and no prejudice is caused to the respondent (Boyes V Gathure (1969) EA 385.

If this Court had dismissed the appeal No. 6 of 2002, then the applicant would not have had another chance to come for an extension of time to file another appeal. As that appeal was struck out there is no bar to the applicant filing another appeal. The doctrine of res judicata is not relevant in such circumstances and especially as that first appeal does not appear to have been competent due to the lack of some necessary documents.

It is common ground that the grant of extension of time to file an appeal out of time calls for an exercise of Court's discretion which has to be carried out after the applicant has given satisfactory explanation as to what led to the delay. It has been held that in considering such an application the length of the delay, reasons for it, chances of appeal succeeding and the prejudice to the respondent ought to be taken into account. It is clear that in the present case that the delay was caused by the pursuit of the appeal which was struck out. The applicant filed this application on the date its appeal was struck out. The reasons for the delay have therefore been satisfactorily explained. The appellant seeks to challenge the trial Court's decision on liability contending that it was not proved. I have perused the evidence relating to the cause of accident and I think the applicant has an arguable appeal. On the issue of the prejudice to the respondent I note that the decretal sum is held in the interest earning account in the joint names of the advocates for the parties.

In the circumstances I would exercise my discretion in favour of the applicant. I extend time to enable the applicant file a fresh appeal within 14 days from to-days date.

Dated and delivered this 10th June 2004 in the presence of Miss Pandit for applicant and Mr. Gichaba for Mr. Muma for respondent.

**B.K. TANUI**

**JUDGE**

**GICHABA**

**I pray for leave to appeal and a stay of proceedings.**

**PANDIT**

**I pray that formal application be filed.**

**ORDER**

**Formal application to be filed.**

**B.K. TANUI**

**JUDGE**



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