



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 231 OF 2016

GRACE W. KANYUGI.....1ST APPELLANT

ROBERT M. NGUNJIRI.....2ND APPELLANT

VERSUS

JACKTON OKUTO KODHE (Suing as

the administrator of the Estate of

Daniel Ouma Okuto (deceased)).....RESPONDENT

RULING

INTRODUCTION

1. In their Notice of Motion application dated 9th May 2019 and filed on 13th May 2019, the Appellants sought extension of time to follow up typed proceedings, judgment and decree in Milimani CMCC No 6479 of 2010 to enable them file their Record of Appeal. Their said application was supported by the Affidavit of their advocate, Jemimah Moragwa, which was sworn on 9th May 2019.
2. They referred this court to its decision of 14th March 2019 in which it dismissed the Respondent's Notice of Motion dated 5th April 2018 and filed on 6th April 2018 which had sought for the striking out of their Memorandum of Appeal and/or dismissal of the Appeal herein for want of prosecution and directed them to file their Record of Appeal within sixty (60) days from the date of the said Ruling, which days were lapsing on 14th May 2019.
3. They pointed out that they wrote to the Deputy Registrar to facilitate the typing of the proceedings but that the same had not borne fruit. They urged this court to allow their said application which they averred was filed without undue and/or unreasonable delay.
4. In opposition to the said application, on 19th June 2019, the Respondent's advocate, Michael Mutuku Maweu, swore a Replying Affidavit on behalf of the Respondent herein. The same was filed on 15th May 2019.
5. The Respondent contended that the Appellants had done nothing to obtain the typed proceedings and to file their Record of Appeal before 13th May 2019 and had only come to court on the last day. They averred that because the said Record of Appeal had not been filed, then the Appeal herein stood as automatically dismissed.
6. He asked this court to dismiss the present application with costs as any extension was oppressive to him as it denied him access to the partial decree that had been deposited in an escrow account.
7. In support of their application, the Appellants placed reliance on the case of **Yusuf M. Hamza vs Frida Pendo Kapumu [2018] eKLR** where the court found that the applicant therein could not be punished because the culprit therein was the Judiciary.
8. On his part, the Respondent relied on the case of **County Executive of Kisumu vs County Government of Kisumu & 8 Others [2017] eKLR** where it was held that the ground of getting typed proceedings was not a panacea for a case of delay whenever it was pleaded.
9. He also referred the court to the case of **Tana & Athi Rivers Development Authority (TARDA) vs Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR** where it was held that there would be cases where justice would be best served by allowing the consequences of the

negligence of advocates to fall on their heads.

10. He further placed reliance on the case of **Portreitz Maternity vs James Karanga, Civil Appeal No 63 of 1997** (the eKLR citation was not provided) where the court held that there must be a just cause for depriving the plaintiff the fruits of his judgment.

11. He submitted that the case of **Yusuf M. Hamza vs Frida Pendo Kapumu** (Supra) was distinguishable from the facts of this case for the reason that the applicants therein had deposited the decretal sum in a wrong account.

12. This court carefully considered the respective parties' Written Submissions and the case law they each relied upon and found that the Appellants correctly sought the intervention of this court on 13th May 2019 when they failed to obtain the certified copies of the proceedings, judgment and decree to enable them file a Record of Appeal.

13. It noted that on 28th March 2019, which was about two (2) weeks after delivery of this court's Ruling, they wrote to the Deputy Registrar seeking to be furnished with the certified copies of the proceedings, judgment and decree but there was no response. A perusal of the file showed that there was neither any response from the Deputy Registrar nor the placing of the lower court file in this file as had been directed.

14. It also took judicial notice of the difficulties in having the proceedings in the lower court typed due to a massive backlog and hence directed the Deputy Registrar to assist. As there was also a possibility of the time given overshooting, this court included in its orders, an order that **"Either party shall be at liberty to apply."** The import of this was that any party who wished to have the time prescribed in the Ruling to do a specified act extended was at liberty to seek extension of the court to comply. Although the Appellants came to court on the last day, this was still within the stipulated time.

15. It was therefore the considered view of this court that the interests of justice demanded that it extends time to the Appellant to obtain the certified copies of the proceedings, judgment and decree so as to file their Record of Appeal.

16. Indeed, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

"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..."

DISPOSITION

17. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Notice of Motion application dated 9th May 2019 and filed on 13th May 2019 was merited and the same is hereby allowed in terms of Prayer No (2) therein. Costs of the application will be in the cause.

18. For the avoidance of doubt, the Appellants shall file their Record of Appeal within thirty (30) days from the date of notification by the court that the certified copies of the proceedings, judgment and decree are ready for collection.

19. This court further directs the Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division to comply with Paragraph 33 of its Ruling of 14th March 2019 within sixty (60) days from the date of this Ruling. The said time has been extended in that manner due to the downgrading of court operations due to the COVID- 19 pandemic.

20. To ensure that the Respondent's fundamental right that justice shall not be delayed as enshrined in Article 159(2)(b) of the Constitution of Kenya, 2010 is not violated, this matter will be mentioned on 1st December 2020 to monitor its progress.

21. Either party is at liberty to apply.

22. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of September 2020

J. KAMAU

JUDGE