



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS APPLICATION NUMBER 480 OF 2019**

**GEORGE KARANJA MUKUNDI.....APPLICANT**

**VERSUS**

**MARIERA FRANCIS.....1<sup>ST</sup> RESPONDENT**

**VICTOR NYACHIEKA MARIERA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The record shows that on 9<sup>th</sup> August 2019 E. Kelly, Senior Resident Magistrate delivered Judgment in **Chief Magistrate's Civil Case Number 1147 of 2015** in the absence of parties.

2. On 11<sup>th</sup> September 2019 the plaintiff filed Notice of Motion under **Section 79G of the Civil Procedure Act Order 51 rule 1 of the Civil Procedure Rules** seeking orders;

***I. That the court be pleased to grant leave to the applicant to file an appeal out of time against the judgment delivered on 9<sup>th</sup> August 2019 in Chief Magistrate's Civil Case Number 1147 of 2015.***

***II. That costs be in the cause.***

3. The application is supported by the affidavit of Robert H. Ndubi Advocate and grounds on the face of the application.

4. Annexed to the application is the judgment, a copy of the plaint, letter by counsel for applicant to counsel for respondent dated 21<sup>st</sup> August 2019 informing them of the outcome of the case and seeking payment of the decretal sum and costs and the Memorandum of Appeal dated 6<sup>th</sup> September 2019 but filed on 11<sup>th</sup> September 2019.

5. The gist of the application is that the counsel was only able to obtain typed copies of the judgment on 19<sup>th</sup> August 2019, that the applicant was advised of the same on 23<sup>rd</sup> and 26<sup>th</sup> August, that the applicant instructed counsel to file the appeal, that a Memorandum of Appeal was prepared, but counsel found out on 10<sup>th</sup> September 2019, a day after the thirty (30) day appeal period that the same had not been filed, that failure to file the appeal within the requisite period was wholly counsel's fault, yet the applicant is desirous to pursue his appeal.

6. The application is opposed vide a Replying Affidavit sworn by Eric Onderi, Senior Legal Officer at UAP Insurance Company Limited on 28<sup>th</sup> October 2019 on the grounds that no sufficient or believable reasons have been given for failure to comply with timelines, that the case does not belong to counsel but to the applicant who ought to have checked with his counsel that the appeal had been filed (referred to **Mwangi S. Kaimenyi vs Attorney General & Another [2014] eKLR**); that the applicant was paid the decretal sum on 3<sup>rd</sup> September 2019 and it is only after the payment that he filed this appeal; that having settled the decretal sum, the respondents stood to be prejudiced "*if the appeal is admitted*" and thereafter dismissed; that the applicants had neither pledged through affidavit that he is capable of refunding the money, nor has he deposited any security in court pending the determination of the appeal; that timelines are not technicalities but put there to ensure efficient and cost effective dispensation of justice.

7. In a further affidavit sworn on 1<sup>st</sup> November 2019 applicant's counsel reiterated that delay was for **one day** and had been explained; that applicant was ready to abide by any conditions set by court.

8. Parties through counsel agreed to argue the application through submissions.

9. I have perused the submissions filed by each party. It is true courts frown upon litigants whose conduct is negligent and whose counsel is negligent as well. I cannot put it much better than *Lord Griffith* in **Ketteman & Others vs Hansel Properties Limited [1988] I All ER 38;** cited with approval in the Court of Appeal Case of **Tana & Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR.**

***“... Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards negligent conduct of litigation as was perhaps possible in a more leisured age.”***

10. With that in mind the issue for determination is whether the applicant has; *“Satisfied the court that he had good cause and sufficient cause for not filing the appeal in time”* **Section 79 G Civil Procedure Act** provides;

***“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.***

11. Was there inordinate delay?

Answer – No, it was delay of **one day**.

Has an explanation been given? Yes. That the counsel’s office out of inadvertence failed to file the Memorandum of Appeal on the 6<sup>th</sup> September, 2019 or soon thereafter before the 10<sup>th</sup> September, 2019.

At this stage I am required to consider whether this explanation is sufficient with regard to the **delay**. The respondent has cited the case of **Nicholas Kiptoo arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** as cited in **Nginyanga Kavole vs Mailu Gideon [2019] eKLR.**

***“I am not the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainly and clarity where issues of rules and their application are concerned.”*** (Emphasis mine)

12. *Emukule J* in **Gerald Milimbine v Joseph Kangani [2009] eKLR** while dealing with a similar application said the following with regard to the proviso to **Section 79G** of the **Civil Procedure Act** ;

***“My understanding of the proviso to Section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court’s leave to have such an appeal admitted out of statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of statutory period. To do so will actually be an abuse of the court’s process which under Section 79 says...”***

The applicant filed his Memorandum of Appeal on 11<sup>th</sup> September 2019. He now seeks to have it admitted as filed within time.

Does his appeal have any chances of success?

13. The respondent argues, it does not. The applicant argues it does. There is filed together with the application, the pleadings and the judgment. The applicant contests the basis upon which he was found 85% liable for the accident which finding affected the overall award of general damages to him. That appears arguable to me on the basis of the Memorandum of Appeal, the plaint and judgment.

14. The respondents argue they will be prejudiced. I have considered the affidavit in opposition. The only prejudice that they set out is the applicant’s failure to demonstrate that he can refund the sum paid. From the record, the counsel for the applicant upon receiving the judgment proceeded to write to the counsel for respondents for payment of the decretal sum and their costs. That letter was not copied to the applicant, and indeed there is nothing on record to show that the applicant was informed of the judgment before his counsel wrote to the advocates for the respondents or that the applicant actually received the payment. It appears to me that the moneys paid on 3<sup>rd</sup> of September 2019 are still with the Appellant’s counsel. In any event that amount is large to create a reasonable apprehension that the appellant would not be able to refund it. In any event counsel for the appellant has deponed that the appellant is ready to abide by any conditions that will be issued by this court.

15. It also argued that the whole thing is an afterthought prompted by the payment on 3<sup>rd</sup> September 2019. However, it is clear that the appellant became aware of the amount to be paid on 23<sup>rd</sup> August 2019 and on 26<sup>th</sup> August 2019 gave instructions for the appeal to be filed. One-day delay cannot be considered an afterthought. Even the best of plans, the tightest deadlines are sometimes hit by something

unexpected that is why that window is given for the 'culprit' to explain themselves. See **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR**;

*“In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time.... In the face of these facts, my finding that the applicant has failed to satisfactorily explain the inordinate delay is inevitable. Yet the policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.”*

16. From the foregoing I do find that though the Memorandum of Appeal was filed out of time, there was no inordinate delay, the one-day delay was explained and is excusable, the respondent will not be prejudiced to any degree that cannot be compensated by way of costs.

17. Hence the Memorandum of Appeal is admitted out of time.

18. The applicant to file and serve the rest of the Record of Appeal within thirty (30) days hereof. The appeal be placed before the judge for directions within fourteen (14) days after service.

19. A third (1/3) of the decretal sum be deposited in a joint interest earning account in the joint names of counsel as security for costs within thirty days hereof.

20. The applicant's counsel to bear the costs of this application

21. Mention electronically unless otherwise directed, on 10<sup>th</sup> June 2020 for directions.

22. The Deputy Registrar to make arrangements for the mention.

**Delivered, Dated and Signed at Nakuru this 30<sup>th</sup> day of April, 2020.**

**Mumbua T. Matheka**

**Judge**

In the presence of: - Via ZOOM

Edna Court Assistant

Mirugi Kariuki & Company Advocates

Robert Ndubi & Company Advocates