



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

**Misc Appli 1389 of 2001**

**HABIL IMENJE (Suing  
as representative of the late**

**HOWARD OMONDI MUSASIA (DECEASED).....PLAINTIFF**

**VERSUS**

**LORIAN KING'OO & 3 OTHERS.....RESPONDENTS**

**RULING**

The applicant by way of this Notice of Motion dated 9<sup>th</sup> November 2001 and brought under Section 3A and 79G seeks leave to file Appeal out of time. It is based on the ground that it is in the interest of justice that the intended appeal be admitted out of time since the applicant is desirous of lodging appeal. The application is also supported by an affidavit sworn by Francis Etole counsel for the applicant who avers that the appeal was not filed in time because instructions were received late and proceedings took time to be obtained.

The claim in this suit arises out of a traffic road accident which occurred on 25<sup>th</sup> June 1992 along Mathenge Road Lower Kabete Nairobi involving motor vehicle registration No. KZE 568.

The suit was filed on 11<sup>th</sup> January 1994 seeking general damages as well as special damages plus costs of the suit. This was two years later. The suit went through a full trial and was dismissed for lack of evidence to support the claim since the only eye witness had passed away. Judgment was delivered on 19<sup>th</sup> January 2000 but this Notice of Motion for leave to appeal out of time was filed on 19<sup>th</sup> November 2001 which was nearly 2 years after the judgment was delivered. The delay is blamed on the counsels who had been instructed to handle the suit.

The application is opposed by the defendant. Miss Wanga for the respondent submitted that the application has no merit. The applicant has not shown sufficient reason to enable the court to exercise its discretion in his favour.

The applicant is guilty of non disclosure of full of material facts. Before the court exercises its discretion in favour of the applicant, it takes into account the length of delay, the reasons for delay, the prejudice to be suffered by the defendant and the chances of the appeal succeeding. In the instant case the accident occurred on 25<sup>th</sup> June 1992. It took the plaintiff about 2 years to file this suit which was filed on 11<sup>th</sup> January 1994.

The suit was heard and judgment delivered on 19<sup>th</sup> January 2000 in which the trial magistrate dismissed the plaintiff's case for lack of evidence and to which the plaintiff admits that the only eye eyewitness had passed away. After the dismissal of this suit, the plaintiff did not prefer the appeal within the statutory period. It was until 19<sup>th</sup> January 2001 another 2 years after the judgment when he brought this application for leave to appeal out of time.

Taking all these into account and the fact that the plaintiff's suit was dismissed for lack of evidence and the fact that the cause of action took place about 14 years ago, I am not persuaded to exercise my discretion in favour of the applicant and I dismiss the applicant's application with costs to the respondent.

Dated and delivered at Nairobi this 25<sup>th</sup> day of October 2006

**J.L.A. OSIEMO**

**JUDGE**