



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CIVIL APPLICATION NO. 261 OF 2019

GEOFFREY SHISANYA MBWAVI & DAROMOTI ENTERPRISES LTD.....PETITIONER

VERSUS

MACTILDA LUPALASA LWANGU (Suing as Legal Representative of the Estate of

STANSLAUS MBEHELO MUSANGA (Deceased).....RESPONDENT

RULING

1. The applicant has filed a notice of motion dated 28th October, 2019 seeking for leave to file an appeal out of time against the award of general damages in Kakamega CMCC No. 20 of 2018. The applicant further seeks for grant of temporary order of stay of execution against the judgment/decree pending the hearing and determination of the intended appeal.

2. The application is based on the grounds that the failure to lodge the appeal within the prescribed time was due to delay in instructing the advocates in conduct of the matter to appeal the judgment. The application was supported by the affidavit of the advocate for the applicant, **Emily C. Bor**. The advocate states in her supporting affidavit that she received instructions to file an appeal after the statutory 30 days right of appeal had lapsed. That the respondent's financial means is unknown and the applicant may not be able to recover the decretal sum of Ksh. 808,000/= if the same is paid to her. That the applicant is willing to abide by all reasonable conditions that the court may impose.

3. The application was opposed by the respondent through her grounds of opposition dated 12th November, 2019, to wit; that the applicant is guilty of laches; that no reason has been adduced as to why the orders sought should be granted; that the application is an afterthought and an abuse of the court process and that the applicant should be compelled to deposit the decretal sum in court before making the application herein.

4. The application was canvassed by way of written submissions by the respective advocates for the parties. The applicant was represented by the firm of **Mose, Mose & Milimo Advocates** while the respondent was represented by the firm of **M/s. Phoebe Munihu Muleshe & Co. Advocates**.

5. In their submissions the advocates for the applicant cited the guidelines provided in Rule 4 of the Court of Appeal Rules on what should be considered in an application for extension of time to appeal to be –

(1) Length of delay

(2) Reason for delay

(3) Chances of the appeal succeeding if the application is granted.

(4) Decree of prejudice against the respondent if the application is allowed.

6. The advocates submitted that the application was brought about 2 months after the time had run out. That the reason for the delay was that they were given instructions to file the appeal after time had lapsed. That the respondent will not suffer any prejudice if the application is granted. The advocates relied on the case of **Samuel Mwaura Muthumbi –V- Josephine Wanjiru Ngugi & Another (2018) eKLR**. They further submitted that in this kind of application it is not necessary for the court to consider the ground that the appeal has chances of succeeding. On this they cited the Court of Appeal decision in the case of **Thuita Mwangi –Vs- Kenya Airways Limited (2003) eKLR**.

7. The advocates for the respondent on the other hand submitted that the reason given for the delay is not satisfactory. That it is clear from

the filed memorandum of appeal that it was drawn at the time of filing this application on 28/10/2019 as it is dated 28th October, 2019. That if the court is inclined to grant the orders sought, then the court should make an order that the entire decretal sum be deposited in a joint interest earning account to be opened between the counsels for the parties.

8. I have considered the application and the grounds of opposition thereto. The application for extension of time is made under Section 79 G of the Civil Procedure Act that provides 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 any time 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:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

9. Section 95 of the Act provides that:-

“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.”

10. The grounds which the court may consider in granting such an application were cited by J. Ngugi J. in **Samwel Mwaura Muthumbi –V- Josephine Wanjiru Ngugi & Another** (Supra) where he stated that:-

“Our case law has developed a number of factors which aid our courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in Mwangi –V- Kenya Airways Ltd (2003) eKLR. They include the following:

a. The period of delay;

b. The reason for the delay;

c. The arguability of the appeal;

d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;

e. The importance of compliance with time limits to the particular litigation or issue; and

f. The effect if any on the administration of justice or public interest if any is involved.”

11. The judgment sought to be appealed against was delivered on 8th August, 2019. The applicant had a statutory period of right to file an appeal of 30 days. That period expired on 8th September, 2019. The instant application was filed on 29th October, 2019. This means that the delay in filing the appeal was less than two months. It is my considered view that the delay was not inordinate. The explanation that the delay was occasioned by the delayed instructions to file the appeal is satisfactory. The respondent did not show that she will suffer any prejudice if the application is allowed. She did not show that she is in a position to refund the money in case the appeal succeeds. The application ought to be allowed.

12. Order 47 Rule 6 (2) of the Civil Procedure Rules provides as follows:

“No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

13. The applicant has offered to comply with any conditions that the court may impose. I consider it prudent for the decretal sum to be deposited in an interest earning account to await the hearing and determination of the intended appeal. The application to file appeal out of time is thereby allowed. I do thereby make the following orders:-

(1) The applicant is granted leave to file appeal out of time.

(2) The intended appeal to be filed and served within 21 days from the date of delivery of this ruling.

(3) Stay of execution in Kakamega CMCC No. 20 of 2018 is granted pending the hearing and determination of the intended appeal.

(4) The decretal sum of Ksh. 808,000/= to be deposited in an interest earning account to be opened between the advocates for the respective parties herein within two months from the date of delivery of this ruling.

In case orders (2) and (4) herein are not complied with within the time stipulated, the orders granted shall stand lapsed and the respondent shall be at liberty to execute the decree of the lower court.

Orders accordingly. The applicant to bear the costs of the application.

Delivered, dated and signed at Kakamega this 22nd day of October, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Applicant

No appearance for Respondent

Applicant:

Respondent:

Court Assistant - Polycap

30 days right of appeal.