Case Number:	Civil Application 194 of 2009
Date Delivered:	17 Dec 2009
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Erastus Mwaniki Githinji
Citation:	Aineah Likuyani Njirah v Aga Khan Health Services [2009] eKLR
Advocates:	-
Case Summary:	[Ruling] Civil Procedure and Practice – extension of time - application to for extension of time to file and serve record of appeal out of time – factors to be satisfied by the court – merit of intended appeal – effect of inordinate delay in filing application
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	H.C.C.C. 275 of 2004
Case Outcome:	Application dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLICATION 194 OF 2009

AINEAH LIKUYANI NJIRAH..APPLICANT

AND

AGA KHAN HEALTH SERVICES...RESPONDENT

(Application for extension of time to file and serve record of appeal out of

time in an intended appeal from the judgment and decree of the High

Court of Kenya at Nairobi (Mutungi, J.) dated 22nd July, 2008

in

H.C.C.C. NO. 275 OF 2004

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R U L I N G

This is an application under **Rule 4** of the *Court of Appeal Rules* for extension of time within which to file a notice of appeal and record of appeal against the judgment of the superior court (Mutungi J.) dated 22nd July, 2008.

The applicant was an employee of United Nations in Nairobi (UN). The UN operated a Medical Scheme with Aga Khan

Hospital under which the employees of UN and their families would get medical services at Aga Khan Hospital, pay for those services and thereafter make a claim to UN for reimbursement. On 4th February, 2002, the appellant filed *Civil Suit No. 709 of 2002* against the Aga Khan Health Services (Respondent) in Chief Magistrate's Court, Nairobi averring, among other things, that he and members of his family visited Aga Khan Hospital on 10th August and 17th August, 1996 for dental care and Hepatitis injections; that the applicant and his family received treatment; that the applicant paid the invoices and thereafter lodged a claim with UN for reimbursement; that by a letter dated 17th August, 1996 the respondent recklessly and maliciously misrepresented to UN that the applicant and his family did not attend the dental clinic on 13th August, 1996 and that the plaintiff and his family anomalously used the same invoices twice to procure the Hepatitis injections; that as a result of the misrepresentation the applicant was summarily dismissed by his employer; that by the letter, the respondent also breached the contractual Doctor – patient relationship based on trust and confidence. The reliefs sought in the plaint were, firstly, a declaration that the respondent's letter dated 17th August, 1996 was a misrepresentation, wrongful, null and void; and secondly, general damages.

The respondent filed a defence in which it admitted writing the letter dated 27th August, 1996 stating that the applicant and his family had not visited the dental clinic but denied liability averring that the applicant's claim was barred by **Limitation of Actions Act**.

Thereafter, the respondent filed an application to strike out the plaint on the ground that it did not disclose any reasonable cause of action against the respondent. It is apparent that the application was dismissed by the subordinate court on 8th April, 2004. The respondent appealed against the ruling to the High Court vide *High Court civil appeal No. 275 of 2004*. The appeal was allowed by Mutungi J. on 22nd July, 2008 with the result that the plaint was struck out with costs.

The applicant intends to appeal against the decision of the superior court.

The applicant is required to satisfy the court, among other things, that the intended appeal is not frivolous; that the delay in bringing the application has not been inordinate and that the respondent would not suffer undue prejudice if the application is allowed (see **Wasike vs. Swala** [1984] KLR 591).

The applicant did not refer to the merits of the intended appeal in his application or in the supporting affidavit. The cause of action arose on 27th August, 1996 when the respondent wrote the impugned letter. The suit was filed on 4th February, 2002. If the applicant's claim was based on tort, then the claim was time barred as it was filed over three years since the cause of action arose. The judgment of the superior court shows that the applicant's counsel conceded that fact and abandoned the claim based on tort. The superior court thereafter examined the applicant's claim as far as it was based on contract and made a finding that the applicant was not a party to the medical scheme cover entered into between the respondent and the applicant's employer hence neither the applicant nor any member of his family could sustain a claim against the respondent based on contract. The appeal was allowed on that ground.

The applicant has not disclosed the grounds of the intended appeal in the application. When I asked the applicant at the hearing of the application whether the intended appeal was arguable he claimed that the superior court erred in finding that the applicant was a beneficiary of the medical scheme. He submitted that the arrangement was an insurance scheme based in New York for which he was paying premiums through deductions from his salary. That apparently is

new evidence as the appellant did not plead so in the plaint nor did his counsel make such a submission in the superior court. I conclude that the applicant has not demonstrated that the intended appeal is indeed arguable.

Moreover, there has been inordinate delay in bringing this application. The application was filed on 3rd July, 2009 over eleven months (11) after the judgment of the superior court was delivered. The applicant blames his former advocates for the delay.

Firstly, the claims that he instructed Mr. D. P. Kinyanjui of the firm of D. P. Kinyanjui & Co. Advocates to file an appeal on the day the superior court delivered the judgment but he did not take action. Secondly, he claims that after instructing another firm of advocates M/s. Ouna Were & Co. Advocates they also failed to take action.

The respondent claims that the applicant appointed the firm of M/s Ouna Were & Co. Advocates to replace M/s. D. P. Kinyanjui & Co. Advocates in November, 2007 vide a Notice of Change of Advocates dated dated 13th November, 2007 and served on the advocates for the respondents on 21st November, 2007. The applicant has annexed a different notice of appointment of Advocates dated 29th August, 2008 appointing the firm of M/s. Ouna Were & Co. Advocates after the judgment of the superior court. The respondent claims that that notice of appointment of advocates is a forgery and intended to mislead the Court in view of the previous Notice of Change of Advocates.

The applicant filed a supplementary affidavit but did not explain the existence of the notice of change of advocates dated 13th November, 2007.

The notice of appointment of advocate dated 29th August, 2008 does not appear to have been drawn by a firm of advocates for it is erroneous. Since there was already another firm of advocates on record, the correct document should have been a notice of change of advocates. The second notice does not refer to the appellant's former advocates and is not copied to them.

It is improbable that the firm of M/s. Ouna Were & Co. Advocates could have filed a second notice not to mention committing such glaring blunders.

By a letter dated 11th August, 2008, the applicant personally applied to for certified copies of proceedings and judgment for purposes of filing appeal. He paid for the copy of judgment and proceedings on 26th September, 2008. The letter bespeaking proceedings was not copied either to the firm of M/s. D. P. Kinyanjui & Co. Advocates or to the firm of M/s. Ouna Were & Co. Advocates. The applicant filed this application in person.

He has not produced documentary evidence that he paid any fees to either of the two firms of advocates after the superior court read the judgment. It is incredible that either of the two firms of advocates, if indeed instructed could have failed to file a notice of appeal, a very simple document.

It seems to me that the applicant decided to act in person after the superior court read the judgment.

In the circumstances, there is no reasonable explanation for the inordinate delay.

It is manifest that the respondent would be prejudiced if the application is allowed as the cause of action arose over 10 years ago, and, in addition, the respondent would incur further costs with no guarantee that the applicant has the means to pay the costs should his appeal fail.

For those reasons, I dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 17th day of December, 2009.

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

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