



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 130 OF 2015**

**COUNTY GOVERNMENT OF UASIN GISHU.....APPELLANT**

**-VERSUS-**

**GEORGE NJOGU.....RESPONDENT**

**RULING**

[1] Before the Court for determination is the Notice of Motion dated **9 May 2018**. It was filed herein by the Appellant, the **County Government of Uasin Gishu** (hereinafter the Applicant) pursuant to **Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 42 Rule 1** and **Order 50 Rule 6** of the **Civil Procedure Rule, 2010**, for the following orders:

[a] Spent

[b] That the Court be pleased to enlarge time within which the Applicant is to file an appeal against the Judgment of **Hon. Tom Olando**, Resident Magistrate, in **Eldoret Chief Magistrate's Case No. 842 of 2014: George Njoroge Njogu vs. County Government of Uasin Gishu**, delivered on **12 November 2015**;

[c] That consequent to granting Prayer [b] above, the Record of Appeal on record be deemed duly filed and served;

[d] That costs be in the cause.

[2] The application was premised on the grounds that the Applicant is aggrieved by the said Judgment; and that it went ahead and filed its Memorandum of Appeal on **24 November 2015** and served its Record of Appeal on **12 January 2018**; but that it was only later that it learnt that the appeal had not been presented before a Judge or the Deputy Registrar for admission on the ground that the Record of Appeal had been filed after the lapse of the period granted by the Court. It was averred that the delay in filing the application is excusable as it is neither deliberate nor deliberate; and that the Applicant stands to suffer substantial prejudice, injury, loss and damage if the orders sought are not granted as it has an arguable appeal with high chances of success.

[3] The application was premised on the averments set out in the affidavit of **Kiprono G. Kibiwott**, sworn on **9 May 2018**, which is, in effect, a reiteration of the grounds set out on the face of the Notice of Motion. It was averred that, whereas the Court directed herein that the Record of Appeal be filed and the appeal admitted within 60 days, Counsel on record for the Applicant erroneously endorsed the last date of compliance as **27 December 2017**, a date when the High Court had closed for the Christmas Recess. Nevertheless, the Record of Appeal was duly lodged after the end of the recess on **12 January 2018**; and that it was only much later, towards the end of **April 2018**, when their Counsel was following up on the status of the appeal, that it was learnt by them that the appeal had not been admitted because the Record of Appeal had been filed out of time.

[4] It was further the contention of the Applicant that the delay in lodging the appeal was occasioned by factors beyond its control; and that the omission or default on the part of Counsel ought not to be visited upon it. In its view, the delay is excusable since it is not inordinate, unreasonable or deliberate. Accordingly, the Applicant urged the Court to employ its inherent discretion to enable it exercise its right of appeal by enlarging time within which to file the Record of Appeal; adding that the Respondent will not be prejudiced in any way if this application is allowed.

[5] The application was opposed by the Respondent, **George Njoroge Njogu**. He relied on the Replying Affidavit sworn by him on **26 July 2018**. His contention was that the application has been brought in bad faith and for the purpose of delaying the enjoyment by him of the fruits of his Judgment. He noted that the appeal was filed on **24 November 2015**, but remained dormant pending admission for three years. He further averred that the Applicant ignored a specific order of the Court dated **10 October 2017** to file Record of Appeal within 60 days; and therefore that the Applicant is not deserving of the Court's discretion. He added that he would be greatly prejudiced if this application is allowed, and therefore prayed for its dismissal with costs.

[6] The application was canvassed by way of written submissions pursuant to the directions made on **24 July 2018**. In its written submissions filed herein on **10 August 2018**, the Applicant reiterated its posturing that its appeal has high chances of success; and that no prejudice will be suffered by the Respondent if extension of time is granted to enable it file its Record of Appeal out of time. Reliance was placed on the case of **Stanley Kahoro Mwangi & 2 Others vs. Kanyamwi Trading Company Limited [2015] eKLR** on the applicable principles for extension of time. Counsel urged the Court to bear in mind the provisions of **Article 159** of the **Constitution** as well as **Order 50, Rule 6** of the **Civil Procedure Rules** and allow the application and grant the orders sought thereby.

[7] The Respondent's submissions, on the other hand, were that the Applicant is not deserving of the Court's discretion as no plausible or satisfactory explanation has been given for failure to comply with the order of the Court dated **10 October 2017**. He similarly cited **Article 159** of the Constitution, but for precept that justice shall not be delayed. He pointed out that it is over 3 years since the appeal was filed; and that the Applicant cannot in those circumstances validly claim that he (the Respondent) stands to suffer no prejudice when he has been kept from the fruits of his Judgment all this while. The Respondent, accordingly, urged the Court to dismiss the application with costs.

