



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 55 OF 2020

JOSEPH ONYANCHA (Suing on behalf of the estate

of RHODA KEMUNTO ONYANCHA-Deceased)..APPELLANT/APPLICANT

-VERSUS-

SIMON WANJIRU.....RESPONDENT

RULING

1. Before me for determination is the ex parte Notice of Motion dated 3rd February, 2020 brought by the appellant/applicant herein and supported by the grounds set out on its face and the facts stated in the affidavit of the applicant. The applicant sought for the following orders:

(i) Spent.

(ii) THAT this Honourable Court be pleased to grant leave to file an appeal out of time.

(iii) THAT upon grant of leave to appeal out of time, the memorandum of appeal lodged herein be deemed as duly filed.

(iv) THAT costs of the application be in the course.

2. In his affidavit, the applicant stated that he had previously filed an application before the lower court in which he sought for leave to file suit out of time and that upon hearing his application, the trial court dismissed it on 3rd December, 2019 which decision the applicant is dissatisfied with and desires to lodge an appeal against.

3. The applicant further stated that the application has been timeously filed and that the intended appeal raises arguable grounds which ought to be heard on merit.

4. At the hearing of the Motion, the applicant opted to rely on the grounds and averments made in his supporting affidavit to the Motion.

5. I duly considered the grounds as presented in the Motion and the facts deponed in the supporting affidavit.

6. The applicable provision in appeals from the subordinate court to the High Court is **Section 79G** of the **Civil Procedure Act** which expresses that appeals of such nature must be filed within a period of 30 days from the date of the decree or order being appealed against. This proviso also makes it clear that a court of law can only grant a party leave to file an appeal out of time where sufficient cause has been shown.

7. The guiding principles in determining an application for leave to file an appeal out of time were discussed by the Court of Appeal in the case of **Thuita Mwangi v Kenya Airways Limited [2003] eKLR**.

8. The first principle concerns the length of the delay. I looked at a certified copy of the order issued by the lower court on 30th January, 2020 annexed to the Motion as "JO 1" and indicating that the impugned ruling was delivered on 3rd December, 2020. Upon considering the time that lapsed between delivery of the ruling and filing of the Motion on 4th February, 2020, I do not find the delay to be inordinate or unreasonable.

9. In respect to the second principle touching on the reason behind the delay, I considered the explanation given by the applicant that following the granting of leave to appeal by the lower court, his advocate filed a notice of appeal on 11th December, 2019 rather than a

memorandum of appeal, thereby resulting in a delay which ought not to be visited upon the applicant. I also looked at a copy of the notice of appeal which was annexed to the Motion and marked as "JO 2."

10. The rules of procedure do not require a party lodging an appeal with the High Court to file a notice of appeal as this is a preserve of appeals to the Court of Appeal. It was therefore unnecessary for the applicant's advocate to lodge a notice of appeal. I consequently find this explanation to be reasonable in the circumstances.

11. On the third principle to do with whether an arguable appeal exists, I looked at the draft memorandum of appeal annexed to the Motion and I note that the applicant is essentially challenging the decision by the trial court to dismiss the application by arguing that the trial court did not consider various relevant factors. In my view, the grounds of appeal raise arguable issues and it would only be fair for the applicant to be given an opportunity to address them on merit.

12. The fourth principle concerns itself with the prejudice which will befall the respondent should the applicant be granted leave to appeal out of time. Upon considering the facts as presented to me, I note that the applicant intends to file a suit against the respondent out of time hence there is no indication that the respondent stands to be prejudiced should the order for leave to appeal out of time be granted.

13. Consequently, the Motion is allowed in respect to order (ii) and I hereby make the following orders:

a) The applicant shall file and serve his memorandum of appeal within 14 days from today and thereafter file the record of appeal within 30 days from today. Thereafter the appeal to be prosecuted within 90 days' which time shall start to run from the new term that is to say on 15/09/2020.

b) Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 30th day of July, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

.....for the Respondent