



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPLICATION NO. 199 OF 2019

SAMMY MWANGI MAINA.....PLAINTIFF/APPELLANT

-VERSUS-

HERITAGE INSURANCE CO. LTD.....RESPONDENT

RULING

The application dated 30th October 2019 seeks an extension of time for the filing of the appeal, and that the appeal be deemed as properly filed.

1. The judgment that is the subject of the intended appeal was delivered on 7th August 2019.
2. The Applicant, **SAMMY MWANGI MAINA**, has told the Court that his advocates informed him about the judgment on 14th August 2019. However, it was not until 1st October 2019 when the Applicant visited his advocate's offices, where he held discussions with his advocate.
3. After being given appropriate advice, the Applicant issued instructions to his advocates, to file an appeal. However, by the time he issued the said instructions, the time within which the appeal ought to have been filed, had lapsed.
4. In answer to the application, the Respondent filed Grounds of Opposition, together with a Replying Affidavit.
5. The Respondent, **HERITAGE INSURANCE COMPANY**, pointed out that, by a letter dated 5th September 2019, the Applicant's advocates provided to the Respondent the particulars of the bank account into which the decretal amount was to be paid.
6. On 5th September 2019, the Respondent effected payment of Kshs 604,201/=, which was constituted of the Judgment sum together with the agreed costs.
7. As far as the Respondent was concerned, the Applicant had failed to give any explanation why he waited until 18th October 2019, to visit his advocate's offices.
8. It was the Respondent's contention that the Applicant was guilty of inordinate delay.
9. The Respondent asked the court to find that the application lacked merit, and that it had been brought in bad faith.
10. When canvassing the application, the Applicant begun by setting out the provisions of **Section 95** of the **Civil Procedure Act**, which reads as follows;

“Where any period is fixed or granted

by the court for doing of any act

prescribed or allowed by this Act, the

court may, in its discretion, from time

to time, enlarge such period, even though the period originally fixed or granted may have expired.”

11. The Respondent concedes that the court has the discretion to extend time for the filing of an appeal. Citing from the decision by the Court of Appeal in **CIVIL APPLICATION NO. 54 OF 2015**, wherein the said Court relied on the case of **LEO SILA MUTISO Vs ROSE HELLEN WANGARI MWANGI, CIVIL APPLICATION NO. NAI. 255 OF 1997**, the Respondent submitted thus;

“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, in general, the 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 the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

12. Those submissions echo those made by the Applicant.

13. The delay in this case was one that ran from 6th September 2019, when the appeal ought to have been filed, until 30th October 2019 when the present application was filed in Court.

14. I pause for a moment to point out that, simultaneously with the application, the Applicant filed a Memorandum of Appeal dated 30th October 2019.

15. By my calculations, the delay is of 49 days.

16. In my considered opinion, 49 days does not constitute inordinate delay.

17. But, did the Applicant explain why the delay happened?

18. The Applicant said that it is he who delayed in visiting his advocates offices, to discuss the judgment which had been delivered on 7th August 2019, and about which he was notified on 14th August 2019.

19. Obviously, if the appeal was to have been filed by 6th September 2019, the prescribed period had already lapsed before the Applicant visited his advocates’ offices.

20. Although the Applicant did not provide details of the reasons why he had not visited his advocates between 14th August 2019 and 1st October 2019, the reason for the delay in filing the appeal is to be found in the very fact that the Applicant had delayed in issuing instructions to his advocates to take that step.

21. The Appellant was well aware of the requirements, which he captured in his submissions by the following words;

“It is trite law that in an application for extension of time, the whole period of

delay should be declared and explained

satisfactorily to the court.”

22. In this case, there are 2 aspects of delay: the first was between 14th August 2019 and 1st October 2019; whilst the second was between 1st October 2019 and 31st October 2019.

23. In relation to the first aspect, the Applicant delayed in visiting his advocates offices. But the Applicant did not tell the court why he delayed.

24. In relation to the second aspect, there was no explanation tendered.

25. The advocate submitted thus;

*“..... our submission is that the delay
was inadvertent and arose from our
client’s delay to instruct us on time
after receiving our e-mail informing
him that judgement had been delivered.”*

26. In my considered opinion, the delay itself cannot be the reason why it happened.

27. Delay can be attributed to facts such as sickness, which prevented a person from taking action; or bereavement which diverted the person’s attention away from other matters.

28. In this case, although the delay itself is not inordinate, the Applicant did not give any satisfactory explanation for it.

29. Secondly, if the Applicant’s delay in giving instructions to his advocates could be attributed to inadvertence, there is not a single word to explain the delay between 1st October and 31st October, 2019.

30. In the case of M/S PORT REITZ MATERNITY Vs JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997, the Court said;

*“The right of appeal must be balanced
against an equally weighty right; that
of the Plaintiff to enjoy the fruits of the
judgement delivered in his favour. There
must be a just cause for depriving the
Plaintiff of that right. A plausible and
satisfactory explanation for the delay is
the key that unlocks the court’s flow of
discretionary favor. There has to be valid
and clear reasons upon which discretion
can be favourably exercised.”*

31. As noted earlier herein, the Applicant fully appreciated that he was required to satisfactorily explain the whole period of delay, but I find that he did not tender valid and clear reasons to explain the delay.

32. In the case of MONICA MALEL & ANOTHER Vs REPULIC, CIVIL APPLICATION NO. NAI. 246 OF 2008, Aganyanya JA said;

“When a reason is proposed to show why there was a delay in filing an appeal, it must be specific and not based on guess work, as counsel for the applicants appears to show”

33. In this case, the advocate has talked about inadvertence on the part of his client, but the Applicant himself did not give any specific reason for the delay.

34. I therefore find no valid or satisfactory explanation for the delay in filing the intended appeal.

35. In the absence of a satisfactory explanation for the delay, the application hereby fails; and it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF MARCH 2021

FRED A. OCHIENG

JUDGE