



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. E032 OF 2020

BRITISH AMERICAN INSURANCE CO. LTD.....APPLICANT

VERSUS

DOROTHY ONYANGO.....RESPONDENT

RULING

1. The application dated 29th July, 2020 principally seeks orders **that the Applicant herein be granted leave to appeal to the High Court against the ruling of the trial court out of time.**
2. Secondly, **that stay of proceedings of the ruling in Milimani CMCC No.3660 of 2013 be granted pending hearing and determination of the intended appeal.**
3. Thirdly, **that the annexed draft Memorandum of Appeal be deemed as properly filed upon payment of the requisite fees.**
4. The application is premised on the grounds stated therein and is supported by the affidavit sworn by the Applicant's Advocate. The Applicant is dissatisfied with the ruling delivered by the Lower Court on 30th July, 2020 and wishes to Appeal. The impugned ruling dismissed an application for enlargement of time within which to comply with the court orders to file a formal application for the Applicant to call a further witness.
5. The delay in filing the Appeal is blamed on the delivery of the Lower Court ruling in the absence of the parties and the subsequent non availability of the court file. It is contended that the intended Appeal has high chances of success. The Applicant further stated in the supplementary affidavit filed that the closure of the courts following the outbreak of the COVID 19 Pandemic caused further impediments to the Applicant. The court was urged to allow the case to proceed and do substantive justice without undue regard to technicalities of procedure.
6. The application is opposed. It is stated in the replying affidavit that the application is a delaying tactic. That the Plaintiff's case was closed on 18th January, 2018 and Defence case adjourned three times but the Defendant did not file their application without delay. That the Applicant has not been diligent and that there is no sufficient cause shown for the delay. That there is no documentation to prove that the court file was missing and that in any event, the notice for the delivery of the ruling was affixed on the court's premises.
7. I have considered the application, the response to the same and the written submissions filed by the respective counsel for the parties.
8. 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 30 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.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 75 and 95 of Civil Procedure Act Cap 21 Laws of Kenya)

9. On enlargement of time, the principles applicable were set out by the Supreme Court of Kenya in the **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** as follows:

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:

- 1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be consideration for extending time.”**

10. The ruling in question was delivered on 30th July, 2019. The application at hand was filed on 29th July, 2020. That is a period of one year following the delivery of the ruling. Although the Applicant states that the court file could not be traced for perusal and that on 13th February, 2020 a letter was written to the Executive Officer inquiring whether the ruling was delivered, the copy of the said letter has not been exhibited herein. In any event, by the date of the said inquiry, a period of over six months had lapsed since the date of the delivery of the ruling.

11. It is not stated whether the date for the delivery of the ruling was set by the trial court or whether the ruling was to be delivered on notice. The issue of the outbreak of the COVID 19 Pandemic came in long after the delivery of the ruling. I find the delay herein is inordinate and shows lack of diligence on the Applicant’s side. The delay has not been explained to the satisfaction of the court. I agree with the Respondent’s submissions that any further delay will be prejudicial to the Respondent who closed her case on 18th January, 2018.

12, With the forgoing, this court finds no merits in the application. The same is dismissed with costs.

Dated, signed and delivered at Nairobi this 24th day of February, 2021

B.THURANIRA JADEN

JUDGE