



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. 285 OF 2019

BETHANY VILLAGE AFRICA.....APPLICANT

VERSUS

BANK OF AFRICA KENYA LIMITED.....RESPONDENT

RULING

1. The applicant filed the notice of motion dated 28th March 2019 seeking the following orders:

i) THAT the court be pleased to extend time for filing Appeal from the judgment of the Chief Magistrate's court at Nakuru (Hon. E. Wanjala SRM) delivered on 6th February, 2019, in Civil Suit No. 3682 of 2012 by thirty (30) days from the date of ruling herein.

ii) THAT the cost of and incidental to this application abide the outcome of the appeal.

2. The same is supported by the grounds on its face and the supporting affidavit of Muriuki David B counsel for the applicant. The main ground is that there was delay in getting the lower court proceedings despite the steps taken to acquire them.

3. Counsel deponed that proceedings were requested for soon after the delivery of the Judgment on 6th February 2019 (Exb BVA-2). The application herein was filed on 29th March 2019 as the time of filing appeal had expired on 6th March 2019.

4. A replying affidavit by Leah Wanjui Muhia was filed on 1st November 2019. She averred that the applicant has never filed a memorandum of appeal in accordance with Order 42 Rule 1 (1) of the Civil Procedure Rules. Further that the applicant did not require typed proceedings to file a memorandum of appeal.

5. She also deponed that the applicant had not satisfied the requirements to warrant extension of time to file Appeal. There was no draft memorandum of appeal filed for the court to see the grounds of appeal for consideration. She further averred that no prejudice will be suffered by the applicant in the event the application is not allowed.

6. On 21st April 2021 the applicant through counsel Ochieng Ogotu swore a supplementary affidavit indicating that the typed proceedings and Judgment were now available (Supp-1 (a) and (b)). He filed submissions dated 8th June 2021. He argues that the delay was only for 20 days which is not inordinate, and that the reason for the delay is plausible. He relied on Article 159 (2) (d), sections 1A, 3A and 79 G of the Civil Procedure Act. He also cited the case of **Joseph Njoroge V Reuben Waweru Mberia [2017] eKLR** where Justice Okongo allowed an extension of time for filing appeal where there was a four (4) months delay. Together with this is the case of **Edith Gichuhu Koine v Stephen Njagi Thoithi [2014] eKLR** in support of this submission.

7. On the reason for the delay he submitted that lack of typed proceedings and Judgment is sufficient reason for delay since these documents would inform the applicant in the formulation of the grounds of appeal, which are key as per Order 42 Rule 4 of the Civil Procedure Rules. He contends that a memorandum of appeal being a pleading must be properly drawn lest it be a candidate for striking out. See **John Gakuo and another v County government of Nairobi and another [2017] eKIR**.

8. On prejudice likely to be suffered counsel submitted that the applicant stood to suffer more prejudice if time is not extended since its claim for USD 6000 from the respondent was dismissed by the lower Court. He submits that the respondent only responded to this application after seven (7) months. He referred to the case of **Blue Nile E.A Ltd v Lydia Gode Yusuf and another [2018] eKLR** where the court held inter alia.

“The right to be heard is a Constitutional right provided for under Article 48 of the Constitution of Kenya, and in all circumstances it will be in the interest of all parties to hear a matter on merit. The only consideration the Court ought to take into account is to balance the rights of both parties. I am therefore inclined to grant the Applicants an opportunity to file their appeal out of time so that the same can be heard on merit.”

9. He further referred to the case of **Attorney General v Lucy Nduta Ng’anga [2017] eKLR**. In the said case the court disallowed the application on the ground that the respondent would suffer a greater injustice if her appeal would not be heard. This is what the court stated:

“It is barely a year since the appeal was filed. The prejudice that the respondent is likely to suffer if this appeal is dismissed might be graver than the prejudice that the applicant will suffer if the appeal is ordered to proceed. In the interest of justice, this court will give an opportunity to the respondent to ensure that the appeal is set down for directions and hearing.”

10. It is therefore counsel’s submission that, the prejudice likely to be suffered by the applicant if the extension of time is not allowed, is graver than the prejudice if any, likely to be suffered by the respondent should the extension be allowed. He urged the court to allow the application.

11. Wamae and Allen advocates for the respondent filed submissions dated 6th October 2020. Counsel submitted that the applicant had not given a sufficient explanation for failure to file appeal in time. He referred to section 79G of the Civil Procedure Act, Order 42 of the Civil Procedure Rules and the case of **Migotiyo Plantations v John Ngesa Agala [2020] eKLR** where the court stated:

“Section 79G of the Civil Procedure Act is clear; an appeal from a subordinate court to the High Court must be filed within thirty (30) days from the date of decree, excluding such period which the lower court certifies as being requisite for the preparation and delivery of the appellant of a copy of the decree or order. There is absolutely no need for proceedings in order to lodge an appeal. Order XLI Rule 1 is even more specific. Only a memorandum of appeal is required. Under Rule 1A where no certified copy of the decree or order appealed against is filed with the memorandum, the appellant shall file such certified copy as soon as possible.

The power to extend time is a discretionary one which may be exercised on the guiding principles. The court must consider the length of the delay, reason for such delay and the prejudice it may occasion the other party should such order be granted.”

12. Counsel argues that there is no mandatory requirement for the memorandum of appeal to be accompanied by the typed proceedings. That, what is required in Order 42 Rule 2 of Civil Procedure Rules is a certified copy of the decree or order appealed against. He therefore submits that the reason given by the applicant for the delay is not satisfactory as was held in the cases of:

i) Joseph Michael Muenya v Woolmatt Ltd [2019] eKLR

ii) Telkom Kenya Ltd v Johnson Ochanda [2014] eKLR.

