



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 169 OF 2018

MARTIN OTIENO & KENYA REVENUE AUTHORITY.....RESPONDENT

-VERSUS-

THOMAS MWITA MARWA.....APPLICANT/APPELLANT

RULING

The instant ruling is in respect to the Notice of Motion Application dated 30/4/2021 filed by the **Thomas Mwita Marwa** (the ‘applicant’) seeking the following orders: -

- i. Spent.**
- ii. Spent.**
- iii. That the applicant be granted leave to file and serve an intended appeal out of time of the decree of the court delivered on 19/9/2019 in terms of the annexed draft Memorandum of Appeal;**
- iv. That pending the hearing and determination of the intended appeal, there be stay of execution of the judgement and decree of this court delivered on 19/9/2019 in Migori Civil Appeal No. 169 of 2018 Martin Otieno & Kenya Revenue Authority -vs- Thomas Mwita Marwa and all subsequent and incidental proceedings thereto.**
- v. That, upon granting no. 3 above, the court be pleased to order that Motor Vehicle T747 DKR, the subject matter of the appeal be preserved pending the hearing and determination of the intended appeal.**
- vi. Any such further orders that the court may deem fit to grant in the interest of justice.**
- vii. Costs of the application.**

The application is supported by the grounds on its body and the supporting affidavit sworn by the applicant. It is the applicant’s contention that judgement was delivered in favour of the respondent on 19/9/2019; that his Counsel requested for proceedings to enable him prefer an appeal; that the proceedings were certified on 25/3/2021; that his Counsel filed a notice of appeal; that in the year 2020, he had a case in Tanzania and was held there for one year; that it is on this basis that the applicant seeks to lodge an appeal out of time; that he shall suffer loss if the intended appeal is not allowed to be filed out of time; that the intended appeal has high chances of success; that this application has been filed timeously and the intended appeal shall be rendered nugatory if this application is not allowed.

The application was opposed. The respondent filed grounds of opposition dated 2/7/2021. The respondent argued:-

- i. That the applicant has never filed or served the respondents with a notice of appeal as stipulated in Rule 75 (1), (2) and Rule 77 (1) of the Court of Appeal Rules 2010.**
- ii. That the applicant was represented by an advocate whom he instructed during the pendency of the suit while in custody and therefore ought to have instructed the advocate to lodge the appeal in time.**
- iii. That the application has been brought with undue delay since the applicant was released from custody on 25/9/2020 but never took steps towards lodging an appeal until 18/5/2021 when this application was filed, 233 days later and therefore he is guilty of indolence.**

iv. That the subject matter of the suit has already been condemned by the respondent in accordance with Section 216 (4) (a) and Section 217 (a) of the East Africa Community Customs Management Act, 2004 and therefore Order number 2 and 5 of the application have been overtaken by events.

v. That the application is misconceived, bad in law and is a gross abuse of the court's process and ought to be dismissed with costs.

Pursuant to court directions of given on 5/7/2021, the application was to be canvassed by way of written submissions. Both parties complied I have duly considered the said submission.

The issues for determination are whether:-

- a. The applicant should be granted leave to file and serve the intended appeal out of time;
- b. Stay of execution of the judgement and decree of 19/9/2019 should be granted.;
- c. Whether this court can make an order of preservation.

Section 7 of the Appellate Jurisdiction Act provides the instances where the High Court can extend time as follows:-

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

The plain reading of the provision is clear. The High Court has jurisdiction to extend time for appeals emanating from it to the Court of Appeal in three instances:-

- a) Giving notice of intention to appeal from the judgement of the High Court.
- b) Making an application for leave to appeal.
- c) Certify that a case is fit for an appeal.

In *Trimborn Agricultural Engineering Limited v David Njoroge Kabaiko & another* [2000] eKLR Shah JA held:-

“The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of *Peter Njoroge Mairo vs Francis Gicharu Kariri & another*, Civil Appeal (Application) No 186 of 1999, (unreported), said:

“In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of *Edward Allan Robinson & 2 others vs Philip Gikaria Muthami*, (Civil Application No Nai 187 of 1997) (unreported), where he remarked, in pertinent part, thus:

‘Section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal.’

