



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC CIVIL APPLICATION NO. 5 OF 2020

PAUL NJAGE NJERU.....APPLICANT

VERSUS

DR. KARIJA K. MUGAMBI.....RESPONDENT

RULING

THE APPLICATION

1. Before the Court is an application dated 10th January 2020 seeking leave to appeal out of time against the Judgment delivered on 17th May 2018 in Meru CMCC No. 77 of 2014. During the court proceedings of 3rd February 2021, Counsel for the Respondent indicated that the decretal sum has already been paid and urged that the application has been overtaken by events. Counsel for the Applicant however affirmed that he would still wish to pursue the appeal and urged that the application should proceed. The Court that acceded to the Applicant's request on the basis that payment of the decretal sum does not practically overtake the challenge on the decision.

APPLICANT'S CASE

2. The application is supported by the Applicant's affidavit sworn on 10th March 2020 in which it is urged that when the Judgment was delivered, he was out of the country and had lost contact with his Advocate and that it was only when he got back to the country that he was able to contact his Advocates and got notice of the Judgment. He urged that being aggrieved by the Judgment, he instructed his Advocates to lodge an appeal but he was unable to raise the legal fees and disbursement costs and the process thereby stalled. He urged that by the time he raised the legal fees, the time to lodge the appeal had run out and that the delay in filing the memorandum of appeal was not inordinate. He argued that on 18th September 2019, his Advocates applied for certified copies of the proceedings and Judgment and they were issued with a certificate of delay. He urged that his intended appeal has overwhelming chances of success and that the Respondent is unlikely to suffer any prejudice.

3. The Applicant also filed written submissions dated 13th July 2020 wherein he urged that the record shows that he was not present in Court when the Judgment was read out. He cited *First American Bank of Kenya Limited vs Gulab P Shah & 2 Others* (2002) 1 EA 65 for the factors to be considered in an application for extension of time and urged that he has given an explanation for the delay i.e that he was out of the country at the time of delivery of Judgment and thus out of touch with his Advocates and that the court proceedings were not supplied in time. He urged that his appeal is arguable since the Respondent's claim which was based on breach of contract was filed outside the statutory limit and was thus time barred. He urged that the trial Court did not have jurisdiction to extend time. He cited *Divecon vs Sumani* (1995-1998) EA 48 and *Kenya Airports Authority vs Shadrack Abraham Kisongochi* (2016) eKLR. He further urged that the Respondent will not suffer any prejudice and that the Respondent is in possession of his title deed for Land Parcel No. Mwimbi/Chogoria/1892 which he intends to sell through a public action, if leave to file an appeal is not granted in which event, he will suffer substantial loss.

RESPONDENT'S CASE

4. The Respondent opposed the application by his replying affidavit sworn on 17th February 2021. He urged that the application herein has been made in bad faith to deny him the fruits of his Judgment. He urged that he is in the final stages of executing the Judgment and thus the appeal would serve no purpose as the Applicant's application for stay of execution was also dismissed. He urged that the Applicant was ably represented in the trial Court, up to the point of delivery of Judgment. He asserted that the Applicant is guilty of laches because when Judgment was delivered on 17th May 2018, Counsel for both parties were present; the Applicant only applied for typed proceedings on 17th September 2019 and the same was supplied on 18th September 2019; and that the application for leave was made on 10th January 2020, over 1 and ½ years after the Judgment was delivered.

5. He contended that the grounds in support of the motion are based on falsehoods, intended to mislead the Court because the Applicant has

been employed as Manager Huduma Stores in Chogoria for many years and that the Applicant was not outside the country between the date the Judgment was delivered on 17th May 2018 and the date he was supposed to file an appeal on 14th June 2018. He urged that the Applicant has been in the country all through and that in any event, no travel documents have been supplied to the Court to show that he was out of the country as alleged. He urged that there has been inordinate delay which has not been explained and the Court should thus not exercise its discretion in favour of the Applicant.

