



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: Hon. D. K. Kemei – J

MISCELLANEOUS APPL. NO. E43 OF 2020

ANTONY MWAU WAMBUAAPPLICANT

VERSUS

COOPERATIVE BANK OF KENYA LTD.....RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 1/12/2020 under section 79G and 3A of the Civil Procedure Act seeking the following reliefs:-

- 1. That this Honourable court be pleased to grant leave to the Applicant to file an appeal out of time against the ruling of Hon. C. K. Kisiangani (SRM) dated 30/01/2019.**
- 2. That the amended draft memorandum of appeal be deemed as duly filed and served upon payment of the requisite court fees.**
- 3. That the costs of the application be provided for.**

2. The application is supported by grounds set out on the face thereof plus the affidavit of the Applicant sworn on even date. The Applicant's case is that he received certified copies of proceedings and ruling after the 30 days period for appeal had expired. It is also the Applicant's case that the Applicant had been ill during the period in question and that his appeal has high chances of success. It was finally the applicant's case that the application has been filed without undue delay and that no prejudice will be suffered by the Respondent as it is in the interest of justice and fair play to grant the orders sought. The Applicant annexed copies of letters seeking for proceedings. He also annexed a draft memorandum of appeal, proceedings and medical treatment notes.

3. The application is strenuously opposed by the Respondent. Vide a replying affidavit sworn on 20/01/2021 by the Respondent's Advocate Philip M. Mulwa, it was averred inter alia that the reasons given by the Applicant for failing to file the appeal for a period of two (2) years is not plausible since filing the same did not require proceedings; that the Applicant's character points to a person who is out to waste the courts time even after failing to prosecute the suit for five (5) years leading to its dismissal for want of prosecution; that the intended appeal has no chances of success whatsoever; that the applications is an abuse of the court process and should be dismissed with costs.

4. The Applicant filed a further affidavit dated 16/02/2021 where he deposed inter alia: that the lapse of two (2) years after the dismissal of suit had been occasioned by his ill health and hospitalization, corresponding with the Respondent with a view to settling the matter, Covid – 19 pandemic and delay in typing of proceedings; that he needed proceedings for perusal before lodging the memorandum of appeal; that he is now ready to pursue his appeal within the time stipulated by the court; that he had been abandoned by his Advocate at a time when he was sick and hence the delay; that the Respondent has not stated how it is likely to suffer if the application is allowed and the matter heard on merit.

5. Parties filed written submissions. The applicant's submissions are dated 16/02/2021 while those of the Respondent are dated 1/03/2021.

6. The Applicant submitted that there was delay in typing of ruling and proceedings while he was hospitalized. It was submitted that the Applicant is keen to prosecute the suit that was dismissed by the trial court once he is granted leave to lodge the appeal and upon its determination. It was the Applicant's contention that the court give meaning to the provisions of Article 159 of the Constitution and do justice by allowing the Applicant lodge appeal out of time in the interest of justice as the Respondents concerns can be taken care of by way of costs.

7. Learned counsel for the Respondent submitted that the application herein has been made quite late in the day yet the impugned ruling was delivered on 30/01/2019. According to counsel, this is unreasonable delay and goes against the overriding objectives of section 1A of the Civil Procedure Act which is aimed at a just, expeditious proportionate and affordable resolution of civil cases. It was also submitted that upon the delivery of the ruling on 30/01/2019 the Applicant ought to have simply filed his Memorandum of Appeal as the same did not need proceedings. Counsel took issue with the Applicant's attempt at seeking refuge on illness yet there is evidence from his affidavit that he used to visit the registry on pursuit of proceedings and therefore ought to have filed the requisite memorandum of appeal. Finally, it was submitted that the Respondent stands to be prejudiced as it had been sued but that the Applicant failed to set the suit down for hearing for a record of five (5) years and which was eventually dismissed. It was contended that the Applicant should not be allowed to rewind the clock again as the Respondent who had loaned its money to the Applicant will suffer prejudice. Learned counsel prayed for the dismissal of the application with costs to the Respondent.

