



Kana v Mwangi (Civil Appeal E006 of 2020) [2022] KEHC 10439 (KLR) (29 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E006 OF 2020**

JR KARANJA, J

JUNE 29, 2022

BETWEEN

NADEEM A. KANA APPELLANT

AND

LUCY WAMBUI MWANGI RESPONDENT

RULING

1. The application dated July 16, 2021, made by the appellant Nadeem Kana is essentially for extension of time for filing appeal and that the Memorandum of Appeal dated June 19, 2020 be deemed as properly filed.

The grounds for the application are set out in the appropriate Notice of Motion and are enhanced by the appellant's averments in his Supporting Affidavit dated July 16, 2021, which are however, opposed by the respondent Lucy Wambui Mwangi, on the basis of the grounds and averments contained in her Replying Affidavit dated October 22, 2021.

2. Basically, the application falls under S.79G of the *Civil Procedure Act*, which provides for time of filing appeals from the Lower Courts in the following terms:

“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 the period anytime 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”.

3. The issue arising herein for determination is whether the appellant has provided good satisfactory grounds for exercise of this Court's discretion in his favour.



The appellant argued that the impugned Judgment of the Lower Court was delivered on March 13, 2020, but he belatedly filed a Memorandum of Appeal and sought leave to have it filed out of time. In that regard, he filed an application dated October 19, 2020, which was struck out by the Court on April 12, 2021 for being overtaken by events. A subsequent application dated April 19, 2021 for review of the order was dismissed on 8th July, 2021, on the basis that he (appellant) ought to have filed a fresh application for leave.

4. The appellant implied that the present application is the new or fresh application for leave to file appeal out of time by extension of the period ordinarily prescribed for filing appeals. His reasons and/or grounds of the delay in filing the appeal are attributed largely to the fact that the impugned Judgment was delivered without notice to himself and the fact that his advocates are based in Mombasa and due to the lockdown and restrictions of movement in the Country due to the Covid-19 pandemic they found it difficult to file the appeal within the prescribed time. However, the respondent argued and contended that the present application is an afterthought intended to vex her. That no reasonable explanation has been given by the appellant as the Judgment was delivered in March, 2020, yet the appellant's application for leave to appeal out of time was made in October, 2020, thereby reflecting a delay of approximately six to seven months.
5. The respondent also contended that a similar application was made by the appellant and rejected by the Court, thereby implying that the doctrine of "res-judicata" applies herein.

However, for the avoidance of doubt, the doctrine does not apply in the present circumstances as the appellant's application which was made on April 19, 2021 was for review under Order 45 Rule 1 of the *Civil Procedure Rules* and was dismissed by the Court on a technicality rather than merit. In the circumstances, the principle of finality for which "res-judicata" is based did not apply.

Under S.7 of the *Civil Procedure Act*, the parameters for the application of the doctrine are set out as follows:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court".

6. The foregoing notwithstanding, extension of time is a discretionary remedy dependent on such factors as the length of delay and the explanations for the delay. These are the key factors for a Court to consider in determining whether or not to extend time.

The fact that the Covid-19 pandemic altered the normal "status-quo" and upset the normal Court operations would be a plausible reason for failure by the appellant to file the intended appeal within the prescribed time considering that the Court operations were scaled down for a period of about four months from March, 2020 and although litigants were allowed to file documents on-line, technological failures were rampant such that timely filing of documents was hindered in most cases.

7. It is only for the foregoing reason that the Court would find that the appellant has provided good and satisfactory ground for exercise of discretion in his favour. Otherwise, the reason that the appellant was not notified of the date of the impugned Judgment was not established and even if it was, the indication by the respondent was that the appellant was indolent in failing to turn up for the mention of the case when the Judgment date was set by the Court. Therefore, he had no one but himself to blame for not



being aware of the date for the delivery of the Judgment. In the circumstances, the lack of a Judgment notice would not be a plausible reason for delay in filing the intended appeal.

8. In the upshot, the present application is allowed to the extent that the appellant is hereby granted leave to file appeal out of time and in that regard the appeal be formally filed within the next four (4) months from the date hereof for necessary admission and directions on hearing. In default, the leave granted shall forthwith lapse.

A mention date shall be given today on the way forward and/or further orders.

It may be noted that the Memorandum of Appeal said to be dated October 19, 2020 cannot be traced in this record.

J.R. KARANJAH

J U D G E

[DATED AND DELIVERED THIS 29TH DAY OF JUNE, 2022]

