



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS APPLICATION NUMBER 174 OF 2020**

**NICHOLAS KARIUKI NDUNG'U.....PLAINTIFF/APPLICANT**

**VERSUS**

**REAL PEOPLE KENYA LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**PHILIP M. KAMUYA T/A CRATER VIEW**

**AUCTIONEERS LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application before me is the Notice of Motion dated 14<sup>th</sup> September 2020. It is brought under **Section 3A, 79G, 95 and 63(e) of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules**. It seeks orders;

*1. THAT the proposed appellant be granted leave to appeal out of time against the whole ruling of Honourable B. Mararo, Principal Magistrate, delivered on 15<sup>th</sup> day of July 2020 in Civil Case No. 1142 of 2018 at the Nakuru Chief Magistrate's Court.*

*2. THAT the Memorandum of Appeal annexed hereto be deemed as duly filed and served upon the respondent within the prescribed time.*

*3. THAT the costs of this application be provided for.*

2. The grounds for the application are on the face of the application;

*1. The Applicants' was dissatisfied with the whole ruling of Honourable B. Mararo, Principal Magistrate, delivered on 15<sup>th</sup> day of July 2020 in Civil Case No. 1142 of 2018 at the Nakuru Chief Magistrate's Court.*

*2. The intended applicant's appeal is barred due to lapse in time and it's necessary to seek leave.*

*3. The applicant delay in lodging the appeal was purely inadvertent and is inexcusable.*

*4. The delay is not so inordinate or so great as to be inexcusable.*

*5. Civil Case No. 1142 of 2018 is still ongoing at the Nakuru Chief Magistrate's Court.*

*6. It is in the interest of justice that the time of filing and serving of the Memorandum of Appeal be extended.*

3. It is also supported by the grounds in the Supporting Affidavit of Nicholas Kariuki Ndonga sworn on 14<sup>th</sup> September 2020.

4. The application is opposed by the Replying Affidavit of Peter Amkoa sworn on 7<sup>th</sup> October 2020.

5. Parties agreed to dispose of the application by way of written submissions; for the applicant filed by Kihara Macharia Advocates dated 30<sup>th</sup> October 2020, and for the respondent filed by Nyambegera & Co Advocates dated 19<sup>th</sup> November 2020.

6. The applicant's case is that he filed an application in the Chief Magistrate's Court, No. 1142 of 2018 to set aside an interlocutory judgment that was entered for failure to respond to a counter claim. That the dispute in that matter is that he borrowed money from the 1<sup>st</sup> respondent and charged his motor vehicle registration number KBX 511 Hino Lorry.

7. That he defaulted on the loan and the 1<sup>st</sup> respondent repossessed the motor vehicle and sold it to a third party. That his complaint was twofold, that the motor vehicle was grossly undervalued, and that he needed to join the buyer as a party to the suit, hence the prayer for amendment of the plaint.

8. The applicant also complained that the reason for not filing the appeal in good time was that the learned trial magistrate scheduled the Ruling for **23<sup>rd</sup> March 2020**, but the same was not delivered till **15<sup>th</sup> July 2020** and that his lawyer only got a copy of the handwritten Ruling on 8<sup>th</sup> September 2020.

9. The issue is whether the prayers sought are tenable.

10. The applicable law is **Section 79G of the Civil Procedure Act**

***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 provides that an appeal from Subordinate Court to High Court shall be filed within 30 days, from the date of the order appealed against. In this case the applicant ought to have filed the appeal within thirty (30) days of 15<sup>th</sup> July 2020, i.e. on or before 15<sup>th</sup> August 2020. The additional or deductible period depending on how you look at it) would be the time (certified by the lower court) it took for the applicant to obtain a copy of decree/order appealed from. Short of that the applicant must satisfy the court that there is good and sufficient cause for not filing the appeal in time.

11. The applicant submits that there was no inordinate delay. That period of delay is two (2) months, and is excusable as it was not deliberate.

12. Secondly that the failure was inadvertent resulting from the fact that new Ruling date was never communicated to the Applicant.

13. As to whether the appeal has any chance of success, it was submitted the draft Memorandum of Appeal raised arguable grounds.

