



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO 31 OF 2016

GITAU PERIS *alias* PERIS GITAU WAMBUI.....APPLICANT

VERSUS

ESTHER NJERI MBUGUA..... RESPONEDNT

RULING

1. **Gitua Peris *alias* Peris Gitua Wambui** (the Applicant) was aggrieved by the judgment of the lower court delivered on 2nd August 2016 in favour of the Respondent herein, **Esther Njeri Mbugua (suing as the legal representative of the estate of Gerald Njoroge Njeri – deceased)** in **Kiambu CMCC No.226 of 2015**. On 1st September 2016 the Applicant filed an appeal to this court which was followed on 21st November 2016 with a motion brought under Order 42 r 6 of the Civil Procedure Rules seeking to stay execution pending appeal, which motion was subsequently compromised on 1st December 2016.

2. Directions were given on 7th March 2017 for the record of appeal to be filed within 45 days. On 22.11.17 the court was informed that the record of appeal had not been filed due to delayed supply of typed proceedings to the Applicant's counsel and the time for filing of the record was extended by another 45 days, in default of which the appeal would stand automatically dismissed. The said record of appeal was not filed until the 6th April 2018 by which date the appeal stood dismissed under the orders made on 22.11.2017.

3. On 26th February 2019 the Applicant had filed a motion seeking to extend the time for compliance with the court's order for the filing of the record of appeal and the reinstatement of the appeal. The application is brought primarily under the provisions of Order 50 Rule 6 erroneously stated as Rule 5 of the Civil Procedure Rules. The application is supported by the affidavit of **Agnes Wangari Gichohi** the Applicant's counsel. The gist of the affidavit is that the delay in filing the record of appeal was occasioned by the fact that the lower court did not, despite several requests, supply the typed proceedings on time.

4. The record does not contain a replying affidavit by the Respondent but on 21st November 2011, the parties agreed to canvass the motion by way of written submissions. The Applicant's submissions took cue from the material in her application, principally asserting that the delay in this case is not inordinate and that the Applicant was keen on prosecuting her appeal but for the delayed supply of typed proceedings. Several authorities were cited including **Imperial Bank Ltd (In Receivership) and Another v Alnashir Popat and 18 Others [2018] e KLR**.

5. The Respondent on his part emphasized the discretionary power of the court in considering an application of this nature. Citing the case of **Fakir Mohamed v Joseph Mugambi and 2 Others Civil Application No. Nairobi 33/04** as to the applicable principles, it was stated that the onus lies with the Applicant to satisfy the court that she is deserving of the exercise of such discretions in her favour. In the Respondent's view, the period of delay, in this case 131 days has not been satisfactorily explained as no certificate of delay is exhibited. Finally, the Respondent submitted that the Applicant's right of appeal ought to be balanced against the Respondent's right to enjoy the fruits of his judgment.

6. The court has now considered the material canvassed by the parties. Order 50 Rule 6 of the Civil Procedure Rules which applies to an application of this nature provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties

making such application, unless the court orders otherwise.”

7. What then are the applicable principles? In the case of **Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission and 7 Others [2014] e KLR**, the Supreme Court stated that:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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

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

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

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

Whether there will be any prejudice suffered by the respondents if the extension is granted;

Whether the application has been brought without undue delay; and

Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.

8. The case of **John Tomno Cheserem vs Sammy Kipketer Cheruiyot [2018] e KLR** in which a motion was brought under Rule 4 of the Court of Appeal Rules appears to have specific relevance to the matter at hand as Rule 4 of the Court of Appeal Rules is in *pari materia* with the provisions of Order 50 Rule 6 of the Civil Procedure Rules. The application in that case was for enlargement of time or leave to file a record of appeal out of time. The court (**Mohammed J**) observed that:

“7. The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to, explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour. In exercising my discretion I ought to be guided by consideration of the factors started in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and any interested parties if the application is granted, and whether the matter raises issues of public importance. In the case of Fakir Mohammed V Joseph Mugambi & 2 Others, Civil Appln No. Nai 332/04 (unreported) this Court rendered itself thus:-

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

[8] The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In Mwangi V. Kenya Airways Ltd, [2003] KLR 48, the Court having set out matters which a single Judge should take into account when exercising the discretion under Rule 4, went on to hold:-

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

9. The delay in this case is about 121 days which the Applicant attributes to the delayed supply of typed proceedings in the lower court. Although no certificate of delay is proffered, there are copies several letters emanating from the Applicant’s advocate to the lower court in pursuit of typed proceedings. These letters are stamped as having been duly received in the lower court. In my view, the delay in the case is not inordinate and has been explained satisfactorily. The Respondent did not file a response to the motion. Thus, there is no material upon which it may be concluded that delay will unduly prejudice the Respondent.

10. The record of appeal has now been filed and although the application to reinstate the appeal and extend time could have been made much earlier than in February 2019, the court is inclined to allow the application to enable the court to hear and determine the appeal on its merits. In the circumstances, the court will grant the motion filed on 26th February 2019 but award costs to the Respondent.

11. The appeal has already been admitted. The court directs that **HCCA 30 of 2016 and HCCA 31 of 2016** which are related be consolidated for purposes of hearing. The parties are directed to file skeletal submissions simultaneously and to highlight the same at the hearing of the appeals during the service week to be held in this court in September 2020. The appeals herein will be heard on 9th September 2020.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 30TH DAY OF JULY, 2020.

C. MEOLI

JUDGE