



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC CIVIL APPLICATION NO.E063 OF 2020

JAMES MWAURA & ANOTHER.....APPLICANTS

VERSES

MOHAMED FADHIL.....1ST RESPONDENT

STEPHEN NDUNGU WAIGWA.....2ND RESPONDENT

RULING

1. By their **Notice of Motion dated 15th July 2020** the applicants pray for orders that leave be granted to lodge an appeal out of time. The application is supported by the sworn affidavit of Mongare Gekonga, their counsel on record, dated the same date.
2. The said advocate deponed that judgement in this matter was delivered on **6th March 2020** and thereafter they closed their offices on **18th March 2020** due to Covid pandemic. As a result of that they were unable to communicate to their clients concerning the import of the judgement.
3. He went on to state that when they resumed on the 15th June 2020 they sought to advise their clients who were not happy with the trial court's decision. Consequently, they instructed him to appeal but by then time had already lapsed for filing an appeal.
4. The applicant has attached a copy of an internal memo from his office advising the staff concerning the closure of the office because of Covid 19 as well as the draft memorandum of appeal. He deponed that the reason for not filing the appeal within the stipulated time were beyond him as the office was generally closed for the reason of Covid 19.
5. The respondent through the sworn affidavit of Kelvin Ngiro has opposed the application terming it frivolous and a total abuse of the courts process. That already the respondent has paid the sum of Kshs214, 300 as directed by the court in its judgement and that effectively they have closed their file. The above amount was duly received by the applicants through their advocates without any complaint or objection.
6. For the above reasons it ought to be deemed that the applicants were satisfied with the judgement. That if the court is inclined to allow the application then the applicants ought to provide security by depositing the above amount already in their custody in a joint interest account in the names of the two law firms.
7. The court directed the parties to file written submissions which they have complied and I have gladly perused them. The same mirrors what they have deponed in their rival affidavits essentially.
8. The issue of granting leave to file an appeal out of time was clearly spelt out in the case of **Mwangi v. Kenya Airways Ltd (2003) klr** where the test applicable as per the court of appeal is as hereunder.;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

9. This court is inclined to allow the application for the reasons that the explanation by the applicants is reasonable and plausible. The novel Covid 19 was to say the least disrupted our *status quo* and the period mentioned by the applicant of March all the way to around August 2020 was tough for everyone. This the court takes judicial notice.

10. It shall therefore in my view prejudice the administration of justice should the court fail to allow the application. There is no evidence that the fault was with the parties' least of all the counsel.

11. I agree with the respondent that having settled its part of the judgement, the matter ought to rest. The same has not been consented to by the applicant since there is no such evidence. The door it appears is still open to them to move to the next court which they have chosen to do.

12. There is no prejudice the respondents stand to suffer. The amount they paid was as per the courts decision and should the appeal succeed then the court shall have the liberty of issuing further orders and directions. For now, it is not within the province of this court to discuss whether the appeal is arguable or not.

13. For the above reasons, the application is hereby allowed, the applicant granted leave to file and serve the memorandum of appeal within 14 days from the date herein.

14. The respondents shall have the costs of this application.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 27TH DAY OF JANUARY, 2022

H K CHEMITEI

JUDGE