



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MERU

MISC CIVIL APPL. NO.E002 OF 2021

AGNES MUCECE MBUI.....APPLICANT/PROPOSED APPELLANT

VERSUS

FESTUS MUINDI NKARATA (Chairman of Ruchoro Tea Buying Centre (IM029) .... RESPONDENT

RULING

1. The court is called upon to determine a Notice of Motion dated 10<sup>th</sup> November 2020 by the applicant, Agnes Mucece Mbui, brought under Section 1A, 1B, 3A, 79G & 95 of the Civil Procedure Act, Order 50 Rule 6, Order 51 Rule 1 of the civil procedure Rules together with all other enabling provisions of the law. In it the applicant seeks inter alia that she be granted leave to appeal out of time against the whole judgement of Hon. C. Kimei, RM, delivered on 23/12/2019 in Githongo Civil Suit No.33 of 2018 and consequently that the Notice of appeal and Memorandum of appeal annexed thereto be deemed as duly filed and served.

2. The grounds upon which the application is premised are that after the judgment was delivered it took the lower court more than 10 months to avail to the applicant the certified copies of the proceedings and therefore by that time the time to appeal had lapsed. She then took the position that the delay was not inordinate as the same was exacerbated by the stringent COVID-19 containment measures leading to lockdown of the court after a staffer tested positive.

3. The respondent opposed the application through his replying affidavit sworn on 18/02/2021 which frowned upon the applicant's indolence, laxity and bad faith in bringing the application. He further faults the applicant for her failure to produce documentary evidence to show that she ever applied for the typed proceedings and contends that the applicant's failure to file either a certificate of delay or a notice of appeal clearly proves that, her application is an afterthought, which ought to be dismissed. It was admitted that the court was indeed locked down but opened soon thereafter hence the court is urged to strike a balance between the rights of a successful party against those of an appellant seeking to be heard on a belated appeal.

4. The application was directed to be canvassed by way of written submissions which were respectively filed on 28/05/2021 and 05/07/2021.

5. For the applicant, submissions were made to the effect that, the delay in filing the appeal in time was occasioned by factors beyond her control. She relied on **Kenya Power & Lighting Company Ltd v Rose Anyango & anor (2020) eKLR** in support thereof.

6. The respondent submitted that the applicant had not satisfied the threshold laid down for granting leave to appeal out of time. He relied on **Thuita Mwangi v Kenya Airways Ltd (2013) and Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others (2014) eKLR** where the judge excused a delay of about two months and extended time to support the position that a delay that deprives a litigant the right to ventilate grievances must be one that is inordinate.

7. The principles for consideration on an application for extension of time to appeal out of time are well established that the power is discretionary, and unfettered but, the applicant must prove to the satisfaction of the court that, the delay is not inordinate, reasons for delay must be plausible, that the appeal is arguable and not flippant and lastly that the respondent will not unduly prejudiced by the order sought. See **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR**

8. I have anxiously considered the application, the affidavits and the submissions made by the parties herein. For a litigant to show a sufficient cause for extension of time to do an act that should be done within a prescribed time, they must show that there is a good reason for delay and more importantly that there is substance in what they want to pursue. Order 50 Rule 6 of the Civil Procedure Rules provides that;

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”**

9. The decision sought to be appealed against was made on 23/12/2019 whereas the instant application, although dated 10/11/2020 was not filed till the 20/1/2021. That is a delay of more than a year. Has sufficient reason been enlisted to explain that delay? I am afraid not and I must state that, such laxity cannot be entertained or encouraged by the court. The applicant contended that she requested for certified copy of the proceedings, but it took the trial court more than 10 months to supply the same. No letter bespeaking such proceedings a copy of the typed proceedings has been exhibited to show when the same were actually certified or received. I equally, been unable to see any serious efforts to have the proceedings obtained. To the contrary, I take the view that one represented by counsel, and genuinely feels aggrieved by decision may as well file a holding memorandum of appeal to save the time and resources of having to seek enlargement of time then seeks to amend after he studies the proceedings and judgment. It is to me indolent that one folds up his hands, like hapless, making no efforts at all, on the sole reason that he is awaiting proceedings to be typed and certified before he can file an appeal, that negates on the duty to assist court execute its mandate with promptitude and runs affront the dictate that justice should not be denied.

10. I find that the period of delay was not only inordinate but there has not been plausible explanation for the inordinate delay. The allegation that the court was closed down could be made more genuine by disclosure on the duration of such closure but no attempt was made in that regard. In addition, even if the proceedings took ten months to be certified, that would land us in October 2020 hence this application should have been filed then but another four months was left to slide by and no explanation is forthcoming from the applicant. Indeed if it were to be true and candid that the delay was upon the court, why was a certificate of delay not resorted to? I draw an inference that the reason given is more of an excuse and that the non-disclosure is deliberate attempt to mislead the court.

11. Even on the merits of the intended appeal, one is left wholly disabled to make an assessment in the absence of both proceedings and judgment.

12. All in all, I find that there is no material to enable me exercise the courts discretion in favour of the applicant and accordingly therefore, I find that the delay is inordinate and unexplained to the satisfaction of the court, with the result that the application cannot succeed but must fail. I dismiss the same with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 5<sup>TH</sup> DAY OF AUGUST, 2021**

**PATRICK J.O OTIENO**

**JUDGE**

**In presence of**

Mrs. Otieno for applicant

Miss Kiyuki for respondent

**PATRICK J.O OTIENO**

**JUDGE**