



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL MISC. APPLICATION NO. E410 OF 2020**

**DR. VINCENT KIBET CHAGWONY.....APPLICANT**

**-VERSUS-**

**MELTUS WANJALA WEKESA.....1<sup>ST</sup> RESPONDENT**

**VIMAL HAILAL VAGHELIA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Dr. Vincent Kibet Chagwony, the applicant took out the motion dated 6<sup>th</sup> October 2020 whereof he sought for the following orders:

**i. THAT this application be certified urgent, service thereof be dispensed with and it be heard ex-parte at the first instance.**

**ii. THAT this honourable court be pleased to grant leave to extend the time limited for filing of the appeal herein following the court's judgment delivered on 30<sup>th</sup> April, 2020 in Milimani CMCC no. 1802 of 2008 Meltus Wanjala Wekesa vs Vimal Harilal Vaghelia & Dr. Vincent Kibet Chagwony.**

**iii. Costs.**

2. The plaintiff/applicant filed an affidavit he swore in support of the motion. Meltus Wanjala Wekesa and Vimal Harilal Vaghelia, the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively filed the replying affidavit sworn by Meltus Wanjala Wekesa to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in this matter both urged this court to consider the material each party filed and come up with a ruling.

3. I have considered the grounds stated on the aforesaid motion together with the facts deponed in the supporting and replying affidavits. It is the submission of the applicant that the trial court delivered its judgement on 1<sup>st</sup> April 2020 in favour of the 1<sup>st</sup> respondent in the sum of ksh.209,160/=.

4. The applicant averred that neither he nor his advocates were served with a notice of delivery of the aforesaid judgment and that he only came to learn of the delivery of judgment when his advocate checked the position of his file using the judiciary e-filing portal when the time to appeal had lapsed.

5. The applicant further argued that the delay to file an appeal within the time prescribed by the Civil Procedure Act and the rules therein was due to the outbreak of the Covid 19 pandemic. It is also argued that the intended appeal raises serious and arguable issues and that the appeal is with high probability of success. It is further argued that the delay is not deliberate nor inordinate.

6. The respondents filed the replying affidavit sworn by Meltus Wanjala Wekesa to resist the motion. The respondents averred that the applicant failed to demonstrate nor give plausible reasons to explain why this court should exercise its discretion to enlarge time to file an appeal. The respondent pointed out that the notice of delivery of judgment was displayed at the Kenya Law Reports Website but the applicant's advocate failed to attend to the judgment.

7. It is also averred that even if the applicant did not see the aforesaid judgment notice, there is no explanation as to the steps the applicant took to inquire as to when the judgment would be delivered.

8. The respondents are of the view that a delay by five months is inordinate. The respondents have also argued that the applicant has not demonstrated that the appeal has any chances of success.

9. The provisions of Section 79G of the Civil Procedure Act gives the court a wide discretion to admit an appeal out of time if the applicant satisfied the court that he has a good and sufficient cause for not filing the appeal in time.

10. The applicant has given three main reasons as to what made him fail to lodge his appeal within the period of 30 days prescribed under Section 79G of Civil Procedure Act. First, he has averred that he was not served with a judgment notice and only came to learn of the existence of judgment on 30<sup>th</sup> September 2020 when he visited the judiciary e-filing portal.

11. Secondly, that the courts remained closed due to the break out of Covid 19 pandemic hence his advocates could not access the court precincts.

12. Thirdly, that he has an appeal with high chances of success.

13. The respondent did not controvert the first and second reasons advanced by the applicant. It is apparent that the applicant had no notice of judgment hence he only came to know of the delivery of judgment on 30<sup>th</sup> September 2020. He filed the instant application on 6<sup>th</sup> October 2020. The delay to file this application cannot be said to be inordinate.

14. It is also not contested that the court was closed due to the outbreak of Covid 19 pandemic therefore preventing parties from physically accessing the court. It is also a matter public notoriety that the judiciary e-filing portal was launched recently and after the period prescribed to file the appeal by the applicant had lapsed.

15. I am satisfied that the two reasons advanced by the applicant were good and sufficient to demonstrate why he was unable to lodge the appeal within the time prescribed by the statute and the rules.

16. In the end, I find the motion dated 6<sup>th</sup> October 2020 has merit, it is allowed as prayed.

Consequently, the applicant is granted leave of 14 days to file an appeal out of time. In the circumstances of this matter a fair order on costs is to order which I hereby do, that each party bears its own costs.

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 27<sup>th</sup> day of November, 2020.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent