



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. E029 OF 2020

CAROLYNE NYAMBURA STEPHEN.....APPLICANT

VERSUS

MOMBASA WATER PRODUCTS LIMITED.....RESPONDENT

RULING

1. The Applicant filed a **Notice of Motion** application dated **29th October, 2020** under **Sections 1A, 1B, 3A & 79 G** all of the **Civil Procedure Act, CAP 21, Section 59** of the **Interpretation and General Provisions Act, CAP 2** and **Order 51 Rule 1 & 3** of the **Civil Procedure Rules, 2010** and all enabling provisions of the Law. The Applicant seeks for the following orders: -

1. Spent;

2. THAT the Honourable Court be pleased to grant the applicant leave to file a cross appeal, out of time, against the said ruling delivered on 4th September, 2020 by the court in CMCC No. 2090 of 2012;

3. THAT the costs of this application be provided for.

2. The **Motion** is supported by the grounds presented on its body and the Affidavit of **Carolyn Nyambura Stephens**, the Applicant herein. She avers that she was informed by her Counsel that the lower court, presided over by Hon. G. Kiage partially allowed the Respondent's Review Application dated **8th January, 2020** vide his Ruling delivered on **4th September, 2020**, where he lowered the decretal sum from **Kshs.320,000/=** to **Kshs.270,000/=**. The Applicant has stated that the application as filed was *res judicata* since the subject matter in the application had earlier been decided on its merits in a ruling delivered on the **8th December, 2017** by the trial Magistrate and the Respondent's review application dated **1st September, 2017** was dismissed.

3. The Applicant has stated that the trial court erred in law when it entertained the said review application by dint of **Order 45 Rule 6** of the **Civil Procedure Rules, 2010**.

4. **Ms. Nyambura** has averred that she was unable to issue timely instructions to her Counsel to Appeal as she lives in Nairobi and due to the novel Corona-virus, hence she could not travel to Mombasa due to the restrictions put in place by the National Government on movement from one town to another. She stated that she managed to travel to Mombasa on the **15th October, 2020** and met with her Counsel who advised her to Appeal the said Ruling, a decision she agreed with.

5. It has been deponed that in order to put in a Cross-Appeal out of time, recent authorities by various Judges sitting at the High Court of Kenya have noted that leave has to be sought from the court as stipulated under **Section 79G** of the **Civil Procedure Act, CAP 21** Laws of Kenya. She has stated that her Cross-Appeal is meritorious with good chances of success as it raises both questions of law and fact.

6. The Applicant has deponed that she is ready to lodge a Memorandum of Appeal once enlargement of time is granted so that if the said orders are not granted, she stands to suffer irreparable loss and damage

7. The Applicant has stated that there is sufficient cause for the application to be allowed and if allowed, she is willing to abide by any directions that may be issued by this Honourable Court to meet the ends of justice.

8. In response, the Respondent filed a Replying Affidavit sworn by **Joseph Mbugua Gichanga** on the **20th April, 2021**. He has stated that the Applicant's application is improperly before court as the same ought to have been brought in **Mombasa Civil Appeal No.1 of 2020, Mombasa Water Products Limited –vs- Carolyn Nyambura Stephen**.

9. It has been deponed that the Applicant has not given sufficient reasons for the delay to warrant the exercise of the court's discretion. Also that the Applicant has not shown any diligence in the observance of timelines set in law for filing of Cross-Appeals and thus is disentitled to the reliefs sought.

10. **Mr. Mbugua** has deponed that the reasons for delay in the application herein do not warrant the exercise of the Court's discretion as she was notified of the Ruling being delivered but she did not move with speed to Appeal the same.

11. The Respondent has stated that the Motion filed herein should be dismissed as it is incompetent and an abuse of the court process.

Directions of the Court

12. Directions were taken that the application be canvassed by way of written submissions and all parties indicated that they would be relying on the said written submissions. The Applicant's submissions are dated the **4th May, 2021** and filed on **6th May 2021** while those of the Respondent are dated the **9th June, 2021** and filed on even date.

The Applicant's submissions

13. The Applicant submitted that after the ruling of the trial court was delivered on the **4th September, 2020** she was unable to have discussions in regard to the same with her appointed Counsel who are based in Mombasa due to the punctilious restrictions put in place by the government curtailing movement so as to curb the spread of Corona-virus. The Applicant then stated that she managed to travel to Mombasa on the **15th October, 2020** and had a meeting with her Counsel on the **21st October, 2020** whereby she was duly advised to Appeal against the ruling delivered on **4th September, 2020** and thus the Counsel prepared the Application herein for leave to file a Cross-Appeal out of time.

14. The Applicant has also stated that the draft Memorandum of Appeal should be admitted out of time in accordance with **Section 79G** of the **Civil Procedure Act** and as was the case in the Court of Appeal case **Charles Karanja Kiiru –vs- Charles Githinji Muigwa [2017]eKLR.**

15. It has been submitted that for a court to exercise its discretion on whether or not to extend time, *it must consider the period of delay; reason for the delay; if the appeal is arguable; degree of prejudice to be suffered by the Respondent if extension is granted; importance of compliance with the limits to the particular litigation or issue and the effect if any on the administration of justice or public interest if any is involved.* The Applicant referred the court to the Court of Appeal case of **Thuita Mwangi –vs- Kenya Airways Ltd [2003]eKLR.**

16. The Applicant has submitted that being a laywoman it was imperative that she had a one on one discussion with her Counsel for the best route to pursue having been dissatisfied with the said ruling while keeping in mind that the matter has dragged on ever since Judgment was duly delivered on the **19th July, 2017.**

