



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 95 OF 2020

DR. VARINDER SUR.....APPELLANT

VERSUS

WALI MOHAMED ALTAF JIWA.....RESPONDENT

RULING

1. By an application dated **24th July, 2020** the Applicant, **Dr. Varinder Sur** seeks from the court Leave to file his Appeal out time challenging **Judgment** made on **5th June, 2020** and costs of application to be awarded.

2. The application is based on the grounds on its face and further supported by an Affidavit and Further Affidavit both sworn by the Appellant/Applicant's advocate **Josyline K. Kimaita** on **17th July, 2020** and **1st September, 2020** respectively. He averred that the matter had been listed for mention on **10th March, 2020** to take a Judgment date which was fixed for **8th June, 2020**. It is averred that the Judgment was not delivered as communicated owing to disruptions caused by the **Covid-19** pandemic and the Applicant's advocate was not aware of any other date fixed by the Court until they were served with a letter from the Respondent's advocates for computation of costs. It until then when the Applicant learned that the Judgment had been delivered.

3. In addition, the Appellant/Applicant's advocate deponed that the instructions to appeal were given on **30th June, 2020** and immediately drafted a **Memorandum of Appeal**. According to the Applicant, the Respondent will not be prejudiced by the orders sought and the court should grant the same in the interest of Justice.

4. The Respondent opposed the application by filing a **Replying Affidavit** sworn by his advocate, **Hamid Mahmood Abdalla**. He deponed that the **Judgment** was delivered on **5th June, 2020** in the presence of the Applicant's advocate. That after the delivery of the Judgment, the Respondent wrote to the Applicant vide a **letter** dated **8th June, 2020** and brought to the attention of the Appellant/Applicant's advocate that the Judgment had been delivered on **5th June, 2020**.

5. It is contented that the Applicant had all the time to appeal within time until **5th July, 2020** but despite receiving the instructions to appeal on **30th June, 2020**, the **Memorandum of Appeal** was filed on **24th July, 2020**. **Mr. Hamid** further deponed that the Respondent on **14th July, 2020** made payments of the decretal sum but the same was declined by the Appellant and the Cheque in respect thereof returned to the Respondent.

6. In the **Further Affidavit**, **M/s Kimaita**, Counsel for the Appellant/Applicant deponed that no **Notice** was given that the matter was coming up for **Judgment** on **5th June, 2020** and no Appeal would be filed within the stipulated period due to **Covid-19** disruptions. Further that all the efforts to file the **Memorandum of Appeal** electronically were futile hence the cause of the delay. Finally, it was averred that the **Memorandum of Appeal** is arguable and it is in the interest of justice that the application be allowed. Parties opted to rely on the pleadings as expressed in the paragraphs above and a date for Ruling set.

Analysis and Determination

7. I have considered the Appellant/Applicant's application together with the two Affidavits which were filed in support thereof. I have also looked the Respondent's Affidavit filed in opposition to the application. The prayers sought in the instant application are fairly simple to apprehend and the sole issue for determination thereof is whether or not the Applicant has placed before the court material grounds to warrant the exercise of this court's discretion in extending time within which the preferred appeal can be filed.

8. Based on the materials presented before this court, the court has not had the opportunity to glance at the impugned Judgment since none of the parties attached a copy of the said Judgment in either of its pleadings. It is alleged that the **Impugned Judgment** was set to be delivered on **8th May, 2020** but on the said date the Judgment was not ready. However, the Judgment was delivered on **5th June, 2020** without any **Notice** to the parties. Consequence thereof, the Appellant/Applicant submitted that part of the delay was contributed by him not being aware that the Judgment had been delivered as well as the challenges brought about by **Covid-19** pandemic.

9. On the foregoing, it is not in dispute that the **Judgment** subject of the **Intended Appeal** was delivered on **5th June, 2020** while the **Memorandum of Appeal** was filed on **24th July, 2020**. The Defendant on the other hand alleged that the Appellant/Applicant was aware of the Judgment as early as on **8th June, 2020** by virtue of letters addressed to his advocate by the Defendant, informing them that the Judgment had been delivered. Further according to the Defendant, the allegation that the Appellant's advocate was waiting for instructions to file the Appeal cannot lie because the Appellant's advocate conceded that they were instructed by the Appellant to file the **Intended Appeal** on **30th June, 2020** within which the time for appeal had not lapsed.

10. It is a common ground that a preferred Appeal to the High Court ought to be within days of the delivery of the impugned Judgment. It is also not in contention that the preferred Appeal herein ought to have been filed on or before the **5th July, 2020** the Judgment having been delivered on **5th June, 2020**. The **Memorandum of Appeal** having been on **24th July 2020** was thus filed **19 days late**. The delay by the applicant is attributed to the confusion that arose in the wake of the **COVID-19** pandemic which occasioned challenges. Such challenges related to the mode of delivery of the Rulings and Judgments by the respective courts, the restriction in movements into and out of Mombasa and the directives issued on **23rd June, 2020** by **Deputy Registrar Mombasa Law Court** following the closure of the Court on "**a 14 days quarantine period**" which affected the Appellant's ability to file the **Intended Appeal** within the **30 days** envisaged under **Section 79G** of the **Civil Procedure Act**. The Applicant even annexed an email made to the court in an effort to file the instant application following the directives issued by the Deputy Registrar but regrettably, the email was not responded to.

11. In the circumstances, I find the delay of **19 days** in filing the **Intended Appeal** not inordinate *vis-à-vis* the explanation given by the Appellant/Applicant and accordingly allow the prayer for extension of time as sought.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 27th day of October, 2020.

D. O CHEPKWONY

JUDGE

27/10/2020

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

D. O CHEPKWONY

JUDGE

27/10/2020