8. I have given due consideration to the Applicant's application, rival affidavits and submissions. It is not in dispute that the lower court vide **Machakos CMCC No. 237 of 2014** delivered a ruling dated 30/01/2019 in which it dismissed the Applicant's suit against the Respondent for want of prosecution. It is also not in dispute that the Applicant lodged the present application in which a draft memorandum of appeal dated 1/12/2020 is annexed. It is also not in dispute that the period for lodging appeal has since expired and that the present application has been filed almost two (2) years after the ruling by the trial court was delivered. The issue for determination is whether sufficient cause has been made by the Applicant for leave to file an appeal out of time from the ruling of the trial court dated 30/01/2019.

9. It is noted that the order sought by the Applicant is a discretionary one. This court has unfettered discretion in the matter and must consider whether justifiable cause has been presented by the Applicant to warrant the exercise of discretion now sought. The Applicant has sought reliance in section 79G of the civil Procedure Act which provides as follows:-

“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 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”.

Flowing from the above provisions, the courts have laid down certain principles for guidance regarding the exercise of discretion to extend time for a party to lodge appeal out of time. These principles include the length of delay, reasons for delay, chances of the appeal succeeding if application is granted and the degree of prejudice to the Respondent if the application is granted.

The Supreme Court in the case of **Raila Odinga –vs- IEBC & 4 others [2013] eKLR** invoked the provisions of Article 159(2) (d) of the Constitution when it held as follows:-

“The essence of that provisions is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit however, in our opinion bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the process of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case and conscientiously determine the best outcome.”

Further, the Supreme Court in the case of **Nicholas Kiptoo Arap Salat –vs- IEBC & 7 others [2014] eKLR** laid down the principles guiding the exercise of discretion to extend time to lodge an appeal out of time as follows:-

“The underlying principles a court should consider in exercise of such discretion include:-

- 1. Extension of time is not a right of any 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 Respondent if the extension is granted.**
- 6. Whether the application has been brought without undue delay.**
- 7.”.**

10. The Applicant has maintained that the delay to lodge the appeal and the application was due to several factors namely typing and supply of proceedings, ill health leading to hospitalization and the Covid – 19 pandemic. He has annexed the copies of letters to the court seeking for proceedings as well as medical notes. The record of the lower court also reveals that the Applicant's Advocates withdrew from representing him and was thus left alone to battle the case. As earlier pointed out, the Applicant delayed in filing the memorandum of appeal as well as the application for extension for lodging appeal out of time. The Respondent contends that the application ought to be dismissed

as the Respondent stands to be prejudiced as it had been dragged into the case by the Applicant who did not bother to prosecute the suit for a long time leading to its dismissal for want of prosecution. The Applicant has entreated and beseeched the court to give him a chance to prosecute his appeal. He seems not averse to paying costs to the Respondent. I have perused the Applicant's draft memorandum of appeal and note that he laments about having been thrown under the bus by his erstwhile Advocate. He has also raised the issue that the trial court erred in dismissing his suit yet he had already rendered an explanation for delay due to illness. Indeed, an arguable appeal is not necessarily one that must succeed and it is sufficient that the intended appeal raises at least one arguable point. The bottom line of the Applicant's draft memorandum of appeal is that he had a good explanation for failing to prosecute his case before the lower court. I find the same to be a triable issue thereby making his appeal arguable and hence the need to give the Applicant a chance to lodge the same. The Respondents inconvenience will be cushioned by an award of costs. I am of the view that this court should render substantive justice to the parties herein. The Applicant stands to suffer greater prejudice if the application is not allowed as he will have lost the opportunity to ventilate his appeal. Hence I find the ends of justice would be better served if leave is granted to the Applicant to lodge appeal out of time.

11. In light of the foregoing observations the Applicant's application dated 1/12/2020 is allowed in the following terms:-

- a. Leave is hereby granted to the Applicant to file an appeal out of time.**
- b. The Appeal be filed and served within 14 days from the date hereof.**
- c. The costs of the application be borne by the Applicant.**

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 29TH DAY OF JUNE, 2021

D. K. KEMEI

JUDGE