



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO 169 OF 2019

JAMES S. M. WARUIRU AND ELIZABETH NJAMBI

(Suing as representatives of the Estate of Virginia Macharia (Deceased))

VERSUS

ELIJAH KARANJA MUIRU.....1ST RESPONDENT

NGATA MAIGU.....2ND RESPONDENT

RULING

1. The Applicants filed a suit at the Principal Magistrate's Court Githunguri, being PMCC No. 33 of 2014 against the Respondents seeking damages in connection with an accident involving the deceased. After several adjournments the suit was dismissed on 11th October 2018 for want of prosecution. Whereupon the Applicants applied to set aside the dismissal order. The court heard the motion and concluded that the Applicants had been indolent and dismissed the motion in a considered ruling delivered on 20th December 2018.

2. This dismissal order prompted the Applicants' motion filed on 12th April 2019 seeking leave to appeal out of time against the ruling of the lower court. The delay in bringing the motion is attributed to the delay in obtaining the copy of the said ruling. The Applicants also deposed that the delay is not inordinate and will not prejudice the Respondents.

3. The Respondents did not personally swear a replying affidavit. Instead their counsel, **Billy Mumo Ndolo** swore the replying affidavit in which he asserted that the Applicants' are guilty of laches and that the delay in this instance is inordinate. The parties did not make submissions, leaving it to the court to determine the motion on the basis of affidavits filed. The Court has now considered the motion and the affidavits on record.

4. Order 50 rule 6 of the Civil Procedure Rules which the Applicant has invoked empowers the court to enlarge the time fixed for doing any act or taking any proceedings. For purposes of enlargement of time to file appeal, the other relevant provision is Section 79G of the Civil Procedure Act provides that:

“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.”

5. The successful applicant must demonstrate **“good and sufficient cause for not filing the appeal in time.”** In **Thuita Mwangi v Kenya Airways [2003] eKLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari material* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.” See also **James Omwonyo's** case.

6. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor.

7. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;

6. Whether the application has been brought without undue delay.

7.”

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

8. The delay to be considered for purposes of this motion is the period between 20th December 2018 when the ruling of the lower court was delivered and 12th April 2019 when the instant motion was filed. Out of that period, the period between 21st December 2018 and 13th January 2019 is excluded by dint of the provisions of Order 50 Rule 4 of the Civil Procedure Rules. Thus, the real period of delay in bringing this motion is 3 months, which in my view is not inordinate, and has been adequately explained by the Applicants. The Respondents' affidavit has emphasized previous delay by the Applicant in the lower court proceedings. These are matters for the appeal and have no bearing on the instant motion. The Respondents have not demonstrated how they stand to be prejudiced if the application is granted.

9. The court is persuaded to grant the motion by extending time for the Applicants to file appeal out of time. Such appeal must be filed within 30 days of this ruling. Each party will bear own costs in light of the failure by the Respondents to personally swear their affidavit in response to the motion.

SIGNED ON THIS 12TH DAY OF JUNE 2020 AND DELIVERED VIA eMAIL TO THE PARTIES ON 12TH DAY OF JUNE 2020

C. MEOLI

JUDGE