



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO. 62 OF 2019

ANN WANGARI KARIMI.....APPLICANT

VERSUS

JOSEPH KABUGI KINGORI.....RESPONDENT

RULING

The application before court is the applicant's motion dated 27 May 2019 filed under Order 51 rule 1 of the Civil Procedure Rules, sections 1A, 1B, 3A and 3B of the Civil Procedure Act, cap. 21. It seeks for extension of time within which the applicant can file her appeal against a judgment and decree delivered by the magistrates' court on 27 November 2018.

The motion is supported by the applicant's own affidavit sworn on 27 May 2019 in which she has sworn that she was the plaintiff in the suit against the respondent in the Nyeri Chief Magistrates' Court Civil Suit No. 371 of 2015. She had apparently sued for damages as a result of road traffic accident involving the respondent's motor vehicle and in which her husband perished.

The suit was dismissed by a judgment dated 27 November 2018. The applicant swore that she required the proceedings to lodge an appeal against the judgment and in this regard, she paid for these proceedings on 28 November 2018. But it was not until 3 April 2019 that the proceedings were ready. It is her case that the delay to lodge the appeal within the prescribed period was not deliberate but was due to circumstances beyond her control. It is also her belief that her intended appeal has high chances of success.

The respondent has opposed the motion and a filed a replying affidavit to boot. He swore that the judgment was delivered in the presence of the applicant's counsel and there was no reason why it took him six months to file the present application. In any event, typed proceedings are not necessary for one to file an appeal; according to the respondent, a memorandum of appeal ought to have been sufficient.

Even then, it took the applicant 58 more days to file her application after she received the proceedings. These delays are inordinate and the extension of time would certainly be prejudicial to the respondent since the cause against him has been in court for the last six years. Again, the respondent urged that the appellant's intended appeal has no chances of success.

The time when an appeal should be filed from the magistrates' court to the High Court is prescribed in Section 79 G of the Civil Procedure Act; it provides as follows:

79G. Time for filing appeals from subordinate courts

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.

This section is, by and large, self-explanatory as far as the time within which the appeal should be filed is concerned; the appeal must be filed within thirty days from the date of the decree or order appealed against. Time starts running once the decree or order has been prepared and delivered to the appellant.

It is possible that even after the decree or order has been prepared and delivered to the appellant, he may, for whatever reason, not be able to file the appeal within the thirty-day period; the proviso to section 79 G provides such an appellant with a window to file the appeal out of time but only after he has satisfied the court that the reason or reasons for the delay are good and sufficient. What amounts to good and sufficient reason or reasons would, of course, depend on the circumstances of each particular case.

A memorandum of appeal is the prescribed form of an appeal from the subordinate court to this court; this is according to Order 42 rule 1(1) of the Civil Procedure Rules. And order 42 Rule 2 of these rules suggests that the memorandum of appeal ought to be filed together with a certified copy of the decree order appealed from; where that is not possible, the filing of the decree or order must follow, at the earliest opportunity possible, after the memorandum of appeal has been filed or at such time as the court may order. Those rules read as follows:

Order 42

1. (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

2. Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.

When section 79 G of the Act is read together with Order 42 Rules 1 (2) and 2 of the Civil Procedure Rules, it becomes obvious that all that one needs to file an appeal from the subordinate court to this court is a memorandum of appeal and a certified copy of the decree or order appealed from. And where circumstances so limit, he may even file the memorandum of appeal without any of those documents, because they can be filed later if at all they are not readily available at the time of filing the memorandum of appeal.

So, while I appreciate that the applicant applied and even paid for the proceedings so soon after the delivery of the judgment, those proceedings would ordinarily not be needed in filing an appeal from the subordinate court to the High Court.

As far as the question whether her appeal is arguable is concerned, I would not hesitate to state that the appeal would be arguable.

I gather from the record of proceedings and the trial court's judgment that the appellant's husband died while travelling as a passenger in the respondent's vehicle registered as KAP 947 T; the vehicle was involved in a road traffic accident on 21 January 2013 and it would appear that it is as a result of the accident that the appellant's husband sustained injuries to which he succumbed. The accident is said to have occurred at night and partly for this reason, no eyewitness was called to testify on how the accident occurred. The learned magistrate dismissed the applicant's suit because, in the absence of an eye witness or any testimony on how the accident occurred, it could not be concluded that the respondent was negligent. The applicant, according to the learned magistrate, did not prove negligence.

I am persuaded that the applicant would have an arguable appeal against this decision.

I am also persuaded that the delay in filing the appeal was informed by misapprehension of the law. As noted, an appellant does not need proceedings to file an appeal to this court against a decision of the subordinate court. This is a mistake of the appellant's counsel which, in my humble view, should not be visited upon the poor widow who lost her husband in the fatal crash.

Again, I do not see how the respondent would be prejudiced if the applicant was to be granted leave to file her appeal out of time.

For these reasons, I will allow the application. The time within which the applicant is to file and serve her appeal is extended by fifteen days from the date of this ruling. The respondent shall, however, have throwaway costs of Kshs. 5,000/=. Orders accordingly.

Signed, dated and delivered on 22 January 2021.

Ngaah Jairus

JUDGE