



REPUBLIC OF KENYA



KENYA LAW
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Wambui v Ngethe (Civil Appeal 1 of 2019) [2023] KEHC 18414 (KLR) (30 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU**

CIVIL APPEAL 1 OF 2019

PM MULWA, J

MAY 30, 2023

BETWEEN

MICHAEL MUTURI WAMBUI APPELLANT

AND

MICHAEL W NGETHE RESPONDENT

(Being an appeal from the judgment of the Resident Magistrate Kikuyu delivered on 22nd November 2018 in Civil Suit No. 184 of 2020 by Hon. G. Onsarigo)

RULING

1. The two (2) applications which are the subject of this ruling have been filed by the opposing parties. The court notes the outcome of one application would effectively determine the other.
2. The first application filed by the respondent is dated August 15, 2022 and filed on August 22, 2022, brought under Order 2 Rule 15 (1)(b)(c) and (d), Order 51 of the *Civil Procedure Rules*, Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*. The substantive order being sought is for this court to strike out the appeal and costs to be awarded to the respondents.
3. The gist of the application is the impugned judgment was delivered on November 22, 2018, and the appeal was filed outside the prescribed timelines without leave of the court. The Memorandum of Appeal was filed on January 9, 2019 and Record of Appeal filed on March 31, 2021 and were both served upon the Respondent on May 4, 2021. It is averred the appeal is incompetent, defective and incapable of a fair determination as it omitted the 2nd Defendant Hesbon Nderitu the person blamed and against whom judgment was entered.
4. The application is supported by the annexed affidavit of Moses Kinyanjui sworn on August 15, 2022. He depones the date of delivery of the judgment has been erroneously captured as December 17, 2018 while it was delivered on November 22, 2018 and the Memorandum of Appeal filed out of time without leave of the court.



5. Opposing the application, the appellant Michael Muturi Wambui filed the Replying Affidavit sworn on September 6, 2022 wherein he depones that the error on the memorandum of appeal as to the date of delivery of judgment was brought to the attention of his counsel by the respondent's counsel vide the application dated August 15, 2022. The trial court failed to issue a notice of the date slated for delivery of the judgment.
6. It was argued that to cure the error the appellant filed the application seeking enlargement of time within which to file the appeal which is incompetent, and urged the court to dismiss the respondent's application dated August 15, 2022.
7. The second application is dated September 6, 2022 and is filed by the appellant. It is brought under Section 79G of the *Civil Procedure Act*, Order 50 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law. It seeks the following orders:
 - i. An order to enlarge the time of filing an appeal against the judgment of Hon Onsarigo delivered on November 22, 2018 in Kikuyu Civil Case No 184 of 2010.
 - ii. The Memorandum of Appeal dated January 8, 2019 and filed on January 9, 2019 be deemed to have been filed on time and be heard on merit.
 - iii. The appellant be granted leave to amend the date of delivery of judgment in the Memorandum of Appeal to read November 22, 2018.
 - iv. Costs of the Appeal.
8. The gist of the application is the appeal was filed vide the Memorandum of Appeal dated January 9, 2019 before the lapse of the 30 days. The court deferred the judgment on September 3, 2018 and was delivered on December 11, 2018 and that the appeal was filed on January 9, 2019 within the stipulated timelines.
9. The application is supported by the annexed supporting affidavit of Michael Muturi Wambui sworn on September 6, 2022, reiterating the averments of the application.
10. The application was opposed by way of replying affidavit sworn by Moses M Kinyanjui the advocate in the conduct of the matter for the respondent on September 9, 2022. He deponed that the application is incompetent, defective mischievous, misplaced and an afterthought, the application is intended to defeat the respondent's application dated August 15, 2022 seeking to have the appeal struck out. The appeal as filed fails to capture the 2nd Defendant Hesbon against whom judgment was issued.
11. The court directed that both applications be heard together by way of written submission.

Appellant's submissions

12. Mr Mundi on behalf of the appellant filed submissions dated November 22, 2022, the submissions mirror the grounds and supporting affidavit of the application. He also argued the error of the date when judgment was delivered was occasioned by miscommunication by counsel who held brief. The respondent in the appeal can be compensated by way of cost and urged the court to hear the application dated August 15, 2022 on merit in the spirit of article 159 of the *Constitution* and exercise its jurisdiction and enlarge time of filing an appeal under section 79G of the Civil Procedure Act. Counsel pleaded with the court to be persuaded by the judgment in *Stecol Corporation Limited vs Susan Awour Mudemb* (2021) eKLR, and allow the appeal as the record is filed.



