



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC CIVIL APPLICATION NO. 16 OF 2021

APRODISIO MUGAMBI (Suing as the legal representatives of the estate of

NELLY KINYA MUGAMBI (Deceased).....APPLICANT

VERSUS

KINORO TEA FACTORY CO. LTD.....RESPONDENT

RULING

1. Before the Court is an application dated 22nd March 2021 seeking leave to appeal out of time against the Judgment and/or Decree delivered on 28th January 2021 in Nkubu PMCC No. 24 of 2020.

Applicant's Case

2. The Application is supported by the grounds on the face of it and by the Applicant's supporting affidavit sworn by the Applicant. The Applicant also filed submissions dated 24th June 2021. The Applicant's case is that being aggrieved by the Judgment, he applied for typed proceedings and Judgment to enable him file an appeal and he paid for the same. That the proceedings were not ready until 2nd March 2021 and subsequently, a decree was issued to that effect on 9th March 2021. He urges that the delay in filing the appeal was not intentional and was caused by the administrative delay of the Court. He urges that his appeal based on quantum is arguable. He urges that he stands to be prejudiced if leave is not granted because he will be forced to settle for the trial court's award despite his contestations to it. He urges that any prejudice that may be suffered by the Respondent can be sufficiently compensated by way of costs. He relies on the case of *Mohamed Saleh Mohamed v Osman Ali Abdi; Asha Hirsi Hassan (2020) eKLR*.

Respondent's Case

3. The Respondent opposes the application by the replying affidavit sworn on 16th April 2021 by Frankline N. Nyaga, the Respondent's Senior Legal Officer. They also filed submissions dated 7th June 2021. He urges that the Applicant had enough time to lodge an appeal but it sept on its rights. They urge that a party is only required to file a memorandum of appeal within 30 days of a decision. That there is no genuine reason why the Applicant failed to file the appeal on time. They urge that they stand to suffer substantial loss of the Applicant is allowed as it has already fully settled the Judgement sum to the Appellant's Advocate and that the instant application as filed only a day after the payment had been credited to the Applicant's Advocates' account. That the Applicant is therefore intent on having its cake and eating it by enjoying the fruits of the judgment and also appealing against the same. That the Applicant's appeal has low chances of success.

4. In their submissions, the Respondent relies on the case of *Equity Bank Limited v Richard Kerochi Ayiera (2020) eKLR* for the proposition that sufficient cause has been shown before leave to appeal out of time can be granted. They urge that if indeed the Applicant was delayed by the failure to be supplied with typed proceedings, they ought to have filed an application seeking extension of time. They urge that the delay is unreasonable and unjustified. They also urge that the memorandum of appeal annexed to the Applicant's application does not raise any point of law or does not demonstrate any facts wrongly construed. They urge that since they already settled the decretal sum on 12th March 2021, the Applicant's financial distress was resolved and he cannot enjoy the fruits of the judgement yet at the same time seek to appeal. They urge that failure by the Applicant to disclose receipt of the decretal sum raises great apprehension to the Respondent that it may not recover the decretal sum if the Court on appeal reduces the award made by the trial Court. They urge that the balance of risk in exercising judicial discretion should be decided in the Respondent's favour. They urge that the Applicant should bear the costs of the proceedings.

Issue for Determination

5. The two issues for determination are as follows: -

i) Whether or not to grant leave to file appeal out of time.

Determination

Leave to appeal out of time

6. This Court has previously dealt with the issue of leave to appeal out of time in the case of ***Meru Misc Application No. 70 of 2020 Lydia Kiaruthi Kaaria & Ano vs Florence Kinairote M'imanyara***. Extension of time is a matter of discretion. The law gives this Court jurisdiction to extend time upon application, even when the time for doing the act in question has already lapsed in as long as there is good and sufficient cause as to why there was delay. See section 79 G of the Civil Procedure Act, Cap 21 Laws of Kenya provides as follows: -

79G. Time for filing appeals from subordinate courts

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.

7. See also Order 50, Rule 6 of the Civil Procedure Rules and Section 95 of the Civil Procedure Act, Cap 21 Laws of Kenya and Section 59 of the Interpretation and General Provisions Act.

8. The general principles to be considered in such application for leave to appeal out of time are as follows: -

i) the length of the delay.

ii) the reason for the delay.

iii) the chances of the appeal succeeding if the application is granted.

iv) the degree of prejudice to the respondent if the application is granted.

9. On the length of delay, the Judgement sought to be appealed was delivered on 28th January 2021. The instant application was filed on 22nd March 2021. This is a delay of about two months. This may not be termed as inordinate.

10. On the reasons for delay, the Court observes that the Applicant blames the court registry bureaucracies in that he made his request to be supplied with typed copies of the proceedings and judgement in good time but the court delayed in supplying these to him. As rightly pointed out by the Respondent, filing of a memorandum of appeal which is the first process when one wishes to appeal from the lower Court to the High Court does not depend on the availability of typed proceedings. Typed proceedings are only necessary for compilation of the record of appeal and even then, it is possible to file a record with the documents that are available at the time and to later file a supplementary record of appeal. To this end, the explanation given by the Applicant is not convincing.

11. On the chances of the appeal succeeding, the Applicant has annexed a draft Memorandum of Appeal raising 6 grounds of appeal touching on quantum of damages. The Applicant's case is that the damages awarded were inordinately low and the magistrate failed to appreciate the standard age of retirement while computing general damages. It is not for this Court to go into the merits of the claim at this stage. This Court finds that an appeal challenging damages awarded for an accident claim is indeed arguable.

12. Concerning the nature of prejudice to be suffered by the Respondent, this Court is not satisfied that there is any real prejudice to be suffered by the Respondent if leave is granted. The Respondent urges that they have already settled the decretal amount and they urge that failure by the Applicant to disclose this demonstrates bad faith and that the Applicant wants to enjoy the fruits of the Judgment while at the same time appeal against the same.

13. In this respect, this Court finds that the settlement done by the Respondent was a natural consequence of the outcome of the Judgement and it cannot be used as a basis to deprive a litigant who is dissatisfied with a decision from accessing justice. Indeed, that would not reflect the tenets of the constitutional principle of access to justice. This Court finds that the door to file an appeal is open to all despite their position in the case i.e whether they were the Plaintiffs or Defendants. If a successful litigant feels that the award given is not enough to fully compensate him of the loss suffered or injuries sustained, he should not be denied the opportunity to appeal just because it appears that he got some sort of relief.

14. Although the Applicant did not discharge their duty to give an adequate explanation for the delay, at least to the extent of filing his memorandum of appeal, and having found that the appeal is arguable, this Court finds that the interests of justice require the Court to exercise its discretion and grant leave to the Applicants to file their appeal out of time.

Orders

15. Accordingly, for the reasons set out above ,the court makes the following orders: -

i) Leave is hereby granted to the Applicant herein to file an Appeal out of time against the Judgement and Decree delivered on 28th January 2021 in Nkubu PMCC No. 24 of 2020.

ii) The Applicant shall file his Memorandum of Appeal within 7 days from the date of this Ruling.

iii) The Applicant shall file his Record of Appeal within 14 days from the date of filing the Memorandum of Appeal.

iv) The Respondent shall have the costs of this application.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF JULY, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kiamba Peter & Co. Advocates for the Applicant

M/S Kiruki & Kayika Advocates for the Respondent.