14. For the respondent it was argued that the application did not satisfy the not satisfy the conditions to be considered in deciding whether to allow an application for extension of time as set out by the Court of Appeal in the case of **Thuita Mwangi vs Kenya Airways Limited [2003] eKLR**. **The applicant has to explain to the satisfaction of the court:**

- Length of delay
- Reasons for delay
- Chances of success
- Degree of prejudice to respondent

15. On length of delay, it was argued that the applicant had not explained the same; that the in lodging the appeal delay was inordinate, that the applicant had not given any evidence to show the effort to find out when the Ruling would be delivered; that this was another delaying tactic by the applicant to unreasonably prolong the matter in the court;. That a similar application filed in the Subordinate Court was found to be without merit and was dismissed.

16. On whether the appeal had any chances of appeal, it was argued for the respondent that the motor vehicle having been sold by way of public auction, the applicant's equity of redemption had been distinguished hence there were no chances that the appeal could succeed. On this respondent relied on;

(1) **Kamulu Academy Limited & Another vs British American Insurance Limited & 2 Others [2018] eKLR**

(2) **Mbuthia vs Jumba Credit Finance Corporation & Another (1968 – 1989) IEA 340 (CAK)**.

17. It was argued further that the applicants attempt to amend the plaint was in bad faith. That the buyer was a *bonafide* buyer of the motor vehicle for value at a public auction who ought not to be joined as an interested party. That the proposed amendment was simply a reaction to the circumstances pursuant to his admitted default in repaying the loan. That in any event the proposed amendment to include loss of user could not stand because he was still indebted to respondent

18. Further that the applicant sought to amend the plaint to enable him file a supplementary list of witness, documents. That the applicant could not be heard to blame his advocates for inaction in failing to follow up on his case, because in the end the case was his and not the advocate's see **Habo Agencies Limited** is **Wilfred Odhiambo Musingo** [2015] eKLR. See also **Rajesh Roghani vs Fifty Investment Limited & Another** [2005] eKLR, **Banes Construction Co. Limited vs John Mzare Ogowe** [2016] eKLR. That even if the advocate was guilty of inaction, the inaction on the part of the applicant was not excusable.

19. I have carefully considered the submissions and Affidavit evidence. The issue is whether the applicant has established sufficient reason to warrant the exercise of this court's discretion in his favour.

20. It is evident from the record of the lower court that the Ruling of 15<sup>th</sup> July 2020 was delivered in the absence of the applicant. Nothing has been placed before this court to demonstrate that the trial court notified the parties of the new Ruling date after the March date expired. If I recall it is in the month of March that a lot of activities stalled in the courts following the outbreak of Covid 19. The evidence on service was necessary in view of the guidelines by the Hon. Chief Registrar of the Judiciary, Chief Justice and Presiding Judge on the manner of conducting matters during the Covid period.

21. The respondent produced no evidence to controvert the applicant's averments that he was not aware of the Ruling date in July, and it is evident that as soon as he learnt about the Ruling he filed this application.

22. Clearly with regard to the application for extension of time to file the appeal, there is sufficient reason to show that the applicant was not aware of the Ruling date. It was the duty of the court to inform the applicant and if the respondent obtained the date ex-parte, the Respondent was obligated to serve the applicant with a Mention Notice of the Ruling date. Without any evidence that the applicant was aware of the date of the Ruling and failed to show up, the evidence that he acted promptly upon obtaining the ruling remains uncontroverted. It follows that the applicant's delay of two (2) months is excusable.

23. It is noteworthy that no other prayer is sought in the Notice of Motion dated 14<sup>th</sup> September 2020 despite the applicant speaking about stay of proceedings in CMCC 1142 of 2018 in his affidavit.

24. The applicant's submissions are also only on the prayer for leave to file the appeal out of time and are based on the provisions of **Section 79G of the Civil Procedure Act**, and the possibility of the success of the appeal.

25. In the circumstances the application is allowed in terms of prayer 1 and 2 on the face of the application.

*1. Leave is granted to the applicant to file the appeal out of time against the whole ruling of Honourable B. Mararo, Principal Magistrate, delivered on 15<sup>th</sup> day of July 2020 in Civil Case No. 1142 of 2018 at the Nakuru Chief Magistrate's Court.*

*2. The Memorandum of Appeal annexed hereto is deemed as duly filed and served upon the respondent within the prescribed time.*

*3. The record of Appeal be filed and served within 30 days hereof.*

*4. Costs in the cause.*

**Dated and delivered virtually this 26<sup>th</sup> day of February 2021.**

**Mumbua T. Matheka**

**Judge**

**In the presence of:**

Court Assistant Edna

Mr. Mwangi for the applicant

Ms. Omuya for defendant respondent