Respondent's submissions

13. In his submissions dated January 27, 2023, counsel submits that the appellant's application seeking enlargement of time is an afterthought, a reaction to the respondent's application seeking to strike out the appeal, which amounts to an admission of filing the appeal out of time and the same ought to be dismissed.
14. To the respondent the appeal is fatally defective as no decree has been attached and the same having been filed outside the 30-day prescribed period without leave of the court. The court lacks jurisdiction to hear a matter that is time barred by a statute and has no alternative but strike it out.
15. Counsel urged the court to strike out the appellant's Notice of Motion dated September 6, 2022, with costs to the respondents and strike out the appellant's appeal with costs to the respondent.

Analysis and determination

16. I have considered both applications, the supporting affidavit, and the submissions filed. The issue for determination is whether the prayer for extension of time is merited?
17. Enlargement of time to file an appeal is provided under Section 79G *Civil Procedure Act* which states as follows:

“Every appeal from a subordinate court to the high court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of the appellant of a copy of the decree or orders.”
18. The law requires that an appellant who seeks enlargement of time provide sufficient cause for doing so. The impugned judgment was rendered on November 21, 2018, an appeal challenging the judgment ought to be filed by December 21, 2018. The Memorandum of Appeal was filed on January 9, 2019, and the application seeking enlargement of time was filed on September 6, 2022.
19. In the instant case the appellant counsel submits there was an error in communication by counsel who held brief that judgment was delivered on December 17, 2018 and thus by filing the memorandum on January 9, 2019 the Appellant was within the stipulated timeline.
20. This court finds it is improper for the appellant to allege miscommunication by counsel holding brief on the date of delivery of the judgment. A copy of the judgment which is the subject of this appeal indicates it was delivered on November 21, 2018. An avid look at the impugned judgment would have given counsel the proper dates.
21. The court of appeal discussed some factors to be considered by the court before exercising its discretion to enlarge time to file an appeal in *Thuita Mwangi vs Kenya Airways Ltd* (2003) eKLR to include:
 - i. The period of delay
 - ii. The reason for the delay,
 - iii. The arguability of the appeal,
 - iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted.
 - v. The importance of compliance with time limits to the particular litigation or issue and
 - vi. The effect if any on the administration of justice or public interest if any is involved.



22. Despite the Memorandum of Appeal having been filed on January 9, 2019, the same was not served upon the respondent until May 4, 2021, a period of 2 years 3 months since it was filed. According to counsel for the appellant the realization that the appeal was filed out of time was made after the filing of the respondent's application dated August 15, 2022 seeking to strike out the appeal, a period of close to 4 years after the delivery of the impugned judgment. The respondent's application seeking to strike out the appeal is what prompted the appellant to file an application seeking enlargement of time to file an appeal.
23. The court finds the appellant has failed to adduce sufficient reasons for the delay. A period of 3 years 10 months is an inordinate delay. The court in exercising its discretion on whether to grant or decline to grant an extension of time to file an appeal must be satisfied that sufficient cause for the delay has been proffered. The court should also balance the rights of the appellant with that of the respondent in ensuring that justice is served on all parties.
24. Under Order 50 Rule 6 of the Civil Procedure Rules, the court has power to enlarge time upon such time as justice of the case may require. Enlargement of time ought to be done in the interest of justice.
25. In the instant appeal, the appellant seems to have slept on his rights and only acted when moved by the respondent. The court should not aid an indolent litigant while exercising its discretion.
26. In *Berber Alibhai Mawji vs Sultan Hashan Lalji & 2 Others* (1990-1994) EA 337 it was held "inaction on the part of an advocate as opposed to error of judgment or a slip is not excusable. Therefore, pure and simple inaction by counsel or refusal to act cannot amount to a mistake, which ought not to be visited on the client"
27. In the circumstances therefore, this court finds the appellant has failed to satisfy the grounds for enlargement of time to file an appeal, the reason for the delay is unreasonable and inordinate. The appellant's application dated September 6, 2022 seeking enlargement of time is bereft of merit and must fail. Costs to the respondent.
28. Having stated earlier, the outcome of one application will affect the outcome of the other, I proceed to find that the application dated August 15, 2022 by the respondent is meritorious. The same is allowed. The respondents is awarded costs.
29. Accordingly, the Court makes the following orders:
 - a. The application dated September 6, 2022 is dismissed.
 - b. The appeal is incompetent and is struck out.
 - c. Costs of the appeal are awarded to the Respondent
- 30 It is so ordered.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 30TH DAY OF MAY, 2023.

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P M MULWA

JUDGE

In the presence of:

Mr Kinyua – Court Assistant



Mr Muindi – for the appellant

Mr Nyuthe – for the respondent

