



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

MISC. CIVIL CASE NO. 95 (A) OF 2019

JAIRUS MUMO.....APPELLANT/APPLICANT

VERSUS

(1) SOMAK SAFARIS LIMITED

(2) RAPHAEL KIMONI.....RESPONDENTS

R U L I N G

1. Before this court is a Notice of Motion dated 5th November, 2019 lodged by **Jairus Mumo**, the Applicant herein asking this court for the following prayers namely:

(i) Spent

(ii) That this honourable Court be pleased to grant the Applicant leave to appeal against the judgment by Hon. F.Nekesa delivered on 22nd May 2019 in Kitui Chief Magistrate's Court Civil Suit No.68 of 2017

(iii) Costs of the Application.

2. The grounds upon which this application has been made are listed as follows:

(i) That the Applicant was aggrieved by the Judgment delivered and desires to appeal.

(ii) That the law required him to appeal within 30 days from date of judgment and that because he could not comply he requires leave to file appeal out of prescribed time.

(iii) That delay in filing the appeal was caused by the fact that judgment was delivered in his absence and without notice.

(iv) That if leave is granted to him, the Respondent would not be prejudiced.

(v) That he has an appeal that raises liable issues.

(vi) That it is in the interest of justice to grant him leave to file appeal out of time.

3. The **Applicant** has supported the above grounds through a Supporting Affidavit sworn on 5th November, 2019 where he has reiterated the above grounds. He avers that judgment was delivered in his absence and that of his counsel. He claims that there was no notice of delivery of the judgment and that he only learnt about the judgment on 15th October, 2019. According to him he was only able to trace the court file on 1st November, 2019.

4. He claims that he obtained a copy of the judgment when the prescribed period of appeal had long lapsed.

5. The **Applicant** through learned Counsel submitted that their attempts to trace the court file was futile and that they were able to get the file on 15th October 2019. He prays for a window of opportunity to enable him pursue his appeal which he insists is arguable.

6. The **Respondents** have opposed this application through a Replying Affidavit sworn on 22nd September, 2020 by Vincent Juma suing learned Counsel for the **Respondents**. The **Respondent's** Counsel avers that contrary to the Applicant's claim, the judgment from the lower court was delivered on a date that had set for the delivery of the judgment which was 22nd May 2019. They claim that that date was given in the open court on 20th March, 2019 in the presence of **Applicant's** Counsel. They fault the **Applicant** for not being candid and misleading this court.

7. The **Respondents** have doubted the **Applicant's** claims asking why they have not shown any correspondence on the claims of the unavailability of the trial court file. They point out that they were able to get copy of the judgment on 11th June, 2019 after they applied for the copy of the judgment.

8. The **Respondent's** added through counsel that the **Applicant** was aware of the date of the delivery of the judgment. They further submitted that the **Applicant** has no disclosed sufficient reasons or basis for this court to exercise its discretion in his favour.

9. This court has considered this application and the opposition by the **Respondents**. The **Applicant** has invoked various provisions of the **Civil Procedure Act** and **Civil Procedure Rules**. The most relevant **Section** is 79 a of the **Civil Procedure Act** which grants this court discretion to extend time to file an appeal. The **Applicant** was required to file the appeal within 30 days from the date of delivery of the decision which was ending on or about 19th April, 2020. The law however gives this court discretion to extend such time. Extension of time is discretionary matter which means that a party moving the court for such a relief must show sufficient reasons or basis.

10. In my considered view showing sufficient reasons, means that a party has to give plausible explanation to explain the delay and also show that he has an arguable appeal. Those are important aspects for consideration.

11. To begin with the 1st aspect, I have looked at the reason given for the delay which is the allegation that judgment was delivered in the absence of the **Applicant** and his counsels. The **Respondent** contested this reason and stated on Oath that the date of the judgment was given in the presence of the **Applicant's** Counsel. That averment made on oath was not contested by the **Applicant**. This court challenged the **Applicant's** Counsel on this issue during the hearing of this application and the excuse given in my view as feeble. The **Applicant's** Counsel told this court that he attended court on 22nd May, 2019 but claims that the judgment was delivered in chamber but when pressed to explain why he could not go to the chamber to take the judgment he could not explain. He also could not explain why he had not stated on oath that the judgment was delivered in chambers when he was in the open court waiting. He claimed that attempts to trace the file was in vain but when pressed to explain why he had no single letter expressing his frustrations in attempting to trace the court file he again fell short. Besides this, the **Respondents** had challenged the **Applicant** vide an Affidavit as to why they had not shown any correspondences asking about the delivery of the judgment or whereabouts of the court file. The **Applicant** never rose up to the challenge. In the first limb this court finds that the reason or basis shown by the **Applicant** to explain his delay is wanting.

12. Secondly the **Applicant** has failed to exhibit a draft memorandum of appeal to show that he has an arguable appeal. It is not enough for a party to allege that he has an arguable appeal. He is required to show or demonstrate that fact by enclosing a copy of what he opines is arguable for the court to peruse it and satisfy itself that indeed that appeal is an arguable one. In the absence of a draft memorandum of appeal, the applicant claim that he has an arguable appeal remains just that. An allegation which is insufficient to move a court to exercise its discretion in ones favour.

In the premises and for the aforesaid reasons this court finds no merit in the application dated 5th November, 2019. The same is disallowed with costs to the Respondent.

Dated, Signed and Delivered at Kitui this 12th day of November, 2020.

R. K. LIMO

JUDGE