



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIVASHA**

**(CORAM: R MWONGO, J.)**

**MISCELLANEOUS CIVIL APPLICATION NO. E010 OF 2021**

**MOSES MUTUGUTI MUHIA.....APPLICANT/INTENDED APPELLANT**

**VERSUS**

**FRANCIS MWANGI KARIUKI.....1<sup>ST</sup> RESPONDENT**

**HIMDAT FADHIL MOHAM.....2<sup>ND</sup> RESPONDENT**

**RULING**

### **Background**

1. In his application dated 12th March 2021, the applicant essentially seeks extension of time to file his memorandum of appeal. The application is made under **Section 3 A, 79 G and 95 of the Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 4, 6 and 7, Order 50 Rule 6, Order 51 Rule 1 and 3 of the Civil Procedure Rules.**
2. The applicant cites six grounds as follows: **That he is aggrieved by the judgment in Naivasha CMCC No. 704 OF 2015 and intends to appeal it; that the application has been made expeditiously and without undue delay; That he has requested the typed proceedings and judgment from the executive officer at Naivasha for to enable file the appeal but has yet to be furnished; That the intended appeal is arguable and, prima facie, has good prospects of success on merit; That it is in the interest of justice allow the application; That the applicant is not in any way obstructing or delaying the cause of justice.**
3. The applicant in his submissions cites sections 79G and 95 of the CPA, which provide for filing appeals within 30 days, and for enlargement of time, respectively, in the event of delay. He relies on the case of **Joseph Schmadevev v Serah Njeri Ngen (2020) eKLR**, where the court allowed an application that was four months delayed. He explained the delay as having been due to inter alia: the fact that the judgment was delivered in September 2020, when the corona virus pandemic had slowed down the court's activity, resulting in a 6 month delay.
4. He attached a Memorandum of Appeal in which he cites the alleged failure of the trial court in failing to consider the Plaintiff's/Applicants submissions on the quantum payable and in awarding comparatively low general damages relative to the injuries suffered by the appellant. Secondly, the appeal argues that the learned trial magistrate erred in law by considering extraneous facts and not the principles known in law in awarding damages and thereby ending up with an award that was too low in accordance with the circumstances before the court. He seeks review of the judgment and re-assessment of damages.
5. The 1st Respondent opposes the application on the grounds that it has no merits, is incompetent, bad in law, frivolous and an abuse of the court process. In his written submissions he argues that the Appellant has not cited cogent evidence or persuasive reasons that would warrant the court's exercise of its discretion. He cited the case of **Major Joseph Mweteri Igweta v Mukira M'ethare & Attorney General (1999) e KLR**. Which places the burden of proof of the reasons for delay on the applicant. He also states that the applicant's counsel was paid the full decretal and costs in settlement for the judgment, and will suffer no prejudice.
6. The respondent argues that the delay in filing the application is inexcusable given that the judgment was issued on 24/09/2020 and application made on 15 march 2021, a period of 6months.
7. The 2<sup>nd</sup> Respondent did not file any submissions.
8. The High court has held in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** that:

*“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable”.*

9. In *Leo Sila Mutiso v Rose Wangari Mwangi* Civil Appeal No. Nai. 255 of 1997, this court held:

*“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; fourthly, the degree of prejudice to the respondent if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted”.*

10. The law on extension of time was settled by the Supreme Court recently in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014]eKLR. The court distilled the factors to be taken into account in the exercise of such discretion as follows:

**“(1) 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.**

**(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.**

**(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.**

**(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**

**(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.**

**(6) Whether the application has been brought without undue delay; and**

**(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”**

#### **Determination**

11. The only issue for determination here is whether the applicant has justified the delay to **the satisfaction of the court to enable the court to exercise its discretion in his favour.**

12. **I have already set out the principles for grant of extension.** I also note that the applicant’s Memorandum of Appeal and application for certified copies of proceedings (which were not lodged as part of its application) ought to have been filed thirty (30) days of 24<sup>th</sup> September 2020, the date of judgment, i.e. on 24<sup>th</sup> October 2020, a Saturday, thus the latest filing would have been on 26<sup>th</sup> October 2020 a Monday.

13. The applicant’s letter to the executive officer for certified typed proceedings decree and judgment for purposes of an appeal is dated ‘March 2021’. Other than the blame on the covid pandemic, no other reason has been offered by the Applicant as to why it took six months to lodge the Memorandum of Appeal.

14. Nevertheless, in *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR there is the principle that **“In exercising its discretion, the court’s primary concern should be to do justice to the parties”.**

15. On the principle as to whether an arguable appeal exists, the Court of Appeal case of *Kenya Railways Corporation v Erdemann Property Limited* [2012] eKLR quoted in the applicant’s submissions, succinctly states that an arguable appeal is not one which will necessarily succeed but is one that raises arguable grounds. The ground that the trial court did not consider the submissions on quantum payable is, in my view, an arguable ground of appeal.

16. On the principle concerning the prejudice which will befall the respondent should leave be granted for the applicant to file an appeal out of time, the respondent’s grounds of opposition and written submissions, do not disclose any credible evidence to indicate the prejudice that would befall him, that cannot be compensated by way of costs.

17. Ultimately, I lean in favour of granting the application, which I hereby do. The application succeeds and the applicant’s memorandum of appeal shall be deemed as duly filed. The appeal shall be concluded expeditiously, pursuant to directions to be issued in court.

18. Orders accordingly.

**DATED AND DELIVERED AT NAIVASHA THIS 25TH DAY OF FEBRUARY, 2022.**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mr. Owuor for the Applicant/Intended Appellant
2. Mr. Mburu for the Respondents
3. Court Clerk - Kamau