6. The Respondent then filed submissions dated 8th February 2021 buttressing what he avers in his replying affidavit. He cited Section 79 G of the Civil Procedure Act, the case of *Dilpack Kenya Limited vs William Muthama Kitonyi* (2018) eKLR, *Aviation Cargo Support Limited vs St. Mark Freight Services Limited* (2014) eKLR and *Thuita Mwangi vs Kenya Airways Limited* (2003) eKLR for the proposition that good reason must be advanced for the delay, which must not be inordinate and he prays that the application be dismissed.

DETERMINATION

Leave to Appeal out of time

7. Appeals from a subordinate Court to the High Court ought to be filed within thirty (30) days of the making of the decision sought to be challenged. Extension of time is a matter of discretion and the law gives this Court jurisdiction to extend time upon application. The law allows for such applications to be made even when the time for doing the act in question has already lapsed. Section 79 G of the Civil Procedure Act provides as follows: -

79G. Time for filing appeals from subordinate courts

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 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.

See also Order 50, Rule 6 of the Civil Procedure Rules, Section 95 of the Civil Procedure Act and Section 59 of the Interpretation and General Provisions Act.

8. The discretion to extend time must be exercised within the established principles of the law and the factors to be considered when determining an application seeking leave to appeal out of time were discussed by the Court of Appeal in *Omar Shurie Vs Marian Rashe Yafar (Civil Application No. 107 of 2020)* being: -

- i) the length of the delay***
- ii) the reason for the delay***
- iii) the chances of the appeal succeeding if the application is granted***
- iv) the degree of prejudice to the respondent if the application is granted***

THE LENGTH OF DELAY

9. The Judgment sought to be challenged was delivered on 17th May 2018, hence the 30 days' window period within which the Applicant was to file a memorandum of appeal lapsed on or about 17th June 2018. The instant application was filed on 10th January 2020, about one and a half years later. To this Court's mind, a one and a half years delay period is inordinate. The Court must however consider the reasons for the delay before making a final determination on whether it is inordinate and unexplained.

THE REASON FOR THE DELAY

10. On the reason for the delay, the Applicant claims that at the point of delivery of Judgment, he was out of the country and was also out of touch with his Advocates. The Court has given due consideration to this reason and finds that the Applicant has been rather vague in his averment. He for instance does not give the specific dates of his travel out and back to Kenya hence the Court cannot ascertain when he got back into the country, if he indeed had left. The Applicant has not also adduced any evidence either in the form of travel or visa documents to confirm that he was indeed out of the country. The Court is thus not able to ascertain whether the factual basis upon which his application is founded is true. When that persists yet it was his duty to prove the fact, there is no proof that he was away.

11. The Court has also considered the other reason advanced that the Applicant was not able to raise legal fees and disbursements to lodge the appeal. The Court has taken note of the fact that no form of evidence either by way of correspondence or any other form was adduced to support this averment. While the Court is mindful of the fact that an individual's financial ability is a matter within the special knowledge of the individual himself, the Court considers that the filing of a Memorandum of Appeal would not be so costly as to deprive even those acting for themselves of their right to access justice. As to the legal fees, the Court would have expected the Applicant's Counsel, being the one that charged legal fees that the Applicant was apparently not able to raise, at the very least, to confirm this averment by way of filing an affidavit. That was equally not done.

12. Finally, the Applicant claims that he was unable to file the appeal on time because there was a delay in securing typed proceedings. The Court takes the learning that the timeline of filing a memorandum of appeal is different from the timeline of filing a record of appeal. Filing a memorandum of appeal does not require the filing of typed and certified proceedings. An Advocates may peruse the Judgment and craft grounds of appeal which can be amended later. The Court also considers that as the Applicant already admits to have been late in firming up his instructions to his Advocates to lodge an appeal, he cannot attempt to shift blame to the court registry. The Court considers that any delays by the court registry in issuing the typed proceedings were as a result of the Applicant's delays in requesting for the same. In any event, the Court has not observed any delay on the part of the registry because the certificate annexed to his affidavit shows that he applied for the proceedings on 17th September 2019 and the same were supplied to him on the 18th September 2019, the very next day. That is extreme promptitude that needs to be commended, not faulted.

