



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 58 OF 2019

FRANKLINE KIMATHI BARIU.....1ST APPELLANT

LUCY MUTHONI MWENDA.....2ND APPELLANT

VERSUS

PHILIP AKUNGU MITU MBOROTHI

(Suing as the administrator and/or personal representative of

ANTHONY MWITI GAKUNGU- Deceased).....RESPONDENT

RULING

1. By a Notice of Motion dated 17/10/2019 brought under **order 45 rules 1 & 2, Order 50 Rule 6 and order 51 Rule 1 of the Civil procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act**, the applicants sought for the review and/or setting aside of the order made on 15/10/2019 dismissing their appeal. They also sought for the enlargement of time to file and serve the record of appeal as well as written submissions.

2. The grounds for the application were set out on the face of the Motion and in the supporting and further supporting affidavit of **Manasses Kariuki Karoki**, advocate. It was contended that this matter came up for mention on 15/10/2019 to confirm the filing of submissions when the court dismissed the appeal on the ground that the record of appeal and written submissions were filed out of time. He stated that his office had encountered some challenges in obtaining certified copies of the proceedings from the lower court file. That this led to a delay of one (1) day in the filing of the record of appeal. That the delay was not intentional and therefore, it would be just and fair that the orders sought are granted.

3. In opposition, **Kaberia Wilson Nkunja**, advocate swore an affidavit. He stated that the record of appeal was filed on 1/10/2019 but served upon him on 14/10/2019. Further, the submissions were filed on 14/10/2019 and served on his firm at about 4.50pm of the same day, outside the time fixed by court. That the explanation given by the applicants for the delay is not true because the lower court file was prepared and sent to this court on 5/6/2019 by which time the typed proceedings were ready and available. He urged the application be dismissed.

4. I have considered the Affidavits on record, and the submissions of counsel. **Order 45 Rule 1 of the Civil Procedure Rules, 2010** provide for review of decrees and orders. A review will be made where there is discovery of new and important matter or evidence which could not be produced by an applicant at the time when the decree was passed or the order made; or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. The application should be made timeously.

5. In their submissions, the applicants relied on **Okiya Omtata Okoiti & Another v. Attorney General & 4 others [2016] eKLR** and **Mulla in the Code of Civil Procedure** for the proposition that the expression “*sufficient reason*” is wide to include misconception of fact or law by a court or even an advocate.

6. According to the respondents, the applicants had not shown any sufficient reason since the delay was caused by counsel’s lack of diligence. That should not be allowed to further delay the finalization of the matter.

7. Where an application for review is based on the ground of sufficient reason, it is for the Court to exercise its discretion judiciously. All that the applicant’s Counsel stated was that he faced challenges in procuring the typed proceedings.

8. I have perused the lower Court file and the record, it is clear that at no time whatsoever did the applicants apply to the try court for the proceedings. They left it for the Deputy Registrar of this Court to call for the lower Court file and the typed copies of the proceedings.

Having not applied for those proceedings, the lower Court was not bound to advise the said advocate that the proceedings were ready for collection. The Court just sent the entire file with the proceedings to this Court 5/7/2019. It is also clear that between the said 5/7/2019 and 16/9/2019 when the matter came up for directions after this Court had served the advocates for the parties with two mention notices, the said advocates did not make any effort whatsoever to look for and obtain the said proceedings.

9. As at the time the directions of 16/9/2019 were being made, the typed copies of the proceedings were lying in the Court file awaiting collection. It is therefore not clear what sort of challenges the said advocates faced collecting the proceedings from the court file.

10. Had the application been only for review under **Order 45 of the Civil Procedure Rules**, I would have dismissed the same as there was no sufficient reason proffered. However, prayer no. 2 is for the enlargement of time under **Order 50 Rule 6 of the Civil Procedure Rules** which gives this Court more latitude in the exercise of discretion. That rule allows the Court to extend time within which an act is to be done by a party.

11. The delay in the filing and service of the record of appeal has not been sufficiently explained. However, I have considered that the delay was for only one day in the filing and 14 days in the service of the record of appeal. I have also considered that the present application was filed timeously. Considering that the amount being challenged is substantial, I will exercise my discretion and allow the time for the filing and service of the record and submissions as prayed but not without showing displeasure by way of costs.

12. Accordingly, the application is allowed on the following terms:-

- a) the order made on 15/10/2019 dismissing the appeal is hereby set aside.
- b) the time for the filing and service of the record of appeal and the submissions is hereby extended.
- c) the record of appeal filed on 1/10/2019 and the submissions on record by the appellant are hereby deemed to have been filed and served with leave.
- d) the appellants do pay the respondent thrown away costs of Kshs.20,000/- within 30 days in default, the appeal shall stand dismissed.

DATED and DELIVERED at Meru this 30th day of January, 2020.

A. MABEYA

JUDGE