



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. E009 OF 2020

DOMINIC OBUYA MIKWAYA.....APPLICANT

versus

SOUTH NYANZA SUGAR COMPANY LIMITED.....RESPONDENT

RULING

On 09/03/2020, the trial court delivered a judgement in Migori PMCC No. 81 of 2017 dismissing the suit of the applicant (the plaintiff). The said judgement was delivered in the absence of both parties. The thirty (30) days allowed for filing an appeal lapsed and the applicant filed the instant Notice of Motion application dated 23/11/2020 seeking the following orders: -

- 1) The applicant be granted leave to appeal out of time against the whole judgement of Hon. Kamau dated 9/03/2020 in PMCC No. 81 of 2017;**
- 2) That the memorandum of appeal annexed hereto and marked X be deemed as duly filed upon payment of the requisite filing fees;**
- 3) That the costs of this application be provided for.**

The grounds upon which the application is premised, are restated in the supporting affidavit of **Learned Counsel, Ezekiel Oduk**. Counsel deponed that this subject suit PMCC 81 of 2017, was dismissed on 9/03/2020 in the absence of both the applicant, (the proposed appellant;) and his counsel and without notice of delivery of the judgment; that it was discovered that the suit was dismissed upon a visit to the registry on 9/11/2020; that by then the time for filing and lodging the appeal had lapsed; that the judgement raised serious grave misdirections and it is important that this court looks into the proprietary of the said decision; that no prejudice will be occasioned to the respondent, the circumstances of the delay being wholly beyond the control of the applicant.

Directions were taken that the application be canvassed through written submissions. Despite being given the opportunity to put in a response and submissions, the respondent failed to do so. The applicant filed his submissions dated 16/03/2021 on 22/03/2021 which I have duly considered.

The applicant raised three issues for determination as follows: -

- a. Whether failure to notify the parties of the date of delivery of the unscheduled judgement, constitutes excusable mistake.**
- b. Whether the application was made without unreasonable delay.**
- c. Whether the appeal raises triable issues.**

On the first issue, the applicant submitted that parties are entitled to a notice of the date of delivery of judgement and where such notice is not given, that omission may well amount to a sufficient reason for enlargement of time to appeal if the applicant moves the court for regularization of his position expeditiously. The applicant relied on the cases of **James Njenga & Another vs Samuel Ngetich (2018) eKLR; Trabo Transporters Limited vs Francis Njenga (2018) eKLR and Zacky Hinga vs Lawrence Nthiani Nzioki & Another Civil Application Nai 359 of 1996 and Ngoso General Contractors Ltd vs Jacob Gichunge Civil Appeal No. 248 of 2001 (2005) 1 KLR 737.**

On the second issue, the applicant submitted that there was no inordinate delay on their part; that between the date of discovery of the existence of the judgement and the drawing of this application was a mere eleven (11) days and **some eight (8) months**. The applicant relied on the decision of **Veronicah Gathomu Mwangi & Another vs Samuel Kagwi Ngure & Another (2016) eKLR.**

Lastly, the applicant submitted that the attached memorandum of appeal raises bona fide triable issues; that the trial court relied on unpleaded issues to arrive at the judgement. **Veronica Gathomu Mwangi (supra)**. The applicant prayed that the application be allowed with costs being in the cause.

This court has carefully read and considered the application and submissions. The issues that emerge for determination are as follows;

- i. Whether there was unreasonable delay in bringing this application.
- ii. Whether leave can be granted to file an appeal out of time.
- iii. Whether the applicant has an arguable appeal.

Whether leave can be granted to file an appeal out of time;

Section 79G of the Civil Procedure Act provides for the time of filing appeals and enlargement of time for filing appeals. It provides as follows: -

“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.”

Further, **Section 95 of the Civil Procedure Act** provides for enlargement of time as follows: -

“Where any period is fixed or granted by the court for the 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.”

The decision to enlarge time is largely discretionary. The principles to consider whether to enlarge time were considered in the case of First American Bank of Kenya Ltd vs Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65 as follows: -

- 1) The explanation if any, for the delay;**
- 2) The merits of the contemplated action, whether the appeal is arguable;**
- 3) Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.**

In Misc Civil Application No. 17 of 2020 Hajar Services Limited vs Peter Nyangi Mwita (2020) eKLR the court held as follows: -

“In this case the Applicant contended that the delay in filing the appeal was due to the fact the judgement was delivered in the absence of its counsel and without notice, a position which is not contested. Ordinarily, where a judgement is delivered in the absence of a party without notification and the party becomes aware of the same after the lapse of the time prescribed for taking action, that constitutes sufficient ground for extension or enlargement of time to take the necessary step.”

Failure to notify either counsel or the applicant of the date for delivery of judgment is good ground to extend time.

(i) Whether there was unreasonable delay on bringing this application:

Judgement was delivered on 9/03/2020. The appeal should have been filed within thirty (30) days, by 10/04/2020. The instant application was filed on 2/12/2020. The applicant contended that he became aware of the delivery of judgment and after a visit to the registry to make an inquiry on 9/11/2020.

The time lapse from the date of the discovery of the judgement to the filing of this application was twenty - three (23) days. Unfortunately, the applicant was very mean on information by not annexing the judgment or calling for the lower court file to confirm this information. However, since the respondent did not respond or oppose the application, the contents of supporting affidavit are deemed to be the true facts.

I take notice of the fact, that during the period the judgement was delivered, the COVID - 19 lockdown measures were in place. That may be the cause of the lapse though the court file may have helped reveal the correct position.

When the decision of the court came to the knowledge of the applicant, he filed the application within twenty - three (23) days. In the circumstances I find that the delay was not inordinate.

i. Whether the applicant has an arguable appeal.

I have seen the annexed Memorandum of Appeal. It is pleaded that the court considered unpleaded issues and relied on undisclosed documents. At this stage and without the lower court file and judgment, this court may not venture into whether or not the appeal is arguable. However, I do find that having not been opposed, there is merit in the application.

In the end, I make the following orders: -

- 1. Leave is hereby granted to the applicant to file and serve the appeal out of time.**
- 2. The appeal be filed and served within fourteen (14) days hereof.**
- 3. Thereafter the Record of Appeal be filed and served within forty five (45) days.**
- 4. Costs of this application to abide the appeal.**

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

R. WENDOH

JUDGE

Judgment delivered in the absence of

No appearance for the applicant (though Counsel had been notified by email of
the date of delivery

Nyauke Court Assistant