In the persuasive decision by J. Odunga in *Nyamodi Ochieng Nyamogo vs Telkom Kenya Ltd Nairobi* HCC 1736 of 1993 the judge said:

“It is clear that the High Court's powers under Section 7 aforesaid is limited to three instances and these are, giving notice of intention to appeal from a judgment of the High Court and making an application for leave to appeal or for a certificate that the case is fit for appeal.”

The question is whether the applicants have satisfied the court that time should be extended for them to file notice of appeal.

The powers donated to the High Court under Section 7 of the Appellate Jurisdiction Act are clear and limited. This court can only come to the aid of a litigant who is desirous of filing a notice of appeal to the Court of Appeal for the first time and has run out of the stipulated timelines. In his supporting affidavit, the applicant has annexed and marked ‘TMM4’ being a notice of appeal filed pursuant to Rule 75 of

the Court of Appeal Rules. According to Rule 75 (1) and (2) of the Court of Appeal Rules 2010, a person who desires to appeal in the Court of Appeal shall give notice in writing to be lodged within fourteen (14) days of the date of the decision against which it is desired to Appeal. The judgment herein was delivered on 19/9/2019 and the notice of appeal was filed on 3/10/2019 which was within fourteen (14) days allowed for filing the notice of appeal. The respondent challenges its competence since it was not served upon as required under Rule 77 (1) of the Court of Appeal Rules. In my view, this is a question which only the Court of Appeal can handle. Otherwise, notice is already filed and there would be no question of this court granting leave to file.

Even if the question was not on the competence of the notice of appeal, already this court was devoid of jurisdiction to entertain any application to extend time once an action has been taken by the applicant by the filing the notice of appeal, as regards the prayer, that is, that the applicant be allowed to file and serve the appeal out of time. Any other question on the intended appeal can only be handled by the Court of Appeal pursuant to Rule 4 of the Court of Appeal Rules.

The powers to enlarge time is discretionary and must be exercised judiciously. It is upon the applicant to convince the court that there was good reason for failure to comply with the timelines.

Principles that guide the court in the exercise of its mandate to extend time were clearly set out in the Supreme Court decision of **Nicholas Kiptoo Arap Korir Salat vs= IEBC & 7 OTHERS (2013)eKLR** where the court said:

“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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.

The applicant explained the failure to file the appeal in time to be because he was in prison in Tanzania in 2020. He attached the court proceedings until 13/5/2021 from Tanzania Court dated 20/3/2019 to 25/9/2020. However, this application was not filed no explanation was given to this court as to why this application was not made soon after the applicant’s release on 25/9/2020. Seven months delay after his release, with the knowledge that there was already a delay from September, 2019, was inordinate and an unexplained delay. In my view the applicant was indolent.

As to the suggestion that there was a delay in availability of the court proceedings, the applicant had counsel on record. There is no evidence that the counsel applied for the proceedings at any given time. There is no certificate of delay issued by the Executive Officer or the Deputy Registrar. In any case, the High Court issues a typed judgment and there would be no reason to delay the filing of an appeal as one awaits the typing of proceedings. Even if notice of appeal had not been filed, the applicant would not have been deserving of leave to file appeal out of time.

On the second prayer, the respondent contended that the subject motor vehicle has already been condemned in accordance with **Section 216 (4) and Section 217 (2) (a)** of the **East African Community Customs Management Act, 2004**. The said sections provide for failure and condemnation of anything which is the subject of proceedings under the Act. After condemnation, it may be disposed of, sold or destroyed as the case may be. The applicant did not file a further affidavit to controvert this position. It therefore goes without saying that the prayer for stay and preservation of the subject motor vehicle pending the hearing and determination of the intended appeal has been overtaken by events. Stay and preservation orders cannot be issued in vain.

In the end, I make the following order: -

The applicant’s application dated 30/4/2021 is incompetent and unmerited for want of jurisdiction and is hereby dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 25TH DAY OF NOVEMBER, 2021

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

Mr. Odera holding for Agure Odera for the Applicant.

Mr. Koima for the Respondent.

Nyauke Court Assistant.