



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

MISC. CIVIL APPLICATION NO. 69 OF 2019

PETERSON KARIUKI GUTU.....PLAINTIFF/APPLICANT

VERSUS

DAVID MURIUKI MAGONDU.....DEFENDANT/RESPONDENT

R U L I N G

A. Introduction

1. In the application dated 16th September 2019, the applicant seeks for leave to appeal out of time against the judgement of Honourable Court in Embu CMCC No. 26 of 2006 delivered on the 8/10/2019.
2. It is the applicant's averment that he applied for certified copies of proceedings and judgement on the 3/11/2018 but the same were supplied on the 7/08/2019 by which time the time for filing appeal had lapsed. The applicant further states that he has an appeal with a high probability of success and that it is only fair and just that the time for filing the appeal be extended.
3. The applicant further states that the respondent will not suffer any prejudice if the orders sought are not granted.
4. In rejoinder, it is the respondent's stated that the applicant is guilty of inordinate delay in bringing the present application and that the proceedings were ready for collection 10 months before the instant application and further that even after collecting the certified proceedings, the applicant took almost a month to bring this application.
5. The parties filed the submissions to dispose of the matter.

B. Applicant's Submissions

6. The applicant submits that the delay was not occasioned by him but rather the court's requisite period for the preparation and delivery of the certified copies of the proceedings and judgement which were supplied to him on the 7/08/2019.
7. It is further submitted that the draft memorandum of appeal annexed to the application raises serious issues of law of the judgement passed on the 8/10/2018 and the appeal has high chance of success if given chance.
8. It is further submitted that the respondent would not suffer any prejudice if the instant application is granted and in the event he would the same would adequately be compensated in an award for costs.

C. Respondent's Submissions

9. It is submitted that the applicant is guilty of inordinate delay which cannot be blamed on the court as the proceedings were signed and certified on the 3/12/2018 but the applicant chose to collect them sometime in August 2019.
10. Further, it is submitted that the applicant took almost 10 days after getting the certified proceedings to file the instant application and that the applicant's counsel need not have waited for the proceedings in filing the memorandum of appeal.
11. It is further submitted that the applicant has merely stated that his appeal has chances of success but has not made any effect to demonstrate the same.

12. It is submitted that he stands to suffer prejudice as the judgement was delivered over one (1) year ago and that he has since moved conscious that the matter had been concluded and that reopening the litigation will prejudice him.

D. Analysis & Determination

13. The singular issue for determination is whether the Applicant is entitled to an extension of time to lodge his appeal. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows: -

“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.”

14. Therefore, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another v Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words “sufficient cause” and “good cause”.

15. It was therefore held in **Daphne Parry v Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

16. Our case law has now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

17. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**. They include the following: -

- a) **The period of delay;**
- b) **The reason for the delay;**
- c) **The arguability of the appeal;**
- d) **The degree of prejudice which could be suffered by the Respondent if the extension is granted;**
- e) **The importance of compliance with time limits to the particular litigation or issue; and**
- f) **The effect if any on the administration of justice or public interest if any is involved.**

18. I will now consider the Applicants’ application for extension of time against these factors. I do note beforehand that this court is not favoured with the proceedings before the subordinate court.

19. From the record, this application was filed on the 10th December 2019 whereas the judgement was entered on the 8th October 2018. This is more than a year after judgement had been entered. I also note that on the 3rd November 2018 the applicant’s advocate applied for copy of certified proceedings and judgements for purposes of filing an appeal however the typed judgement had not been availed. The respondent submits that the proceedings were signed and certified on the 3/12/2018 but the applicant chose to collect them sometime in August 2019.

20. In any case by the time the proceedings were ready whether on the 3/12/2018 as alleged by the respondent or on the 7/08/2019 when the applicant chose to collect them, the time which the requisite time to lodge an appeal had lapsed. Accordingly, I do not find this to be inordinate under the circumstances.

21. I am of the considered view that no adverse effects will be caused by the granting of the orders sought to the respondent. On the contrary, the applicant will benefit from the orders in that he will exercise his rights of appeal.

22. The applicant is required to demonstrate the arguability of the intended appeal with probability of success. At this point, the applicant is *not* required to persuade the appellate court that the intended appeal has a high probability of success I have perused the grounds of appeal but did not have the advantage of looking at the proceedings. However, I find the grounds plausible which will be subject to the determination of this court during the hearing of the appeal.

23. While the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the administration of justice.

24. Consequently, I find the application dated 23rd October 2018 to be meritorious and grant it in the following terms: -

a) The applicant is granted leave to appeal out of time against the judgment the trial court in Embu CMCC No. 26 of 2006 delivered on the 8/10/2018.

b) The appeal shall be filed within seven (7) days in default of which these orders will stand vacated.

c) Each party to meet their own costs.

25. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF MAY, 2020.

F. MUCHEMI

JUDGE

Ruling sent to the parties through their respective emails