



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

MISC. CIVIL APPLICATION NO. 73 OF 2019

JOSHUA MALALE.....APPLICANT

VERSUS

NZOIA SUGAR COMPANY LIMITED.....RESPONDENT

R U L I N G

By a Notice of Motion Application dated 30th July, 2019 brought under the provisions of Section 79G, of the Civil Procedure Act, Order 50 Rule 6 of the Civil Procedure Rules, the applicant seeks;-

1. That this court grants the applicant leave to file a memorandum of appeal and serve out of time.
2. Any other order the court deems fit to grant.
3. Costs be in the cause.

The application is supported by the affidavit of Kundu Robert Maliekhe advocate. He depones that judgement in Bungoma CMCC 378 of 2014 was delivered on 15th March, 2018 when all along he had reliably been informed that judgment could be delivered on notice which was never served on him and delivered in the absence of all the parties.

He depones that when he came to know of the judgement, 30 days had already lapsed and upon tracing the applicant and reading out the judgment to him, he expressed his wish to appeal. That the intended appeal raises crucial issues that were not addressed by the learned trial magistrate or casually discussed without any proper determination.

The respondent filed its grounds of opposition reiterating *inter alia* that the delay of nearly 1 year and 3 months is inordinate and inexcusable and the application ought to be dismissed.

By consent the application was canvassed by way of written submissions. The parties filed their written submissions which have been carefully considered. The sole issue arising for determination is whether the applicant has advanced sufficient reasons to warrant the orders sought.

Appeals to this court are anchored in section 79G of the Civil Procedure Act which provides;

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.

The Section affords the applicant a window to appeal out of time provided the applicant advances satisfactory reasons for the delay. The power donated to the court to enlarge such time is discretionary provided the applicant furnishes the court with satisfactory reasons for the delay. In *Aviation Cargo Support Limited V St. Mark Freight Services Limited [2014] eKLR*, G.B.M. Kariuki, JA. observed;

..... Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.

In the instant case, it is a fact that judgement was delivered on 15th March 2019. The applicant lodged his application on 31st July, 2019. This clearly is out of the time provided for by the law. The applicant ought to have lodged his application by 15th April, 2019 or thereabouts. Computing the number of delays from the last day of filing the appeal up to the time the application was filed gives a delay of about 105 days.

The applicant states when he came to learn of the judgement, he traced the applicant and informed him of the judgement whereupon they decided to appeal.

Some of the factors the court will consider before granting such leave were espoused in *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported)*, include;

..... 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 the 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.”

I find that the appellant has demonstrated that he deserves the courts discretion in his favour for the reasons explained.

Consequently, I make the following orders;

1. The applicant is granted leave to appeal to this Court within **Thirty (30) days** from the date of this ruling failure of which the order automatically lapses.
2. Costs of this application shall abide by the outcome of the intended appeal.

DATED AND SIGNED AT BUNGOMA THIS 30TH DAY JULY, 2021.

S N RIECHI

JUDGE