



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MERU

MISC APPLICATION NO.E064 OF 2021

JACOB KINYURU M'MUNGANIA.....APPLICANT/ APPELLANT

VERSUS

M'NKANATA M'MWONGERA.....RESPONDENT

RULING

1. What is before the court is a Notice of Motion under certificate of urgency dated 9th August 2021 by the applicant, brought under Section 3A, 75 & 95 of the Civil Procedure Act, Order 43 Rule 1 & 2 of the civil procedure Rules. In it, the applicant seeks leave to appeal out of time against the whole judgement of Hon. F. Gikonyo, delivered on 17/1/2021; the draft Notice of appeal annexed thereto be deemed as duly filed and served.

2. The applicant appreciates the obligation to explain the default and delay in lodging the appeal in time and attributes same to the prevailing Covid-19 pandemic situation as well as an alleged communication breakdown between him applicant and his former counsel. It is of note that there is no indication of when the applicant learnt of the ruling or when counsel was instructed. In the supporting affidavit sworn on even date, the applicant blames his former advocate for failing to notify him when the judgement was entered, so that he could appeal in time. He contends that his efforts to procure the services of another advocate were unsuccessful, as most of them had closed their offices. He then avers that he fell victim to the pandemic and had to isolate for a long period of time. He is certain that his appeal is arguable as it raises serious triable issues. In conclusion, he urges the court to allow his application, as no prejudice will be suffered by the respondent.

3. The respondent did not file any response to the application, despite having been duly served hence the application proceeded unopposed. That notwithstanding, the thresholds on when to grant extension of time remain and never shift merely because the application has not been opposed.

4. On 4/10/2021, Mr. Ashaba for the applicant made oral submissions in court, in the absence of the respondent after the court was satisfied that there had been due service. In the submissions, Mr. Ashaba took the view and made out the point that he would be relying on the grounds on the face of the application as well as those in the supporting affidavit. Those grounds are the ones alluded to at the beginning of this ruling

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

6. I have anxiously considered the application, the affidavit and the oral submissions made in support of the application. 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.

7. The decision sought to be appealed against was made on 17/1/2019 in the presence of both counsels for the parties, whereas the instant application, although dated 9/8/2021 was not filed till the 20/9/2021. There is an allusion to a draft notice of appeal being annexed but none is indeed exhibited nor is any referred to in the affidavit in support. More importantly, whereas there is an allegation that it took time for the applicant to learn of the decision, no disclosure was made on when he came by the information. It is thus difficult to measure how long he took to protect his right to access justice.

8. The main reasons cited for the delay are the prevailing Covid-19 pandemic and the applicant's previous counsel's failure to notify him of the entry of judgement. It is the duty of every litigant to be candid and forthright with the court so that the court exercises its discretion on verifiable fact. Here I find that there is lack of candour upon the applicant. The grounds put forth are indeed general and smirks of real evasion to be precise. While the Covid19 pandemic is one that invites judicial notice, notice must also be taken that, for most of this year, the

situation has largely reverted to normal, at least in access to court and judicial services. When published, statistics will show that the measurable deliverables have significantly increased this year compared to last year. I dare say that cost of litigation related to physical attendance at the registry and in court rooms has greatly improved to the benefit of court users. It is therefore not a *carta blanche* that Covid19 has shut down court and advocates offices operations. More works has been done online and much more is capable of being achieved online.

9. I am not satisfied that covid19 situation prevented the applicant from undertaking the very mechanical act of drawing a standard document called the Notice of Appeal and having it lodged in time. I find that reason most implausible.

10. On the allegation that the advocate lost touch with the client, I find the same incredible for no mention is made of any attempts to visit counsel's offices even to just find out the status of the case. In this I reiterate that the case belongs to the party and not the advocate. Such party must demonstrate the interest in his matter than just sitting back and blame counsel. However, the choice of counsel is a right that come with obligations. Once a litigant chooses a counsel and the counsel fails in his duty to the litigant, that litigant must look the way of a remedy against counsel and not visit the misfortune, if any, on his adversary by prolonging the litigation. That appreciation must have informed the legislature and the legal profession on the now compulsory professional indemnity insurance for lawyers. I find that the inordinate delay has not been explained to my satisfaction, since no viable reasons have been proffered.

11. On whether there is substance in what is sought to be pursued, I note that although the draft memorandum of appeal together with the impugned decision have been exhibited, the certificate of confirmation of grant has not. Without it, I am unable to ascertain whether any miscarriage of justice was occasioned to the applicant, in the manner in which the distribution of the estate was done. I am therefore not in a position to make an informed decision on the arguability or otherwise of the intended appeal.

12. The last point I need to mention is that an application to extend time for appeal to the court of appeal needs to be filed in the file in which the decision was made and not in a miscellaneous application as has been done here. That has the benefit to the court in getting the true facts from the file and in addition discourages undue and unnecessary statistics of pending files. That however is not a good reason to refuse a befitting request.

13. In conclusion, I find no merit in the application which I now dismiss with no orders as to costs as the respondent never responded to the application nor attended court

DATED SIGNED AND DELIVERED AT MERU VIRTUALLY VIA MICROSOFT TEAMS THIS 22ND DAY OF OCTOBER, 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Ms Mwititi for the applicant

No appearance for the respondent

Patrick J.O Otieno

Judge