



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. E282 OF 2021

MBUKONI SERVICE LTD.....1ST APPLICANT

HARRON KYALO DANIEL.....2ND APPLICANT

-VERSUS-

ESTHER NZILANI MUINDI..... RESPONDENT

RULING

1. By their motion dated 10th June, 2021 by **Mbukoni Services Limited** and **Harron Kyalo Daniel** (hereafter the 1st and 2nd Applicants) seek leave to appeal out of time against the judgment and decree delivered in **Milimani CMCC No. 4745 of 2019**. The motion is expressed to be brought under sections 3A, 79G and 95 of the Civil Procedure Act, inter alia. On grounds, among others that, judgment in **Milimani CMCC No. 4745 of 2019** was delivered in favour of **Esther Nzilani Muindi** (hereafter the Respondent) on 7th May, 2021 but the Applicants were unable to obtain a copy of the judgment in time, and upon doing so, the Applicants were aggrieved and resolved to file an appeal.

2. The affidavit in support of the motion is sworn by **Alfred Kyalo Kivuu** who describes himself as the director of the 1st Applicant and duly authorized by the 2nd Applicant, and is competent to swear the affidavit. The deponent states that upon judgment being delivered on 7th May, 2021 counsel on record embarked on efforts to obtain a copy of the judgment but did not succeed in time. That upon counsel obtaining the judgment, he served a copy upon the Applicants who felt aggrieved and dissatisfied with the whole judgment and instructed **M/s Kimondo Gachoka & Company Advocates** to appeal, however the time within which to appeal had already lapsed on 7th June, 2021. The deponent states that the delay was inadvertent and is not so inordinate as to be inexcusable. Finally, he asserts that the intended appeal raises pertinent points of law and has overwhelming chances of success and that the Respondent will not suffer any prejudice beyond compensation by costs.

3. The Respondent opposed the motion by way of grounds of opposition dated 14th October, 2021. To the effect that the application is an abuse of the court process, is an afterthought, lacking in substance, totally defective intended to deny the Respondent the fruits of her judgment.

4. The motion was canvassed through written submissions. As a preamble the Applicants anchored their submissions on the provisions of Section 79G of the Civil Procedure Act and the decision in **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** on the principles governing grant extension of time to file an appeal. Counsel reiterated the explanation for the delay as stated in the supporting affidavit and asserted that the delay was only 9 days and therefore not inordinate, relying on the decision in **James Njenga & Another v Samuel Ngetich [2018] eKLR**. Concerning prejudice, he cited **G.N Muema p/a (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR** and asserted that the lower Court's award was excessive, and the appeal had high chances of success. On this latter submission counsel cited the case of **Amal Hauliers Limited v Abdulnasir Abubakar Hassan [2017] eKLR** and contended that the grounds in annexed draft memorandum of appeal demonstrate an arguable appeal.

5. On the part of the Respondent, it was submitted that the Applicants have not satisfactorily explained the delay and that no evidence had been tendered to confirm the Applicants' effort to obtain a copy of the lower court judgment and as such, the motion must fail.

6. The court has considered the application in light of the parties' respective affidavit material and submission. Section 79G of the Civil Procedure Act provides that:

“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.

7. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] eKLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“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 the general matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent of the application is granted.”

8. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.

9. The Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 a case- to-case basis;

4. Whether there is a 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 if the extension is granted;

6. Whether the application has been brought without undue delay.

7.”

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR**.

10. The judgment of the subordinate court was delivered on 7th May, 2021. The instant motion was filed on 16th June, 2021, therefore the delay in this case is about nine (9) days, which in this court’s views is not inordinate. The Applicants have further averred that the delay in filing the appeal was occasioned by the delay in obtaining a copy of the judgment in time. Under section 79G of the Civil Procedure Act a successful applicant ought to demonstrate ‘good and sufficient cause’ for the court to exercise its discretion. In this court’s view, the explanation offered by the Applicants seems plausible and reasonable notwithstanding the absence of documentary proof.

11. The Applicants have asserted that the intended appeal has a high chance of success. From the language employed in **Mutiso v Mwangi** (supra) the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The draft memorandum of appeal attached to the Applicants’ affidavit appears to raise issues serious enough to require the court’s consideration on appeal or that are *prima facie* arguable. The Court of Appeal in **Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited (2020) eKLR** stated that such appeal:

“... may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”

12. In **Vishva**’s case, the Court emphasized the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding *inter alia* that:

(i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;

(ii) the right to be heard is a valued right; and

(iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice...”

13. The delay in this case is short. In addition, there is no demonstration of undue prejudice being visited upon the Respondent if leave were granted to the Applicants. The Respondent can be compensated through costs. In the circumstances, to facilitate the Applicant’s undisputed right of appeal, the court allows the motion and directs that the appeal be filed within 14 days. Costs of the motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21st DAY OF APRIL 2022

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Ms. Sang

For the Respondent: Mr. Waiganjo

C/A: Carol