[8] I have given due consideration to the application, the pertinent affidavits filed herein together with their annexures as well as the written submissions filed by the parties. I have also perused the record and it confirms that the Applicant lodged its appeal from the Judgment of the Resident Magistrate in **Eldoret CMCC No. 842 of 2014**, dated **12 November 2015**, well within time on **24 November 2015**. The record further confirms that no action was taken to progress the appeal, either by the Court, by way of admission, or by the Applicant.

[9] Accordingly, the Respondent moved the Court vide his application dated **27 March 2017** for the dismissal of the appeal for want of prosecution. When that application came for hearing on **10 October 2017**, the Applicant convinced the Court that it was interested in prosecuting the appeal and that the delay was excusable. Hence, the Court issued orders, inter alia, that the Record of Appeal be filed and served forthwith; and that the appeal be admitted and fixed for hearing within 60 days, failing which the appeal would stand automatically dismissed.

[10] There is no dispute that the Applicant did not strictly comply with the Orders issued on **10 October 2017**, in that, although it filed its Record of Appeal as ordered, the same was not filed within the time stipulated by the Court. Hence, by dint of the Orders of **10 October 2017**, the appeal stood dismissed as of **11 December 2017**. That being the case, the Applicant ought to have, first and foremost, sought to have the appeal reinstated before seeking extension of time for filing the Record of Appeal. Nevertheless, **Section 95** of the **Civil Procedure Act** is explicit 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."**

[11] Similarly, in **Order 50 Rule 6** of the **Civil Procedure Rules**, it is provided that:

**"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."**

[12] Clearly therefore, the Court's discretion to enlarge time, where necessary, is unfettered; the only consideration being whether sufficient cause has been shown for the exercise of the discretion. The principles to bear in mind in determining an application of this nature are now well settled; and they include:

[a] whether there is a good and reasonable explanation for the delay;

[b] whether the application has been brought without undue delay; and

[c] whether any prejudice will be suffered by Respondent.

**[a] On the Explanation for the Delay:**

[13] The Applicant's explanation for not complying with the Court Order dated **10 October 2017** was that Counsel on record for the Applicant erroneously endorsed the last date of compliance as **27 December 2017**; and that by then the High Court had closed for the Christmas Recess. **Annexures KGK 2 and KGK 3** were exhibited to prove this assertion and to confirm the offices of the Applicant's Advocates were also closed between **21 December 2017** and **8 January 2018**; and that the Record was indeed filed as soon as possible on **12 January 2018**; and that the mistake of its erstwhile Counsel should not be visited on it. In the circumstances, I find that explanation plausible as the delay is not inordinate.

**[b] On whether the application was filed without delay:**

[14] The explanation given by the Applicant was that it was only much later, towards the end of **April 2018**, when their Counsel was following up on the status of the appeal, that it came to light that the appeal had not been admitted because the Record of Appeal had been filed out of time. Since the instant application was filed on **10 May 2018**, I would be of the view that there application was filed without undue delay.

**[c] On whether the Respondent will be prejudiced:**

**[15]** The contention of the Applicant was that the Respondent would suffer no prejudice if the application is allowed. The Respondent has refuted that assertion and contended that he is already prejudiced as it is; and that he continues to suffer prejudice since he has been unable to enjoy the fruits of his Judgment. However, balancing the competing interests of the parties, it is my considered view that the justice of this case would best be served by granted the Applicant an opportunity for the hearing and determination of its appeal on the merits. The Respondent can be compensated in costs should it turn out that the appeal was unwarranted.

**[16]** In the result, I find merit in the application dated **9 May 2018** and would allow it and grant orders as prayed therein. Accordingly and in the exercise of the powers conferred on this Court by **Sections 1A, 1B, 3A , 63(e) and 95** of the **Civil Procedure Act** as read with **Order 50 Rule 6** of the **Civil Procedure Rules**, it is hereby ordered that:

**[a]** The Applicant's appeal herein be and is hereby reinstated and is hereby admitted for hearing and determination on the merits.

**[b]** That the Record of Appeal that was filed herein on **12 January 2018** be and is hereby deemed duly filed. The same to be served on the Respondent forthwith, at any rate not later than 14 days from the date hereof.

**[c]** Costs of the application to be borne by the Applicant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 28<sup>TH</sup> DAY OF FEBRUARY 2019**

**OLGA SEWE**

**JUDGE**