



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. 43 OF 2020

BABU YUSUF.....APPLICANT

VERSUS

ANTONY BAHATI.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

A. N. Atancha advocate for the applicant

Respondents in person

RULING

On 16.7.2020 the applicant **Mr. Babu Yusuf** filed a notice of motion expressed to be brought under Section 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules seeking leave be granted to the applicant to file an appeal out of time.

The respondent is stated to be served but no rejoinder has been filed against the motion. The applicant's application is supported by an affidavit of the applicant dated 13.7.2020.

The Law

Under the Civil Procedure Act in Section 79 (G), Section 1A and Order 50 rule 6 of the Civil Procedure Rules. The Court has a wide discretion to extend the time for complying with the statutory time limit on appeals. The matters which the Court will consider in the exercise of its discretion are as stated in **Salat v Independent Electoral Boundaries Commission & 7 Others {2014} eKLR**:

- “(1). Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.**
- (2). A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.**
- (3). Whether the Court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis.**
- (4). Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court.**
- (5). Whether there would be any prejudice suffered by the respondents if the extension was granted.**
- (6). Whether the application had been brought without undue delay.”**

The Court in **Paul Wanjohi Mathenge v Duncan Gichane Mathenge {2013} eKLR**, **Leo Sila Mutiso v Rose Hellen Wangari Mwangi CA No. 255 of 1997** laid down four principles to be observed in exercising the discretion to extend time for leave to file an appeal thus:

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are. First, the length of the delay, secondly, the reason for the delay, third, the chances of the appeal succeeding, if the applicant is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

I now apply these principles to the case at hand. The respondent filed a claim against the applicant in **CMCC No. 44 of 2018**. In that Judgment delivered on 29.5.2020 the trial Court awarded the respondent a sum of Kshs.575,000/= plus costs and interest is repossession of the motor vehicle.

The applicant challenges the impugned Judgment on grounds that the Learned trial Magistrate erred in Law and fact for specifically awarding a refund of the quantum not proved on a balance of probabilities. That the resultant Judgment is irregular and liable to be set aside on appeal if leave to file an appeal out of time is granted. In my view, prima facie this shows that the applicant has a viable appeal with high chances of success.

On the length of delay, the trial Court delivered and pronounced Judgment on 29.5.2020. The draft memorandum of appeal towards filing an appeal is dated 13.7.2020. The delay of about one and half months between the delivery of Judgment of the trial Court and the applicant's application to apply for enlargement of time cannot be said to be inordinate. The explanation given by the applicant on failure to receive timely communication from the advocate on record occasioned the deadline of thirty days to be surpassed. Therefore, the delay was substantially due to the conduct of his counsel on record at the primary proceedings.

I have looked at the facts of the case as presented by the applicant and bearing in mind the approach taken in **Salat case and Leo decision (supra)**, the applicant could have been vigilant save for the conduct of his counsel. Further, I find no reason that by granting the applicant leave to file his appeal out of time there is a likelihood of the respondent being prejudiced.

In **Carteen Pemberton v Mark Brantley SK BHC v AP 2011/2009** the Court held:

“Much depends on the nature of the failure, the consequential effect, weighing the prejudice, and of course, the length of the delay, and whether there is any good reason for it which makes it excusable. This is by no means an exhaustive list of all the factors which may have to be considered in the exercise. Another very important factor, for example, where the application as here, is to extend time to appeal, is a consideration of the realistic prospect of success.”

From the combined effect of the notice of motion and totality of the principles laid down in the above precedents there are compelling reasons to exercise discretion in favour of the applicant.

Conclusion

In the result I would allow the notice of motion dated 13.7.2020. The applicant's memorandum of appeal be deemed as duly filed within time. The costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF NOVEMBER 2020

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R. NYAKUNDI

JUDGE