



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**MISC. CIVIL APPLICATION NO. 266 OF 2019**

**ANNE MUTHONI KARIUKI.....APPLICANT**

**VERSUS**

**JAMES MWANGI.....1<sup>ST</sup> RESPONDENT**

**LAWRENCE N. NG'ANG'A.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 1<sup>st</sup> August, 2019 by **Anne Muthoni Kariuki** (hereafter the Applicant) seeks leave to appeal out of time from the judgment of 10<sup>th</sup> December, 2018 delivered in favour of **James Mwangi** and **Lawrence N. Ng'ang'a** in **Thika CMCC No. 945 of 2011** (hereafter the Respondents). On grounds *inter alia* that despite her request for copies of the judgment and proceedings in January, 2019, the same were supplied in July, 2019. These grounds are however not included in the depositions of the Applicant in the supporting affidavit which appears to address in part, issues of execution of the decree while asserting that the Applicant's intended appeal raises serious questions of law and fact.

2. Through a replying affidavit sworn by **Isabella Nyambura**, described as a Legal Counsel in Direct Line Assurance Company Ltd, the Respondent's insurers, the application was opposed. The affidavit restates the history of the lower court case since July, 2007 when the primary suit was first filed at **Yatta Law Courts**, in respect of an accident which occurred in December, 2006. That the suit was heard in November, 2018 and judgment delivered in December, 2018, awarding the Applicant a sum of Kshs. 500,000/= as general damages subject to apportionment on liability. The Respondents assert that neither proof has been furnished of the Applicant's alleged request for lower court proceedings nor draft memorandum of appeal annexed to the application and that the Applicant is guilty of indolence and negligence. Pointing out that the Respondents had as of September, 2019 satisfied the entire decree in the lower court by paying the sum of Kshs. 453,534/= to the Applicant, the deponent states that the Respondents will be prejudiced through unwarranted extra costs if the application is allowed. The deponent further asserts that the application is an afterthought and urged that it be dismissed.

3. When the motion first came up for hearing on 18/02/2020, counsel for the Applicant sought adjournment and leave to file a further affidavit. The application was resisted by counsel for the Respondent who stated that despite the application herein having been filed on 1/08/2019 they were only served on 20/12/2019 and that they served their affidavit on the Applicant's Advocate on 20/1/2020. The court granted a last adjournment to the Applicant for the purpose of allowing the filing of the further affidavit and set down the motion for oral argument on 17/06/2020. On that date, the Applicant was absent and counsel for the Respondents informed the court that no further affidavit had been filed and reiterating opposition to the motion sought that a ruling date be given. The Court obliged and reserved a ruling date. The court will therefore determine the motion based on the applicable principle and the affidavit material on record.

4. The motion erroneously invokes Order 42 Rule 6 of the Civil Procedure Rules which relates to stay of execution pending appeal instead of the provisions of Section 79G of the Civil Procedure Act which are pertinent in this case.

5. Be that as it may, the principles governing leave to appeal out of time are settled. The successful applicant must demonstrate "*good and sufficient cause*" for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630 as follows:**

**"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."**

6. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of **Telkom Kenya Limited V. John Ochanda And 996 Others [2015] eKLR**

that:

**“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay.... This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....”**

**It is this Court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant but are the handmaidens of justice that facilitate the right of access to justice in the terms of Article 48 of the Constitution....”**

See also **Patrick Wanyonyi Khaemba V Teachers Service Commission & 2 Others [2019] eKLR.**

7. Section 79G of the Civil Procedure Act provides that:

**“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.”**

8. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time.

The Court stated inter alia that:

**“(T)he 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 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. ....”**

**See also County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR.**

9. The onus was upon the Applicant to satisfy the court that *“she had good and sufficient cause for not filing the appeal in time”*. As earlier noted, the grounds on the face of the motion are that the delay in this case of about 8 months was caused by late supply of proceedings of the lower court. However, not only is a corresponding deposition to that effect missing from the supporting affidavit, but the said affidavit appears to relate to matters of stay of execution, apparently in tandem with the erroneous invocation of Order 42 Rule 6 Civil Procedure Rules in the motion itself. There is some reference to the intended appeal in the supporting affidavit but not a single deposition therein addresses the subject of good and sufficient cause. Neither is the alleged letter requesting lower court proceedings annexed to the affidavit in support of the motion. Therefore, the reason for delay has not been demonstrated.

10. In their replying affidavit, the Respondents have set out the history of this matter. The accident which was subject of the lower court suit occurred in 2006 and even though the suit was filed in 2007, it was not heard and determined until 2018. The Respondents have already paid out monies to the Applicant in satisfaction of the decree. In these circumstances the court agrees with the Respondents that allowing this motion will work prejudice against them. The Applicant does not appear to follow up with her case in any serious manner as demonstrated by her pleadings and conduct before this court. Indeed, no draft memorandum of appeal has been exhibited before the court to demonstrate that she has good grounds and is ready to file the appeal.

11. In the circumstances of this case, the court can find no justification to allow the application and thereby effectively extend the life of

litigation which commenced some 14 years ago. There is no merit in the motion dated 1<sup>st</sup> August, 2019 and it is dismissed with costs.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29TH DAY OF JULY 2021**

**C. MEOLI**

**JUDGE**

**In the presence of:**

**N/A for the Applicant**

**Mr Njuguna h/b for Mr Kuria for the Respondents**

**Kevin: Court Assistant**