



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CIVIL APPLICATION NO. 82 OF 2020

JORAM WAITHAKA1ST APPLICANT

DAVID WAITHIRA.....2ND APPLICANT

VERSUS

SAMMY KIARIE NJOROGE.....1ST RESPONDENT

SCHOLASTICA WAMBUI WAWERU.....2ND RESPONDENT

(Both suing on their own Behalf and as the Administrators of the Estate of Michael Kimani Kiarie- Deceased)

RULING

1. **Joram Waithaka** and **David Waithira** (hereafter the Applicants) have by their motion dated 17th March, 2020 applied for leave to appeal out of time from the judgment of the Lower Court in **Thika SPMCC No. 1327 of 2015** delivered on 4th February, 2020. The motion is supported by affidavits of **Billy Mumo Ndolo** the Applicants' Advocate and **Isabella Nyambura**, Legal Counsel at **Direct Line Assurance Co. Ltd**, the insurers of the vehicle registration no. **KBU 940A** the subject of the accident claim in the Lower Court.

2. The gist of the two affidavits is that the Applicants were not in attendance on the date the judgment was delivered in the Lower Court, and upon learning of it on 12th February, 2020 through a demand letter had embarked on seeking the copy of judgment and upon obtaining it on 12th March, 2021, elected to file an appeal but that by the said date, time had run out even as the COVID -19 pandemic broke out. The Applicants assert that the delay in applying is not inordinate and that the Respondent will not suffer any prejudice if the application is allowed.

3. The Respondents **Sammy Kiarie Njoroge** and **Scholastica Wambui Waweru** opposed the motion through a replying affidavit sworn by Scholastica Wambui Waweru. To the effect that the application has been brought in bad faith and that it was prompted by their demand letter to the Applicants dated 18th June, 2020 (annexure **SWW2** to replying affidavit) and that the affidavits sworn in support of the motion are defective for want of capacity with regard to **Isabella Nyambura's** affidavit and for erroneous reference to different parties in regard to **Billy Ndolo's** affidavit.

4. Moreover, it is deposed that contrary to assertions in the latter affidavit, the trial court was sitting on 4th February, 2020 as evidenced in the copy of cause list annexed as annexure **SWW3** and that by a letter dated 12/02/2020 the respondents' Advocate notified the Applicants' Advocates of the judgment. They take issue with the Applicants' claims that it took them until 12/03/2020 to obtain a copy of the judgment and assert that no evidence of a request to the court is annexed, and besides, the Applicants could have filed the memorandum of appeal without the copy of judgment. They dismiss the alleged obstacle caused by the COVID – 19 Pandemic and assert that the Applicants have not given a reasonable explanation for the delay of four months. In their view, the Applicants have not demonstrated candor and that they will be prejudiced if the court allows the applications. Other depositions address prayer (3) of the motion which is spent and raise argumentation not suited to an affidavit.

5. The court directed on 11/7/2020 that the application be canvassed through written submissions. Only the Applicants complied. The Applicants submitted that the delay in this matter was not inordinate and has been adequately explained. Further that the Respondents will not suffer prejudice. Several authorities were relied on including **Imperial Bank Limited (In Receivership) & Another V Alnashir Popat & 18 Others [2018] eKLR** and **Edith Githugu Koine v Stephen Njagi Thoithi [2014] eKLR** on the applicable principles.

6. The court has considered the application in light of the parties' respective material and submission. 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.”

7. 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.”

8. 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.

9. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** 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**.

10. The delay in this case is about 4 months. While judgment in the lower court was delivered on 4th February, 2020, in the absence of Applicants’ counsel, the Respondent’s Advocate notified the former Advocates of the delivery vide their letter of 12/2/2020. It was not until 10th June, 2020, however that the Applicants moved this court.

11. The explanation given by the Applicants for not attending the judgment is not convincing, as evidently the trial court was sitting on the 4th February, 2020. While it is believable that the Applicants were not able to immediately obtain a copy of the judgment, there is no evidence tendered to indicate when the request was made, and indeed as asserted by the Respondents, the Applicant could have filed the memorandum of appeal, said to have been ready by 12th March, 2020, before obtaining the copy of the judgment. Nonetheless, the court is prepared to accept, given the short period of delay, that the Applicants were unable to get hold of the copy of judgment in good time. Equally, and though the Respondents have dismissed this reason, in the period between march and June, 2020 there was a scaling down of court operations and indeed many litigants were adversely affected. Ditto for operations of other public and private institutions.

12. Majority of the explanations advanced by the Applicants appear plausible, in the circumstances. The Respondents will not be unduly prejudiced if the motion is allowed to facilitate the Applicants’ right of appeal. The court is therefore persuaded to grant prayer (2) of the Notice of Motion filed on 10th June, 2020. The Applicants are directed to file the memorandum of appeal within 14 days of this ruling. Costs occasioned by the application are awarded to the Respondents in any event.

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

C. MEOLI

JUDGE

In the presence of:

N/A for the Applicants

N/A for the Respondents

Kevin: Court Assistant