



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

MISC CIVIL APPLICATION NO.134 OF 2020

BETWEEN

BRIAN OKUTHE ODERO.....APPLICANT

VERSUS

AGA KHAN HOSPITAL KISUMU.....RESPONDENT

RULING

1. By a judgment dated 19.02.2020, the trial court in **KISUMU CMCC 353 OF 2012** entered judgment in favour of the Respondent as against the Applicant.

2. By notice of motion dated 10.07.2020 filed on 13.07.2020, brought under Sections 1A, 1B, 3, 3B and 79G of the Civil Procedure Act Cap 21 Laws of Kenya and Order 50 (6) of the Civil Procedure Rules, the Applicant prays for orders that:

1) That leave be granted to the Applicant to appeal out of time

2) Costs be in the intended appeal

3. The application is based on the grounds among others that the Applicant is aggrieved by the judgment delivered on 19.02.2020 and that the delay in filing the appeal was caused by outbreak of Covid 19.

4. The application is supported by the affidavit sworn on 10.07.2020 by COLLINS ORIEYO, advocate for the Applicant on in which he reiterates the grounds on the face of the application. He further avers that the Applicant is ready and willing to provide security for due performance of the judgment. Annexed to the affidavit is a letter dated 12.03.2020 requesting for certified copies of proceedings and judgment and copy of draft memorandum of appeal.

5. The application is opposed by way of a replying affidavit sworn on 20.07.2020 by JOSEPH ODUOR OTIENO, advocate for the Respondent. He avers that judgment was delivered in the presence of both parties on 19.02.2020 and that the explanation for the delay in filing the appeal ought to be rejected since court operations were not scaled down until 16.03.2020.

Analysis and Determination

6. I have considered the affidavits on record and annexures thereto. The main issue for determination is whether the Applicant ought to be granted leave to appeal out of time.

7. The law on extension of time is to be found in Section 95 of the Act which states as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

8. Order 50 of the Civil Procedure Rules on the other hand states 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”.

9. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya states that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period anytime which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order”.

10. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered. In the case of Eliud Buku Thuku v Beatrice Wambui Mwangi [2013] eKLR, the Court of Appeal reiterated the parameters for exercise of court’s discretion as set out in Mutiso v Mwangi [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

11. As much as the discretion of the court is unfettered, an Applicant is obligated to present material upon which the court should exercise its discretion, or in other words, the factual basis for the invocation of

the court’s discretion in his favor.

12. I have considered explanation for the delay advanced by the Applicant and whilst it is true that court operations were scaled down due to Covid 19 pandemic, the courts were not closed down completely and services were still available. On the other hand, the Applicant did not require the certified copies of proceedings and judgment in order for him to file the memorandum of appeal.

13. This court appreciates that it has the inherent discretion under Section 3A to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. The court is also enjoined under Article 159(2) b of the Constitution to do justice without any delay.

14. The Court of Appeal in the case of Simon Thuo Mwangi v Unga Feeds Limited [2015] eKLR cited Esther Waimaitha Njihia & Others Vs. Safaricom Ltd (2014) eKLR with approval and reiterated that:

“The exercise of judicial discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice”. (Emphasis added).

15. From the material presented before the court, it is clear that the Applicant was well aware of the judgment delivered on 19.02.2020 but only moved the court 5 months later.

16. The foregoing notwithstanding, I find that the delay is not overly inordinate.

17. In the end, notice of motion dated 10.07.2020 filed on 13.07.2020, is allowed on the following terms:

1. The applicant is granted leave to appeal out of time
2. The Applicant is further directed to file the Appeal not more than 30 days from the date hereof
3. Costs shall be costs in the Appeal

DATED AT KISUMU ON THIS 23rd DAY OF October 2020

T.W. CHERERE

JUDGE

Court Assistants - Ms. Amondi/Ms. Okodoi

For Applicant - Ms. Namusubo for Otieno, Yogo, Ojuro & Co. Advs For Respondent - Mr. Oduor L.G. Menezes & Company Advocates