



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISC. CIVIL APP. NO. 18 OF 2020**

**OMEGA MWAVUO NYANJE (minor suing through mother & next friend**

**EUNICE MAPENZI WANJE ..... APPLICANT**

**VERSUS**

**JASPER NCHONGA MAGARI ..... 1<sup>ST</sup> RESPONDENT**

**JACKLINE DAMA KARANI ..... 2<sup>ND</sup> RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Wambua Kilonzo advocates for the applicants**

**Respondents in person**

**RULING**

On 7.2.2020 the applicant filed a notice of motion pursuant to Section 3A, 79 (G) and Section 95 of the Civil Procedure Act and Order 42 Rule 6 (1) of the Civil Procedure Rules seeking the following order:

***(a). That the applicant be and is hereby intent of appealing against the decision by Hon. Wasike in CMCC No. 30 of 2019 delivered on 22.10.2019 but failed to appeal within the thirty (30) days period under Section 79 (G) of the Act.***

***(b). That pursuant to the delay an extension of time for filing an appeal would be most appropriate to validate the appeal.***

The appeal alluded to is as premised in the draft memorandum of appeal. To buttress the arguments in support of the application subsequent affidavit as a matter of procedural necessity is annexed for easier reference by the Court.

The respondent was duly served but as the time of preparation of this Ruling no evidence of any material in opposition of the reliefs being sought. In addition to the notice of motion, applicants counsel **Mr. Wambua Kilonzo** filed written submissions touching on the various guiding principles in exercise of discretion under the proviso of Section 79 (G) of the Act for leave to extend time to file an appeal.

**Determination**

The issue before me is the determination whether the applicant has satisfied the threshold test of being granted leave to file an appeal out of time.

Before delving into this issue the principles to be distilled in exercise of the unfettered discretion of the Court are now well settled as derived in the cases of **Salat v IEBC & 7 others {2014} eKLR**, **Leo Sila Mutiso v Rose Hellen Wangari Mwangi CA NO. 251 of 1997**, **Paul Wanjohi Mathenge v Duncan Gichane Mathenge {2013} eKLR**. The factors to take into account include, the length of the delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice likely to be suffered to the respondent if the application is granted. With the settled principles in mind, the position taken by the applicant discloses as follows:

***(a). That the impugned Judgment was delivered in absence of the parties without notice to the parties.***

***(b). That the existence of the aforesaid Judgment came to the notice of the applicant on 22.1.2020 indicative of the declarations***

*and award of general damages of Kshs.70,000/= plus costs and interest.*

***(c). That the applicant is aggrieved with the entire Judgment and has intent of seeking to challenge it on appeal, hence the need for extension of time.***

In the present motion on computation of time basically from the date of delivery of Judgment on 22.10.2019 to the date of filing an application to extend time on 7.2.2020 there is an overreach of about three and half months.

However, if the Court was to believe the assertion that the impugned Judgment was read and delivered without notice to the parties, the applicants calculation of time commences from the 22.1.2020 when the existence of the Judgment came to his knowledge. As a matter of fact, the record of the trial Court supports this assertion by the applicant that none of the parties attended delivery of Judgment on the due date.

As I have stated earlier, elsewhere in another decision of this nature reserved Judgments once written should be read and delivered in the presence of the parties in open Court. However, the Court acknowledges the unfortunate state of affairs that has been occasioned by the COVID – 19 pandemic. As a matter of correct procedure the recommended procedure under Order 21 of the Civil Procedure Rules is no longer tenable. To add context it is important to underscore that whatever legal procedure adopted by the Court to bring to the attention of the parties any outcome of the case through a written Ruling/Judgment copy of the same ought to be supplied forthwith or within 24 hours from the date of delivery. It is not lost for this Court to observe that an overburdened schedule, nature of the case, due pressure of work to go through the handwritten Judgment and have it prepared in an eligible format consumes additional time outside the prescribed statutory period for delayed Judgments. Be that as it may be a Courts failure to provide a copy of his or her Judgment may serve as a ground in applying the Law to extend time to file an appeal out of time.

In principle Court Judgments remain to be the public face of the judiciary and therefore the duty to timely delivery of Judgments and allowing immediate access of such to the parties to the claim without any impediment appeals to the constitution that honours and promotes fairness, transparency, accountability, integrity and enforcing the rule of Law. With the introduction of the E-filing portal, Judgments, Rulings, orders of the Court should be electronically issued upon notice of the parties.

Coming back to the present application, my straight answer based on the submissions by counsel, the non-compliance with time in terms of Section 79 (G) of the Act has been explained in the affidavit.

Further, the length of the delay is not inordinate to provide a ground to satisfy the prejudice test where one expresses intention to file an appeal after a long period of time denying the respondents the fruits of his or her Judgment.

In light of the guidance in **Salat case (supra)** and **Paul Wanjohi case (supra)**, I hereby grant the following orders:

- (1). Leave to the applicant to file the intended appeal out of the prescribed statutory time.***
- (2). That the draft memorandum of appeal be deemed as properly filed within time.***
- (3). The intended appellant does move within thirty (30) days from today's date to file the record of appeal and have it served upon the respondent.***
- (4). Having perused the trial Court record, the appeal be and is hereby admitted for hearing before a single Judge.***
- (5). The costs of this application to abide the appeal.***

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 5<sup>TH</sup> DAY OF AUGUST 2020**

.....

**R. NYAKUNDI**

**JUDGE**

This ruling has been delivered in terms of Article 48 and 159 (D) of the Constitution and practice directions on the general risks associated with COVID – 19 pandemic and the specific consent dated 5<sup>th</sup> August 2020 (*See Gazette Notice No. 3137 of 17.4.2020*)