

IN THE HIGH COURT OF KIRIBATI 2013

CIVIL APPEAL NO. 19 OF 2012

[MARAWA IRATA
[
BETWEEN [AND
[
[ATTORNEY GENERAL IRO MINISTRY OF
[COMMUNICATIONS AND TOURISM
[DEVELOPMENT

APPELLANT

RESPONDENT

Before: Hon Chief Justice Sir John Muria

2 May 2013

Mr Banuera Berina for Appellant
Mr George McKenzie for Respondent



JUDGMENT

Muria CJ: The applicant who was the plaintiff in the Magistrates' Court in case Bet. Civ. 610/2010 seeks leave to appeal out of time against the Magistrates' Court's decision made on 26th July 2011. It would be useful to set out the background to this application with the following chronological events:

1/12/10 - Civ Case 610/10 called before the Magistrates' Court

- Plaintiff represented by one Tekaobo
Defendant represented by George McKenzie
 - Defendant not ready to proceed. Asked for adjournment
 - Magistrates' Court adjourned case to 28/12/10.
- 30/3/11
- Case called before the Magistrates' Court
 - Plaintiff appeared in person
Defendant represented by George McKenzie
 - Both parties informed the Court that they were ready to proceed.
 - Court fixed a hearing date on 13/5/11.
- 13/5/11
- Court resumed. Case called.
Defendant represented by George McKenzie
Plaintiff did not attend
 - No explanation for plaintiff's failure to attend Court
 - Single Magistrate struck out the plaintiff's claim.
- The plaintiff filed Civil Case 608/11 to set aside the Magistrates' Court's decision in Civil Case 610/10.
- 22/7/11
- Civil Case 608/11 was called.
- One Ebwati represented the plaintiff and asked the Magistrates' Court to set aside the Order made on 13/5/11.

Mr George McKenzie represented the defendant and opposed the application.

26/7/11 Single Magistrate refused the application.

6/6/12 Appellant filed Notice of Appeal against the Magistrates' Court's decision of 26/7/11, some 10½ months later.

Appellant also filed Application for leave to appeal out of time.

With the above chronology of events, I turn to the application for leave to appeal out of time. The grounds of the application are contained in the affidavit of the applicant, and in particular, in paragraphs 2-8:

- “2. The reason why I was late with my appeal was because I did not know what I should do when the judgment was first delivered.**
- 3. AI had a lawyer acting for me but unfortunately I needed money to pay him for his services.**
- 4. It is very hard for me to come up with any money that would be enough to pay for my lawyer's fee.**
- 5. I knew I had to see a lawyer to see me for my case and I knew also that I must have enough money to pay for my lawyer.**
- 6. I did see my lawyer before my court case and that is why I knew that I must pay him for his services.**
- 7. As soon as I had enough money I saw my lawyer only to be told that I was out of time and that an application must be made in order for the time within which to appeal to be extended to enable me to file my appeal out of time.**
- 8. I am sorry it has been some time after the decision barring me from applying to set aside the default judgment was made, however I**

feel that injustice would be done to me if I were not allowed to have my say in court about my claim".

Mr Berina of Counsel for the applicant did not seek to resile from the fact that Banuera Berina Law Firm represented the applicant at the hearing on 22 July 2011 of his Notice of Motion to set aside the 'default' judgment. It is also a fact that on 26 July 2011 when the Single Magistrate gave his ruling, refusing the application, the applicant was also present in person, although his legal representative was not. It is the decision of the Magistrates' Court made on 26 July 2011 that the applicant is seeking extension of time to challenge by way of appeal.

In a case such as this, the applicant must demonstrate good and acceptable reason for the delay of 10½ months before seeking to appeal against the Single Magistrate's decision. The applicant must also demonstrate that in the circumstances it would be fair and just to extend time. See *Batee -v- Trustee for Jehova's Witness Church* [2006] KICA 17 (26 July 2006). The considerations to be taken into account for the exercise of the Court's discretion are also discussed in *Batee's* case.

Mr McKenzie of Counsel for the respondent submitted that, in the present case, the explanation given by the applicant for the delay is not an acceptable explanation since the applicant had been represented by a Law Firm all along. Further counsel argued that the applicant, knowing what to do but for the lack of money, could have gone to seek legal assistance from the Office of the People's Lawyers where legal assistance is free.

I feel that the submission by Mr McKenzie is a formidable one and the Court is persuaded to agree with Counsel that there is no acceptable explanation for the delay of 10½ months to appeal against the simple ruling of the Single Magistrate in this case. The explanation contained in the applicant's affidavit shows that he knew what he had to do after receiving the decision of the Single Magistrate but that he had no money to seek further legal assistance from the Law Firm that represented him in the Magistrates' Court. So he decided to wait until he found the money before he could seek legal assistance from his lawyers to assist him with his appeal.

As Mr McKenzie properly submitted, the applicant could easily have gone to seek legal advice and assistance from the Office of the People's Lawyer since he had no means to further engage a private Law Firm. He chose to wait until he found the money to do so, and consequently time has caught up with him and he was out of time by more than 10 months.

A party who, knowing what to do, chose to buy time in order to find funds to pay for legal assistance before complying with the time required by law to appeal cannot be allowed to use such reason to obviate the legal requirements of an appeal. Non compliance with the statutory time limit for appeal because of waiting to secure a lawyer is not an acceptable explanation for the delay in filing a notice of appeal.

The decision of the Single Magistrate was a simple ruling of refusing the applicant's application to set aside the judgment given on 13 May 2011. The applicant had ample time to frame the grounds of appeal using the

Form available in the Court and seek to amend if necessary once he secured a lawyer.

As I have said earlier, the decision sought to be appealed is the decision of the Single Magistrate made on 26 July 2011 which refused to set aside the order of the Court made on 13 May 2011 striking out the applicant's claim. The applicant did not appeal against the decision of the Magistrates' Court made on 13 May 2011. This even lessened the strength of the applicant's case, apart from the fact that, in my view, the Magistrate was correct in refusing to set aside the striking out order made on 13 May 2011.

The applicant's application is refused. Each party to bear its own costs.

Dated the 3rd day of May 2013


SIR JOHN MURIA
Chief Justice

