



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**HIGH COURT MISC. APPLICATION CASE NO. 1 OF 2020**

**PHILIP KYALO MWONGELA.....APPLICANT**

**VERSUS**

**MARYLYNE UTILITIES LTD**

**MACLOUD MUKITI MALONZA**

**SAMMY MUE MBOLOI.....RESPONDENTS**

**R U L I N G**

1. **Philip Kyalo Mwangela**, the applicant herein has vide a **Notice of Motion** dated 10<sup>th</sup> January, 2020 sought the following reliefs namely;

(i) *Spent*

(ii) *That this Hon. Court be pleased to grant the applicant to appeal against the judgement of Hon. R. Ombata (RM) delivered on 10<sup>th</sup> September 2019 in Kitui Chief Magistrate's Court civil case No. 439 of 2015.*

(iii) *Cost of the application.*

2. The applicants have listed the following grounds as the basis of his application namely;

(i) *That the Judgement in the Lower Court was delivered on 10<sup>th</sup> September, 2019 in his absence and that of his advocate.*

(ii) *That he is aggrieved by the judgement delivered by Hon. R. Ombata in Kitui CMCC No. 439 of 2015 and has desire to appeal against the same.*

(iii) *That the provisions of Section 79G of Civil Procedure Act required him to appeal within 30 days from the date of judgement.*

(iv) *That the delay was occasioned by the fact that judgement was delivered in the absence of parties and their advocates and that it took time for him to know the contents of the judgement and give instructions to his counsel.*

(v) *That the delay in filing the appeal is not inordinate.*

(vi) *That the Respondents will not suffer any injustice if his application is allowed.*

(vii) *That the intended appeal raises valid triable issues and has high chances of success.*

(viii) *That it is in the interest of substantive justice that the applicant be given a chance to file his appeal out of time contending that the intended appeal raises triable issues and has high chances of success.*

3. This application is supported by an affidavit sworn on 10<sup>th</sup> of January, 2020 by Musili Mbiti the counsel for the applicant. The deponent avers that the judgement was delivered on 10<sup>th</sup> September, 2019 in absence of counsels for both parties. He reiterates the grounds listed on the face of the application listed above.

4. The applicant submits that this delay in filing his appeal is attributed to having no knowledge of the delivery of the judgement by the trial court.
5. He submits that there was also delay by the court to avail him a copy of the typed judgement. He contends that the intended appeal raises pertinent issues.
6. It is on these grounds that the applicant has sought the discretion of this court to allow him file an appeal out of time. He relies on ***Leo Sila Mutiso versus Rose Hellen Wangari Mwangi (Nairobi Civil Application No. 255 of 1997)***. He submits that the decision sets out general principles for consideration in an application for extension of time and states that the same are length of delay, reason for delay and chances of appeal succeeding if the application is granted.
7. The Respondents have opposed this application vide grounds of opposition dated 7<sup>th</sup> February, 2020. They contend that the delay in filing appeal has not been adequately explained. In their view the delay is inordinate and the intended appeal stands no chance.
8. In their submissions, the Respondents aver that in an application of this nature, the party seeking the court's discretion is the one who is supposed to swear the affidavit supporting his application and not his counsel as done in this case. Further to that he submitting that the affidavit by counsel does not state whether the applicant is desirous of appealing the court's decision.
9. This court has considered this application and the response made. This is an application for extension of time for the applicant to file his appeal out of time. The applicant has invoked ***Sections 1A, 1B, 3A and 79G of Civil Procedure Act (Cap 21), Order 42 & 51 Rule 1 of Civil Procedure Rule.***
10. The provisions of ***Sections 79G of the Civil Procedure Act*** provide as follows: -

***“Every appeal from a subordinate court to the High Court shall be filed within 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 to the appellant of a copy of the decree or order.***

***Provided that an appeal may be admitted out of time if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal on time.”***

11. It is evident that the judgement, the subject of this application was delivered on 10<sup>th</sup> September, 2019 and this application was filed on 10<sup>th</sup> January, 2020 beyond the 30 days stipulated under ***Section 79G of the Civil Procedure Act.***
12. Leave to appeal out of time or an extension of time to carry out any act provided by civil procedure is a matter of discretion.

The exercise of that discretion is underpinned by some considerations like length of delay and reasons for the same, substance of the intended appeal and if prejudice will be occasioned to the opposite party or parties.

In the case of ***Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission (IEBC) & 7 Others [2014] eKLR***, the Supreme Court gave guidelines on the considerations for extension of time and listed them as;

- (i) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.***
- (ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.***
- (iii) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.***
- (iv) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.***
- (v) Whether there will be any prejudice suffered by the respondent of the extension is granted.***
- (vi) Whether the application has been brought without undue delay; and***
- (vii) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”***

13. In the present application counsel has attributed the delay to lack of knowledge of delivery of the judgement. Counsel has stated that the decision by the lower court was delivered in the absence of parties and their counsels. This fact is evident from the lower court's record which clearly states that Judgement dated and delivered on 10<sup>th</sup> day of September 2019 in the absence of parties.

It is therefore indeed true that the applicant was unaware of the lower court's decision as such time stipulated under ***Section 79G of the Civil Procedure Act*** started running without his knowledge.

14. The counsel for the applicant has also averred that there was a delay in procuring a copy of the court's judgment as he was unable to get the court file. This averment is however unsupported as counsel for the applicant failed to attach any evidence in form of a letter to the

court's registry seeking a copy of the judgement and typed proceedings for purposes of filing his appeal. To this end the Applicant has not provided any evidence indicating that they have sought a copy of typed proceedings from the lower court.

15. The Respondents have averred that they will be prejudiced in the event this application is allowed due to the fact that this is an old matter as the accident in question occurred in January 2015. It is however important to appreciate that there is a possibility that the Respondents themselves only became aware of the lower court's decision after time had run out as they were also not present in court when the trial court delivered its judgement. To that end, I am of the opinion that the delay is excusable.

16. A court would always exercise its discretion in a manner that promotes access to justice in instances where a party shows that the action intended to be taken is not frivolous but pertinent. I find that the applicant in this matter has demonstrated that he deserves a chance to ventilate his issues at the appellate forum. The Respondents would not suffer any prejudices.

In the premises, I find merit in this application which I hereby allow.

The costs shall be in the intended appeal. The applicant has 30 days from today to file his appeal.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 24TH DAY OF JANUARY, 2022.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**