



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC APPLICATION NO. E 003 OF 2021

ONGARA PETER MWITA.....APPLICANT

VERSUS

SOUTH NYANZA SUGAR LIMITED.....RESPONDENT

RULING

By the Notice of Motion dated 7/1/2021, brought by **Ongara Peter Mwita**, against the South Nyanza Sugar Company Ltd, (the Respondent) the applicant seeks the following orders:-

- i) That the Hon. Court do grant leave to the applicant to file his appeal out of time against the ruling delivered on 1/10/2020;***
- ii) That upon the grant of leave, the draft Memorandum of Appeal annexed to the Motion be deemed as duly filed;***
- iii) Cost be in the cause.***

The application is supported by the applicants affidavit sworn on 7/1/2021 and grounds found in the body of the application. He deponed that the ruling was made by **Hon. Areri Senior Resident Magistrate**, on 1/10/2020 whereby his suit was struck out and he immediately instructed Messrs Kerario Marwa & Co Advocate to appeal against the said ruling; that he has information that Mr. David Kerario Marwa was critically ill in October and November 2020 and was not able to file the appeal in time which is an excusable mistake; that in any case the mistake of Counsel should not be visited on the litigants; that this appeal is arguable and has high chances of success as revealed in the amended Memorandum of Appeal; that it is in the interest of justice that the application be allowed.

Maurice Omondi Nga'yo, the legal services manager of the Respondent swore a replying affidavit dated 11/3/2021.

In opposing the motion, he deponed that the applicant did not bother to file the Preliminary Objection, and the applicants' submissions to the preliminary objection, to enable this court to evaluate the arguability of the appeal; that the applicant has not shown any evidence that he followed up with the matter at the Registry and was told that copies of proceedings were not ready; that there is no good reason why the applicant failed to file a timely appeal; that the applicant has not demonstrated that he paid for the said proceedings; that there is no evidence that the applicant even tried to obtain uncertified copies of the proceedings; that the applicant has now lodged a draft Memorandum of Appeal with this Notice of Motion, yet he has not been supplied with certified copies of proceedings which is evidence that the applicant did not need certified typed proceedings in order to file an appeal in time. It was also deponed that the applicant had sufficient opportunity and material with which to file the intended appeal but squandered his chances; that even if leave is granted to the applicant to file an appeal out of time, there is no guarantee that he will do so. It was also deponed that the delay in filing the Notice of Motion is unexplained; that the applicant has not been diligent and the court should allow litigation to come to an end by declining to allow the application.

Counsel did not file submissions as the court had directed. The instant application is brought pursuant to Section 79G and 95 Civil Procedure Act which provide for enlargement of time for filing appeals from subordinate courts and for enlarging time generally.

Section 79(G) 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.”

Section 95 provides 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.”

In the Supreme Court case of **Nicholas Kipto Arap Korir Salat vs= IEBC and 7 others, SCAPP NO. 16 of 2014**, the court stated as follows:-

i. 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;

ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

iii. Whether the court should exercise the discretion to extend time, is consideration to be made on a case bass;

iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

v. Whether there will be any prejudice suffered by the Respondents if the extension is granted;

vi. Whether the application has been brought without undue delay;

vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

This court is guided by the principles set down in the above case and the affidavits filed in this matter .

In the instant case, the trial court read the impugned ruling on 1/10/2020. The Applicant claims to have instructed David Kerario Marwa Advocate soon thereafter. The applicant did not disclose the date when he did that. He then alleges that the said Advocate fell seriously ill between the same month of October and November and hence could not file the appeal in time. The application was then prepared on 7/1/2021 and filed in court on 12/1/2021 about 2 ½ months after the delivery of the ruling. In my view, no satisfactory explanation has been given for the delay of over 2 ½ months. As I have observed above, the applicant is very vague and does not disclose when he specifically instructed his counsel or when the counsel fell ill. Since the excuse given for the delay in filing the appeal is the indisposition of counsel, counsel should have sworn an affidavit to explain the reason why he did not file the appeal within the period allowed i.e 30 days. In my view, the delay of about 2 ½ months has not been explained to the satisfaction of this court. Besides, the applicant has not demonstrated that he paid for or applied for the proceedings of the trial court to enable him prepare his appeal.

The applicant filed this Notice of Motion together with the draft Memorandum of Appeal. It means that the applicant had in his possession or had access to the lower court proceedings. Even after the advocate recovered from his illness in November, no explanation is given why it took over one month to file this application for extension of time.

Even without considering whether or not the appeal is arguable, the delay is unexplained and in my view ,the delay is unreasonable in the circumstances. The applicant’s suit was dismissed for want of jurisdiction. There is no sufficient material placed before this court by the applicant to demonstrate that he has an arguable appeal.

Even though the applicant has a right to appeal, yet litigation must come to an end. Equity does not aid the indolent. The case against the Respondent having been dismissed, it should be allowed to rest from unnecessary litigation.

In the end, I find that the applicant has not satisfied this court as to why it should exercise its discretion in favour of the applicant. The application is unmerited and is hereby dismissed with costs to the Respondent

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

R. WENDOH

JUDGE

Ruling delivered in the absence of:

Counsel absent though they had been notified of the date of delivery of the ruling.