



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

MISC CIVIL APPLICATION NO. E023 OF 2021

BETWEEN

JBR .....APPLICANT

VERSUS

FKB ..... RESPONDENT

RULING

1. By a notice of motion dated 21<sup>st</sup> April 2021 and filed on 22<sup>nd</sup> April, 2021 brought under Order 50 Rule 6 and Order 51 Rules 1,2,3 and 4, Sections 1A,1B,3A 1. and 63(e) of the Civil Procedure Act Cap 21 Laws of Kenya and Articles 25 (c), 48,50 and 159 of the Constitution, the applicant prays for orders THAT-

**1. That the Applicant be granted enlargement of time and leave to file an appeal out of time against the judgment delivered in MERU CMCC DIVORCE CAUSE NO. 16 OF 2017.**

**2. That the costs of the application be provided for**

2. The application is based on the grounds among others that he was not notified about the delivery of the judgment and only learnt of the judgment on 09<sup>th</sup> April, 2021 when his advocate was served with an application in which the said judgment was referenced.

3. The application is supported by the affidavit sworn by the Applicant on 21<sup>st</sup> April 2021 in which he reiterates the grounds on the face of the application and avers that the cause was heard fully in Meru Law Court but it was transferred to Maua Law Courts before delivery of judgment, which judgment was to be delivered on notice. That no notice of delivery of judgment was ever delivered on himself or his advocate and that his memorandum of appeal raises serious grounds and he will be prejudiced irreparably if his right of appeal is denied.

4. Annexed to the affidavit are three letters in which Applicant's advocate was asking for the status of the judgment, Respondent's application dated 29<sup>th</sup> March, 2021 and a draft memorandum of appeal marked JBR 1 to 4 respectively.

5. The application is opposed by way of a replying affidavit sworn by the Respondent on 21<sup>st</sup> July 2021. Respondent concedes that judgment in the matter was to be delivered on notice and that her advocate received the notice and attended court. Respondent additionally avers that Applicant was made aware of the delivery of the judgment when a Decree Absolute was served by email and acknowledged by his advocate on 10<sup>th</sup> December, 2020.

6. In a rejoinder, the Applicant filed a supplementary affidavit dated 6<sup>th</sup> August 2021 and denied being made aware of the delivery of the judgment. He annexed an affidavit sworn by one James Baariu, a clerk at the law firm of Carlpeters Mbaabu explaining that the letters to court were not stamped because the file could not be traced.

#### **Analysis and Determination**

7. I have considered the application in the light of the affidavits on record and annexures thereto the issue for determination is whether the Applicant has met the threshold for granting of leave to appeal out of time.

8. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered The law on extension of time is to be found in Section 95 of the Act which states as follows:

**“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”**

9. Order 50 rule 6 of the Civil Procedure Rules on the other hand states 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”.**

10. The parameters for exercise of court’s discretion were concisely laid out in the case of Mwangi v Kenya Airways Ltd [2003] KLR where the Court of Appeal expressed itself thus: -

**“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 in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.**

11. In determining this application; I will endeavor to address each of the principles laid down in the above cited case.

**i. Length of delay**

12. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states:

**“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 anytime 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”.**

13. The judgment from which the Applicant proposes to appeal against was delivered on 27<sup>th</sup> February, 2020 in the absence of Applicant and his counsel. It has not been demonstrated that Applicant’s counsel was served with a judgment notice and the explanation by the Applicant that the judgment came to their notice on 09<sup>th</sup> April, 2021 when his advocate was served with an application in which the said judgment was referenced remains unchallenged.

14. The present application was filed on 22<sup>nd</sup> April, 2021 which was 11 days after the Applicant became aware of the judgment and the length of delay is therefore not inordinate.

**ii. Reason for delay**

15. As pointed out hereinabove, the reason for the delay has been explained to have arisen from the fact that the Applicant and his advocate were not notified about the delivery of the judgment in the matter.

**iii. The chances of appeal succeeding if the application is granted**

16. Determining at this juncture that the appeal does or does not raise triable issues will amount to deciding on a matter not before this court. All that this court needs to determine is whether the applicant has a *prima facie* case that is triable. (See **Nicholas Kiptoo Arap Korir Salat v. The Independence Election & Boundaries Commission & 7 Others, [2014] eKLR**).

17. I have considered the issues raised in the memorandum of appeal which mainly faults the trial court for finding that the Respondent’s case had been proved which issue is triable.

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

18. Article 50 (1) of the Constitution underscores the right to be heard and provides that:

**(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

19. After considering the application in its totality, I am persuaded that the Respondent does not stand to suffer any prejudice if the Applicant is granted leave to ventilate the issues in his intended appeal.

20. From the foregoing analysis, the motion dated 21<sup>st</sup> April 2021 and filed on 22<sup>nd</sup> April, 2021 is allowed in the following terms:

**1. The applicant is granted leave to appeal out of time**

**2. The intended appeal shall be filed within 30 days from today's date**

**3. Costs shall be costs in the Appeal**

**DATED IN MERU THIS 30<sup>TH</sup> DAY OF SEPTEMBER,2021**

**WAMAE. T.W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For the Applicant - Mr. Mutisya for Carlpeters Mbaabu & Co. Advocates**

**For the Respondent - Mr. Wamwayi for Wamwayi & Co. Advocates**