17. The Applicant has stated that she has a sufficient cause for time to be enlarged under **Section 79 G** of the **Civil Procedure Act Cap 21, Laws of Kenya** being that her Appeal is arguable Appeal as the trial court erred in law and fact by failing to correctly apply the mandatory provisions of **Order 45 Rule 6** of the **Civil Procedure Rules.**

18. It has been submitted by the Applicant that the cross-Appeal ought to have been filed on or before **4th October, 2020** but the Application herein was filed on the **30th October, 2020** and thus the Applicant is not guilty of inordinate delay. That, it is only equitable that she be allowed to file the Cross-Appeal out of time. It has further been submitted that the Respondent will not suffer any prejudice that cannot be compensated by an award of costs. This court ought to extend time pursuant to the provision of **Order 50 Rule 6** of the **Civil Procedure Rules.**

The Respondent's Submissions

19. The Respondent has submitted that there has been a delay of two (2) months in bringing the Application herein and the Applicant has not given any sufficient reason for the said delay. The ruling of the trial court was delivered on the **4th September, 2020** and the application herein filed on the **30th October, 2020** but no evidence that has been adduced to support such delay.

20. It has also been submitted that the Applicant's intent is to cause a delay as the draft Memorandum of Appeal is yet to be filed and thus should not be allowed. According to the Respondent, the Applicant should have filed the Memorandum of Appeal for the intended Cross-Appeal and thereafter sought for enlargement of time to have the said Memorandum of Appeal deemed as though it was properly filed within time. The Respondent has gone on to submit that the filling of a Memorandum of Appeal gives the High Court jurisdiction to hear and determine the application for enlargement of time.

21. Further, it has been submitted that this miscellaneous application is bad in law as the same ought to have been filed in **Mombasa Civil Appeal No.1 of 2020 Mombasa Water Products Limited –vs- Carolyn Nyambura Stephen** and not as a miscellaneous application.

22. The Respondent has stated that the provisions of **Section 79 G** of the **Civil Procedure Act Cap 21 Laws of Kenya** are discretionary in nature and the Applicant must express herself intensively and to the satisfaction of the court as to why the delay has been occasioned.

23. The Respondent has submitted that the Applicant herein is operating as though time can always be extended. According to the Respondent extension of time is not as a matter of right but a party must provide sufficient reason as was held in the Supreme Court case of

Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral and Boundaries Commission & 7 Others [2014]eKLR.

24. Lastly, it has been submitted that the court should take judicial notice of the fact that due to the Covid-19 pandemic the way people conducted their work has changed from having actual to virtual meetings, thus the Applicant ought to have conducted a virtual meeting with her Counsel to avoid being time barred, thus the Application herein should be dismissed.

Analysis and determination

25. Having considered all the pleadings and submissions by the parties, the issue that arises for determination is *whether the court can extend time for the Applicant to file a Cross-Appeal out of time against the Ruling of the trial court delivered on 4th September, 2020.*

26. The legal authority to file a cross-appeal in the High Court is found under **Order 42 Rule 32** of the **Civil Procedure Rules** which provides:-

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.”

27. I agree with **Lady Justice Njoki Mwangi** in the case of **Kenya Power & Lighting Co. Ltd –vs- Peter Langi Mwasi [2018]eKLR**, wherein she agrees that a Cross-Appeal is provided for under **Order 42 Rule 32** of the **Civil Procedure Rules** but it does not address timelines as to when the Cross-Appeal should be filed. However, this being an application for extension of time, the Applicant is required to show that the same has been done within reasonable time.

28. Whether or not to grant extension of time is a discretionary power of the Court as is settled in the celebrated Supreme Court case of **Nicholas Kiptoo Arap Korir Salat (supra)**, where the court stated: -

“(1) Extension of time is not a right of a 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, is a consideration to be made on 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; and

(7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

29. Under **Section 79 G** of the **Civil Procedure Act**, an Appellant has thirty (30) days within which to put in an Appeal and in this case the trial court’s ruling was delivered on the **4th September, 2020** wherein the Respondent filed its Appeal and served the same on the Applicant on the **30th September, 2020**. The thirty (30) days provided in statute lapsed on the **5th October, 2020**, which meant that the Applicant had until then to put in her Cross-Appeal. The Applicant herein filed this application on the **30th October, 2020** and explained the delay to have been occasioned by the strict government rules on movement due to the Covid-19 pandemic. I therefore find a delay of twenty (22) days reasonable and excusable for this court to exercise its discretion in favour of the Applicant.

30. The Respondent has raised issue with the fact that this was a Miscellaneous Application and stated that the Application herein ought to have been filed in **Mombasa Civil Appeal No.1 of 2020, Mombasa Water Products Limited –vs- Carolyn Nyambura Stephen**. I find this to be a technicality that can be cured under **Article 159(2)(d)** of the **Constitution of Kenya, 2010** as a Cross-Appeal for all intents and purposes, ought to be filed under the said Appeal file.

31. Further, I find the Respondent’s submission that the Applicant ought to have filed their Cross-Appeal before she sought for leave to be misguided as was the holding in the **Salat case (supra)** where the Supreme Court stated: -

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

32. The upshot is that the Applicant’s Application dated **29th October, 2020** is allowed and the following orders do and hereby issue:-

i. Leave to file a cross-appeal out of time be and is hereby granted to the Applicant.

ii. The Cross-Appeal be filed and served within 30 days of today’s date.

iii. Failure by the Applicant to comply with Order (ii), the Application dated 29th October, 2020 shall stand dismissed.

iv. Costs of this application to be met by the Applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF SEPTEMBER, 2021.

D. O. CHEPKWONY

JUDGE