



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U, J

MISC. CIVIL APPLICATION NO. 160 OF 2019

FRANCIS M. BICHAGE.....1ST APPLICANT

GABRIEL BICHAGE2ND APPLICANT

VERSUS

THE KENYA NATIONAL LIBRARY SERVICESRESPONDENT

RULING

1. By way of a Notice of Motion dated 18/11/2019, Francis Bichage and Gabriel Bichage (the applicants) seek orders;

a. Spent

b. That the honourable court be pleased to grant/issue and/or give an order in favour of the applicant (sic) to file an appeal out of time.

c. That costs of the application be in the cause.

2. The application is anchored on grounds on the face of the application and on the supporting affidavit of Gabriel Bichage, the 2nd applicant.

3. The gist of the grounds and affidavit in support is that it was not intentional on the part of the applicant to file appeal out of time but due to natural forces and attrition which befell the family. It is urged that the appeal has high chances of success.

4. The application is opposed and Sarah N. Ogembo of the respondent has sworn a replying affidavit. She avers that the application is an afterthought, an abuse of the court process, misconceived, evasive of facts and cleverly crafted to mislead the court.

5. It is contended that the intended appeal has no chances of success. No justifiable grounds are given for the delay since the delivery of judgement on 12/7/2019. The reason given is stated as vague since the natural forces and attrition which befell and arose in the applicants' family is not explained.

6. Am urged that leave to appeal out of time is a discretionary remedy but which should be exercised judiciously.

7. The application was canvassed by way of written submissions.

8. As correctly captured by the applicants' counsel in their submission, the discretion of the court is wide; In **Njuguna vs Magichu & 73 Others** the stated;

“The discretion exercisable under rule 4 of these rules is unfettered. The main concern of this court is to do justice to the parties. Nevertheless the discretion has to be exercised judiciously, that is on sound, factual and legal basis.”

9. Further in **Mwaniki Murangiri –vs- Ndwiga Murangiri Murua Mbuci & Another [2019]eKLR** the court stated;

“In an application for extension of time, where the court is being asked to exercise discretion, there must be some material before the court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence

to satisfy the court why the discretion should nevertheless be exercised in his favour, and the rule is that where there is no explanation, there shall be no indulgence.”

10. The conditions precedent to allow an application for leave to file a memorandum of appeal out of time are;

1. **The period of delay.**
2. **The reason for the delay.**
3. **The arguability of the appeal.**
4. **The degree of prejudice on the respondent.**

11. On the period of delay, I noted the applicants’ appeal was due by 12/8/2019. It is not until 20/11/2019 that this application was filed. This is a delay around 3 months. Without proper explanation such delay is inordinate. So what is the explanation given. We shall see this in the following paragraphs.

12. The reason offered for the delay is found in paragraph 10 of the supporting affidavit. It is summarized as **“natural forces of attrition which befell the applicants’ family members.”**

No explanation whatsoever is forthcoming to shed light on what these natural forces were and the particulars of the family members befallen by them (if at all).

13. I place reliance of the decision in **Diplack Kenya Ltd –vs- William Muthama Kitonyi [2018] eKLR** where G.V Odunga J held;

*“... It is therefore clear that whereas inadvertence may be a ground for extension of time, **the nature and quality of the inadvertence must be disclosed for consideration by the court.** It therefore does not suffice to simply state that the failure to comply with the prescribed timelines was due to inadvertence, as the applicant did in this case.”*

14. On the question whether the appeal has chances of success, the applicants in their submission at paragraph 10 thereof state;

“10. That, your Lordship the applicants’ application for leave to file appeal out of time has high chances of succeeding as per the attached memorandum of appeal.”

15. That statement is made in a clear misapprehension of the applicable principle. It is the appeal that ought to be based on solid grounds with overwhelming chances of success that will lead to the success of an application to appeal out of time. A party therefore must endeavour to show that the leave to appeal out of time will not be futile as the intended appeal had chances of success.

16. The Court of Appeal in **Nelson Ongera Migiro –vs- Geoffrey Nyauma Osindi & Another [2014]eKLR** had this to say on arguability of an appeal;

*“(vii) An arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the court; **one which is not frivolous** (Joseph Gitahi Gachiu & Another vs Pioneer Holdings (A) Limited & 2 Others C.A No. 124 of 2008).”*

17. The Court is obligated to look at the issues intended to be raised in appeal. In **Hidiya Construction & Mineral Limited –vs- Ajabu East Africa Ltd [2018]eKLR** the court stated;

“(vii) Where the issues intended to be raised on appeal have no basis or foundation, they cannot be said to be arguable.”

18. I have considered the memorandum of appeal and submissions by the applicant. No basis or foundation is shown in regard to the issues intended to be raised on appeal.

19. Is there prejudice on the part of the respondent?

The answer is in the affirmative. This is an old matter which is over 6 years old. The respondent being a successful party ought to enjoy the fruits of judgement and should only be kept away from this enjoyment by good cause. In light of the above no good cause is shown.

20. In the end and upon applying my mind to all the issues raised, I reach the conclusion that the application before court is without merit. The same is dismissed. Each party to bear its own costs.

Dated and Delivered at Kisii this 26th day of February, 2020.

A.K NDUNG’U

JUDGE