



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL APPLICATION NO 755 OF 2019**

**STANLEY MUTUA MUSYOKI.....APPLICANT**

**VERSUS**

**CHARLES SELAINDO SAMJI.....1<sup>ST</sup> RESPONDENT**

**BENARD GITHINJI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. In his Notice of Motion application dated 25<sup>th</sup> November 2019 and filed on 29<sup>th</sup> November 2019, the Applicant herein sought leave to file an appeal against the judgment that was delivered by the Learned Trial Magistrate, Hon D. Ocharo, in **Milimani CMCC No 4311 of 2018 Stanley Mutua Musyoki vs Charles Seliando Samji & Another**, out of time. He swore his Affidavit in support of the application herein on 25<sup>th</sup> November 2019.
2. He contended that he was highly aggrieved with the aforesaid decision and intended to appeal against the same but that he did not file the appeal on time as he was not notified of the said decision that was to be delivered on 29<sup>th</sup> August 2019. He stated that he visited his advocates' offices and was informed that the said judgment was to be delivered on notice as the Learned Trial Magistrate was indisposed.
3. It was his contention that his advocates only became aware of the delivery of the judgment when they received a letter from the Respondents' advocates on 16<sup>th</sup> October 2019 and that upon tracing and perusing the court file on 18<sup>th</sup> November 2019, they noted that the said judgment was delivered on 27<sup>th</sup> September 2019. He averred that the failure to file the appeal within time was therefore not intentional and/or willful.
4. He pointed out that his intended appeal was arguable and had high chances of success and thus urged this court to allow his application to enable him exercise his constitutional right of appeal.
5. In opposition to the said application, on 3<sup>rd</sup> February 2020, the Respondents filed Grounds of Opposition dated 29<sup>th</sup> January 2020 in which they termed the present application as frivolous, vexatious, an abuse of the court process, incompetent, defective and unmerited. They added that the Applicant was guilty of laches as the delay in filing the present application was unexplained. They thus urged this court to dismiss the said application with costs to them.
6. The Applicant relied on the case of **Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi [2018] eKLR** where the court therein allowed a similar application on the ground that the said application had not been made in bad faith, that it was not an abuse of the court process, that there had been no inordinate delay in filing the said application, that the appeal was arguable and that the respondent therein would not suffer any adverse effects if the said application was allowed.
7. On their part, the Respondents submitted that the Applicant was well within the thirty (30) days window to file an appeal against the judgment when they notified him of the delivery of the judgment. They pointed out that he had not furnished the court with proof that he could not trace the file which was proof of *mala fides* on his part.
8. They further argued that they would suffer great prejudice. They contended that despite the Applicant's advocates having called for a breakdown of the costs, the said costs had not been paid. Further, he made them believe that he had waived his right of appeal and consequently, there was no good and/or sufficient reason for them not to have filed the appeal on time.
9. They asked this court to take into consideration the fact that the Applicant had in fact failed to comply with the time lines of filing their Written Submissions herein which blatant disregard of rules and orders was a constant feature of his conduct. They urged this court not to be

led away by sympathy and the appeal should be dismissed as time barred, even at the risk of injustice and hardship to him. Notably, the Respondents did not rely on any case law to support their case.

10. Section 79G of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that an appeal has to be lodged within thirty (30) days from the date of delivery of the decision to be appealed.

11. This court took cognisance of the fact that every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.

12. It is for that reason that Section 79 G of the Civil Procedure Act provides that an appeal can be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not having filed his appeal within the prescribed time. A similar conclusion was arrived at by Odunga J in **Dilpack Kenya Limited vs William Muthama Kitonyi [2018] eKLR.**

13. Further, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

**“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...”**

14. Having said so, the extension to file an appeal out of time is not a matter of course. The court has to consider certain factors before allowing an application for extension to file an appeal out of time. These are the period of delay, the reason for the delay, the chances of the appeal succeeding and/or the arguability of the appeal and the prejudice that would be suffered by a respondent if the said application for leave to file an appeal out of time was granted as was held in the case of **Mwangi vs Kenya Airways Limited (2013) KLR.**

15. Notably, the decision the Applicant intended to appeal against was delivered on 27<sup>th</sup> September 2019. The period of filing an appeal expired on 26<sup>th</sup> October 2019. As was rightly pointed out by Respondents herein, he became aware of the delivery of judgment on 16<sup>th</sup> October 2019 which was well within the thirty (30) days period. He did not give a good or plausible reason why he did not file his appeal on time. Indeed, there was no evidence that the court file was missing.

16. Even in the absence of a plausible explanation, if it can be shown that no prejudice has been suffered by the opposing party, courts must always strive to do substantive justice to both parties. This court noted that the present application was filed on 29<sup>th</sup> November 2019. This was about one (1) month after the period of filing an appeal had expired. It was thus the considered opinion of this court that the period of about one (1) month between the time the appeal was to be filed and the time the present application was filed, was not inordinate.

17. Further, this court did not see the prejudice the Respondents would suffer if the Applicant exercised his constitutional right of appeal. If they suffered any, then they did not demonstrate the same to the court. This court was thus persuaded that it was in the interests of justice that the Applicants herein be granted leave to file an appeal out of time.

18. Accordingly, weighing the Applicant’s right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondents’ fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicant if he was denied an opportunity to ventilate his Appeal on merit.

## **DISPOSITION**

19. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated 25<sup>th</sup> November 2019 and filed on 29<sup>th</sup> November 2019 was merited and the same is hereby allowed in the following terms:-

**1. The Applicant is hereby directed to file and serve his Memorandum of Appeal within fourteen (14) days from the date of this Ruling.**

**2. The Applicant is hereby directed to file and serve his Record of Appeal within one hundred and eighty (180) days from the date of this Ruling. In the event the proceedings of the lower court and the lower court file will have been placed in the file herein and the Applicant shall have failed to file his Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed.**

**3. Since the Applicant does not have control of the court diary, the Registrar of High Court Civil Division Milimani Law Courts is hereby directed to facilitate the typing of proceedings and placing of the lower court file within ninety (90) days from date of this Ruling.**

**4. Either party is at liberty to apply.**

**5. Costs of the application will be in the cause.**

20. It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of November 2020**

**J. KAMAU**

**JUDGE**