



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

(CORAM: R. MWONGO, J.)

MISC. CIVIL APPLICATION NO. E002 OF 2020

MICHAEL KANYI MWARANO.....APPLICANT

VERSUS

JAMES MAINA KIMARU.....1ST RESPONDENT

MARY NYAMATHI KIMARU.....2ND RESPONDENT

RULING

1. The applicant seeks to be granted leave to file his appeal out of time vide his application of 9th September, 2020. He is aggrieved by the order made on 4th February 2020 by the Magistrate's Court, Kerugoya, in Succession Cause No. 282 of 2017- Estate of Iteria Kimaru Wangombe (deceased).
2. He argues that soon after the decision of the lower court was rendered the operations of the courts countrywide, including the Kerugoya Court, were closed down due to the Covid-19 Pandemic, and it was not practically possible for the applicant to pursue the filing of the intended appeal.
3. According to the applicant, he was finally able to collect a certified copy of the proceedings and the order in the month of August 2020, with difficulties because access to the court premises was heavily regulated and limited due to the Covid-19 Pandemic. These circumstances, he says, the courts should take judicial notice of, arguing that he moved the court within reasonable time after a certified copy of the proceedings were made available to him.
4. The 1st Respondent opposes the application through his replying affidavit dated 11th November, 2020. His key assertions are that: the applicant has not attached a draft memorandum of appeal as evidence of his intended appeal or to show the intended appeal is arguable that he has not indicated when he applied for proceedings and ruling; and that there is neither anything to show his intention to appeal nor any certificate of delay exhibited.
5. The 2nd respondent opposes the application on the grounds that: the application is defective and bad in law; and that the application lacks merit.

Applicant's submissions

6. The applicant submits that he is a senior citizen of over 80 years, residing in Ndia Sub- County of Kirinyaga County. That the offices of his Advocates on record are situated in Nairobi. That the court should take judicial notice of the fact that there were restrictions to move in and out of Nairobi due to Covid-19 Pandemic during the period between March and September 2020, making it difficult to get in touch with his advocates in Nairobi to give instructions and to prepare filing of an appeal. That these were circumstances beyond his control and that of his advocates.
7. He urges that he demonstrated his intention to appeal against the order by applying for certified copies of the proceedings and the order on 4th February 2020, the very day the ruling was made. That it took the court almost 6 months to prepare a certified copy of the proceedings and the order. Therefore, filing the intended appeal in time became a challenge. Hence, the reason for the delay.

Respondents' Submissions

8. The 1st respondent submitted that the intended appeal is not grounded on any of the orders set out under section 75 of the Civil Procedure Act as well as Order 43 of the Civil Procedure Rules. Consequently, it was mandatory for the Applicant to seek leave from the Court

appealed from before filing the application for enlargement of time, a point settled by numerous judicial authorities.

9. He cites the case of **George Odhiambo Umidha v Co-operative Bank of Kenya Limited & Another [201] eKLR** where the court stated that in an application for leave to appeal out of time the intended Appellant has to establish: First that the application has been brought timeously and without undue delay; and secondly, that he has a good and arguable appeal with reasonable prospects of success.

10. Here, he argues the applicant did not exhibit to the Court the letters applying for typed proceedings and Ruling that he alleges he sought, or a Certificate of delay. Without these the Court cannot establish whether he did indeed apply for the typed proceedings and Order. Further, he submitted that 30 days from the date of the impugned Ruling, ended on 4th March 2020 which is 2 whole weeks before the onset of Covid-19 pandemic lock down on 16th March 2020. Clearly, he submits, the Applicant had no good reason not to have filed the appeal in time within 30 days from 4th February 2020.

11. As to whether the applicant fulfilled the criteria as to whether the appeal is demonstrably arguable, the 1st respondent submitted that there was no way for the court to know as there was no memorandum of appeal filed. As such the application is a mere waste of time

12. The 2nd Respondent submitted that extension of time to appeal is a discretionary power of the court. He cited the Court of Appeal case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi Nbi Civil Application No 251 of 1997**. There, the court held that:

“It is well settled that in general, that the matters which the 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, 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”

13. The 2nd respondent concedes that the courts are entitled to take judicial notice that the Chief Justice scaled down court operations during the Covid 10 pandemic, but argues that the courts were in operation as usual as found by Cheron, J in **ELC Misc Application No 13 of 2020**, the full citation of which was not availed. He argues, on the strength of **R v Laikipia District Land Disputes Tribunal & 3 Ors [2006]eKLR** that ***“cases belong to the litigant who should not be heard to shift blame to advocates who are not parties to the suit”***.

Analysis and determination

14. The only issue which I have to determine here, is whether the applicant has met the threshold for grant of leave to file the appeal out of time.

15. **Section 75G of the Civil Procedure Act** provides that:

“79G. 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 to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. (Emphasis added).

16. I have carefully perused the application and the documents annexed in support thereof and the responses and submissions of the parties.

17. The applicant annexed to his application and supporting affidavit the proceedings and ruling of the lower court, where the applicant was an interested party represented by Mr Kamau. The proceedings show that the ruling date taken in presence of the parties and counsel was 4th February 2020. Judgment was delivered on the due date. The proceedings have no date of certification, but the judgment was certified as a true copy on 10.7.2020.

18. There is no notice of appeal or draft Memorandum of appeal filed. Nor are there any documents showing that the applicant sought the proceedings ruling or a certificate of delay. To that extent the court is blind as to whether an appeal was preferred, and as to the efforts allegedly made by the applicant to get his appeal off the ground. The court has only his averments to go by, and no supporting documentation.

19. As earlier stated, the ruling is stamped as certified on 10th July, 2020. The application is shown to have been filed on 9th September, 2020, two months later. There is no explanation for even that delay for the period after the certification of the ruling other than the blame on the covid pandemic. The total period of delay is from 4th March, 2020 to 9th September, 2020. Covid is blamed.

20. It is conceded that the covid pandemic led to a scaling down of the court's operations. But the proof that the courts were still working is the fact that the proceedings were in fact produced during that period, and the applicant even got the ruling certified on 10.7.2020.

21. In order to balance justice as between the parties, I think the delay must be explained by circumstances beyond the covid pandemic, and in addition to it.

22. There are the other grounds which the court can consider in reaching a position on whether or not to extend time, as stated in the Leo Sila case: whether the appeal has a likelihood of success and the degree of prejudice the respondent may suffer. It is impossible to assess whether the appeal has any chances of success without the court seeing the memorandum or grounds of appeal.

23. As to prejudice likely to be suffered by the respondent, it is not clear whether any grounds of appeal have been conceptualized, hence what degree of delay will be occasioned to the respondent as the applicant prepares the grounds and, in addition, the record of appeal.

24. Where an applicant wishes the court to grant him a discretionary opportunity, that party must avail the court clear and convincing reasons and demonstrate that it seriously wishes to pursue the course it is alleging.

25. In light of all the foregoing, I do not think this is a proper case for the exercise of the court's discretionary power to extend time.

26. The application is dismissed with costs.

27. Orders accordingly.

DELIVERED AT KERUGOYA ON THIS 30TH DAY OF MARCH, 2022

.....

R MWONGO

JUDGE

Delivered in the presence of:

1. Asiiimwe holding brief for Kamau for Applicants
2. Kagio for 2nd Respondent and holding brief for Muriuki for 1st Respondent
3. Murage Court Assistant