13. The importance of offering a sufficient explanation for delay was underscored by the Court of Appeal in *Susan Ogutu Oloo & 2 others vs Doris Odindo Omolo [2019] eKLR* where Otieno-Odek JA held as follows: -

'The instant application is founded on Rule 4 of the Rules of this Court. In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo arap Korir Salat V. IEBC (2014) eKLR Sup. Ct. Application No. 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted.'

14. Based on the above reasons, the Court does not find that the Applicant has advanced any good and sufficient cause for the delay of over one and a half years. In any event, once the certificate of delay was issued by the Court, the Applicant had from that day a fresh period of 30 days to file the appeal. He did not and left the time to lapse again. No reason is given for the failure.

CHANCES OF THE APPEAL SUCCEEDING

15. On the chances of the appeal succeeding, the Applicant has annexed a draft Memorandum of Appeal raising 3 grounds of appeal which challenge the trial Court's exercise of discretion to grant leave to file a claim which was already time barred. The Court considers that an appeal on the question of whether or not the Court could grant leave to appeal out of time and therefore, whether the Court has jurisdiction to entertain the claim is arguable. The Court considers that an arguable appeal is not one which must necessarily succeed and it is not for this Court, at this stage to go into the merits of the appeal, to avoid embarrassing the Court that will sit on appeal, if leave is ultimately granted and the appeal is filed.

16. The Court disagrees with the Respondent that the fact that the decretal sum has been fully paid and the fact that there are no stay orders in force means that the appeal has been spent.

PREJUDICE TO BE SUFFERED BY THE RESPONDENT.

17. It is clear that the Applicant's application for stay of execution was dismissed. The Respondent in his replying affidavit has averred that he is in the final stages of execution. During the last court attendance, Counsel for the Respondent in fact, admitted that the entire decretal amount has been settled and the only thing pending is the Auctioneer's costs. This Court is of the view that since the Respondent has recovered and thus enjoyed the fruits of his Judgment, save for the trouble of engaging his Advocates once again, which can be compensated by an award on costs, there appears to be no real prejudice to be suffered if the Court grants leave to appeal out of time.

CONCLUSION

18. Ultimately, the Court considers that in the circumstances of the case, even though the delay of one and a half years on the part of the Applicant was inordinate and that the Applicant has not advanced any good reasons for the delay but has merely made unsubstantiated claims which this Court cannot fully rely on, the Court finds that there appears to be an arguable point of law, on the question of whether or not the trial Court could extend time for filing a claim based on breach of contract after the statutory timelines had lapsed. That, together with the absence of prejudice entitles the Court to exercise its discretion in favour of the Applicant and therefore grants leave to appeal out of time. The Court however finds that the Applicant must pay the costs of the application for failing to advance any good reasons for the delay as was required of him.

RENDITION

19. Accordingly, for the reasons set out above, this Court makes the following orders: -

i) Leave is hereby granted to the Applicant to file his Appeal out of time on condition that he files a Memorandum of Appeal within 7 days from the date of this order and the Appeal is prosecuted within 90 days from the date of this order.

ii) The Applicant shall pay to the Respondent the costs of this application which is hereby assessed in the sum of Ksh 10,000/= to be paid within 30 days from today and in default, the respondent shall be at liberty to execute.

DATED SIGNED AND DELIVERED THIS 17TH DAY OF DECEMBER 2021

PATRICK J.O OTIENO

JUDGE

APPEARANCES

NO APPEARANCE FOR M/S B. G. KARIUKI & CO. ADVOCATES FOR THE APPLICANT

MR KARANJA ADVOCATE FOR THE RESPONDENT

PATRICK J.O OTIENO

JUDGE