Counsel submits that failure to obtain typed proceedings is never an excuse for failing to comply with section 79G of the Civil Procedure Act and Order 42 of the Civil Procedure Rules.

13. He also relied on the case of **Kyanjau Co-operative Society Ltd v Miriam Wanjiru Nganga [2019] eKLR** where it was stated: -

“The applicant has argued that the delay was caused by the unavailability of typed proceedings and judgment. The delay by the applicant is not excusable or inadvertent but inordinate much as the Applicant has a right to file the appeal, it squandered its opportunity by failing to file the appeal on time.”

14. In **Zacharia Okoth Obado v Edward Akongo and 2 others [2014] eKLR** the Supreme Court stated: -

“Rules and timelines serves to make the process of judicial adjudication and determination fair, just and even handed. Court cannot aid in the bending or circumventing rules and shifting goal post, for while it may seem to aid one, it unfairly harms the innocent party who strives to abide by the rules.”

15. Besides the above, counsel argued that the applicant does not have an arguable appeal. That no memorandum of appeal (in draft) was attached to the application to enable the court to determine whether the appeal was arguable. The respondent stands to suffer prejudice by being continually dragged into court after having successfully defended the suit in the lower court. He relied on the Supreme Court case of **Nicholas Kiptoo Arap Korir Salat Vs IEBC and 6 others [2014] eKLR** to support his contention.

Analysis and Determination

16. Having considered the application, affidavits, submissions and authorities cited I find the issue falling for determination to be whether the applicant has met the threshold for extension of the time for filing appeal. Section 79G of the Civil Procedure Act provides: -

“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 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.”

17. Whether or not to extend time for appealing is an exercise of discretion by the court and is granted on a case by case basis. A number of decisions have been made on this issue, bringing out a number of factors to be taken into account before a decision is made. In the case of **Mwangi Vs Kenya Airways Ltd [2003] eKLR** the court of Appeal listed the following as some of the factors for consideration:

- a) The period of delay
- b) The reason for the delay
- c) The arguability of the appeal.
- d) The degree of prejudice which could be suffered by the respondent if the extension of time is granted.
- e) The importance of compliance with time limits to the particular litigation or issue, and
- f) The effect if any on the administration of justice or public interest if any is involved.

18. The impugned Judgment was delivered on 6th February 2019. This application which is dated 28th March 2019 was filed on 29th March 2019. Under section 79G of the Civil Procedure Act the appeal ought to have been filed by 6th March 2019. By 29th March 2019, the intended appeal was about 22 days late. The first time the application was fixed for hearing was 20th January 2020 and the Hon. Judge was not sitting. It was next fixed for hearing on 9th March 2020, then 28th April 2020, when parties were directed to file written submissions.

19. No submissions were filed by the applicant. There after the matter was listed for hearing on 20th January 2021, 4th March 2021, 8th April 2021, 6th May 2021 and finally 8th June 2021 when fresh directions were given. The applicant finally filed its submissions on 14th June 2021.

20. From the foregoing it can be seen where the delay not only in filing but also in hearing the application emanated from. Had the application been heard expeditiously there would not have been any serious delay worth complaining about. In the notice of motion dated 28th March 2019 the applicant gave the reason for the delay in filing appeal as the un typed proceedings.

21. M/s Muhia for the respondent has dismissed that reason as a non starter. She argues that one does not require proceedings to file a memorandum of appeal.

22. The applicant in its further affidavit annexed a copy of the typed proceedings and judgment and in the submissions filed a draft memorandum of appeal. Counsel has argued that the proceedings and judgment were required to enable the applicant capture its memorandum of appeal and all the relevant factors. That a memorandum of appeal not properly drawn can be a candidate for striking out.

23. The applicant annexed a copy of the letter to the executive officer at the Chief Magistrate’s court Milimani Commercial courts dated 6th February 2019 requesting for a certified copy of the proceedings and Judgment delivered on 6th February 2019. The letter was received on 8th February 2019. This application was filed 22 days after time had run out for the filing of an appeal. Considering all this I do not find there to have been inordinate delay as submitted by the respondent. Upon filing of the application on 29th March 2019, the application was never heard until 8th June 2021. The record speaks for itself, on what was happening. The delay was outside the control of the applicant.

24. On arguability of the appeal I have looked at the draft memorandum of appeal filed together with the submissions. The applicant’s suit against the respondent was dismissed with costs by the lower court. The applicant in the intended four (4) grounds of appeal is questioning the trial court’s four (4) findings which led to the impugned Judgment.

25. At this stage all that needs to be shown is that one has an arguable appeal and not one that has high chances of success. I find the four (4) grounds raised in the draft memorandum of appeal to be arguable.

26. Upon considering all the arguments put forward I do not find any serious prejudice that the respondent will suffer if the applicant is granted the leave sought. The applicant lost its suit in the lower court and all it seeks is to have this court re-examine the material that was placed before the trial court to see if it would arrive at the same finding. Were the extension of time to be denied the applicant would be prejudiced because it may not know what a different eye considering the same evidence would come up with.

27. I therefore find that the application dated 28th March 2019 is merited and I allow it and issue the following orders:

- i) The applicant is granted leave to file appeal out of time as prayed. The Appeal to be filed within 14 days.
- ii) Costs of this application to abide the outcome of the appeal.

Orders according

DELIVERED ONLINE SIGNED AND DATED THIS 23RD DAY OF SEPTEMBER 2021 IN OPEN COURT AT MILIMANI

NAIROBI

H. I. ONG'UDI

JUDGE