



**REPUBLIC OF KENYA**

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

**MISC.CIVIL APPLICATION NO. 33 OF 2018**

**NICHOLAS MUGA OHAGA.....APPLICANT**

**-VERSUS-**

**KENYA COMMERCIAL BANK.....RESPONDENT**

**RULING**

[1] The Notice of Motion dated **28 March 2018** was filed by the Applicant, **Nicholas Muga Ohaga**, under **Section 3, 3A, 75, 78, 79G, and 95 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules, 2010** for orders that the Court be pleased to grant him leave to file an appeal out of time against the Judgment and **Decree in Eldoret Chief Magistrate's Civil Case No. 771 of 2010**; and that the costs of the application be provided for.

[2] The application was premised on the grounds that Judgment in **Eldoret CMCC No. 771 of 2010** was delivered on **14 January 2016** whereupon the Applicant's case was dismissed without his knowledge; and that on **16 March 2018**, the Applicant instructed his Advocates to lodge an appeal but the time within which to file the same had already lapsed. It became necessary to seek leave, whereupon this application was filed on **27 March 2018**. It was the averment of the Applicant that he has an arguable appeal; and that it is in the interest of justice that he be allowed to file his appeal out of time. It was further averred that no prejudice will be suffered by the Respondent should this application be allowed.

[3] The aforesaid grounds were amplified in the Applicant's Supporting Affidavit sworn on **28 March 2018**. The Applicant averred that it was not until **16 March 2018** that he was notified by his brother, **Kenneth Oduor**, that while at Eldoret Law Courts Registry attending to his matters, he came to learn that his (Applicant's) suit had been dismissed on **14 January 2016**. He then inquired from his Advocates, **Ken Omollo & Company Advocates**, as to what had transpired and why no notice had been sent to him advising him of the outcome of his case; but his Advocates also said they were unaware that Judgment had been delivered as no notice was served on them. Accordingly, it was the Applicant's prayer that his application be allowed and the orders sought granted.

[4] The application was opposed by the Respondent and an affidavit to that effect sworn on **28 June 2018** by **Josephat Khanani**, the Respondent's Assistant Manager, Credit, to say that the application has not only been brought too late in the day, but is also devoid of merit, and therefore ought to fail. It was averred that no explanation has been given for the failure by the Applicant and his lawyers to follow up on the matter with the Court for two years; and that both the Applicant and his lawyers had an equal duty to exercise diligence in following up the case; which they failed to do; and hence, they cannot seek to benefit from their own failures. It was further the contention of the Respondent that whereas the Applicant blames lack of Notice for Judgment for his failure to appeal within time, notice was actually issued and served by the Court and that explained why the Respondent's Advocates were in attendance for the Judgment; and that in the absence of an Affidavit from the Applicant's erstwhile Advocates, **M/s Ken Omollo & Company Advocates**, the Applicant's allegations are mere speculations and excuses rather than a justification for the current application. The Respondent urged for the dismissal of the application.

[5] Pursuant to the directions given on **30 May 2018**, the application was disposed of by way of written submissions. Thus, the Applicant's written submissions were filed on **18 July 2018** by **M/s Mukabane & Kagunza Advocates**; while the Respondent's written submissions were filed on **2 August 2018** by **M/s Manani, Lilan, Mwetich & Company Advocates**. It was the Applicant's submission that he has met the prerequisites for extension of time, in that it has been shown that the delay was not inordinate; that the same is not inexcusable; that the appeal has chances of success and that no prejudice will be suffered by the Respondent. Counsel further urged the Court to bear in mind the Oxygen Principles under **Sections 1A and 1B of the Civil Procedure Act** and the holding in **APA Insurance Limited vs. Michael Kinyanjui Muturi [2016] eKLR**, and find that the orders sought are merited.

[6] Counsel for the Respondent was however of the submission that the assertion that no notice for delivery of judgment was issued was not verified by way of an affidavit by the Applicant's previous Advocates and therefore cannot form the basis for extension of time. The Respondent also took issue with the apparent lack of diligence on the part of the Applicant, who sat on his laurels for two years without knowing that his case had been finalized. The Court was also urged to note that no affidavit was sworn by the relative who brought the matter to the attention of the Applicant; and therefore that even this assertion was not verified for credibility. The Respondent thus prayed for the dismissal of the motion with costs.

[7] I have given careful consideration to the application, the affidavits as well as the written submissions made by the parties. **Sections 79G** of the **Civil Procedure Act**, which has been cited as one of the enabling provisions for this application, states that:

**"Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period any time which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal."**

[8] It is indubitable therefore that the Court does have the discretion to enlarge time where necessary; the only consideration being whether sufficient cause has been shown for the exercise of the discretion under the aforementioned provisions; and, what amounts to sufficient cause has been discussed in a long line of authorities, including Mwangi vs. Kenya Airways Limited [2003] KLR 486 in which the Court of Appeal held thus:

**"Matters which the court takes into account in deciding whether or not to grant an extension of time are:-**

- a) the length of the delay;**
- b) the reason for the delay;**
- c) Possibly, the chances of the appeal succeeding if the application is granted; and**
- d) the degree of prejudice to the respondent if the application is granted.**

**The chances of appeal succeeding if the application is granted is merely stated as something for a "possible" consideration, not that it must be considered..."**

[9] Hence, it is now settled that some of the guiding principles are:

- [a] That there be a good and reasonable explanation for the delay;
- [b] That the application be brought without undue delay;
- [c] That no prejudice will be suffered by Respondent.

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

[10] The Applicant's explanation for not filing his appeal within 30 days of delivery of the lower court Judgment was that he was unaware of the date of judgment and therefore did not attend court; and that this was because his erstwhile Advocates were never served with a Judgment Notice. The record does confirm that although the Judgment was written by **Hon. S. Mokuu, SPM**, it was delivered on his behalf by **Hon. Barasa, PM**. Accordingly, it was imperative that notice of the date of Judgment be given to the Applicant's Counsel; or at the very least, notice of delivery be promptly served to enable the Applicant exercise his right of appeal, if need be. That this was not done, in my view, is a good explanation as to why the Applicant was unable to appeal within the statutory appeal period.

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

[11] The Applicant has explained herein that upon being notified on **16 March 2018**, of the existence of the Judgment and the dismissal of his case in **CMCC No. 771 of 2010**, he proceeded to file the instant application for leave. The application having been filed on **28 March 2018**, it cannot be said that there was inordinate delay in filing the application, for the pertinent period for purposes of reckoning time is not the two years of ignorance, but the period from **16 March 2018** when the existence of the lower court decision was brought to the attention of the Applicant.

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

[12] The outcome of the lower court decision favoured the Respondent in that the claim against it was dismissed with costs. Thus between the Applicant and the Respondent, it is plain that the Applicant would be most prejudiced should his application be dismissed as he would then be precluded from exercising his constitutional right of appeal on account of circumstances for which he was not to blame. I would thus find instructive the position taken by the court in Banco Arabe vs. Bank of Uganda [1999] 1 EA 22 that:

**"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."**

[13] In the result, I would find merit in the application dated **28 March 2018** and would allow it with costs. It is accordingly ordered that the proposed appeal be filed forthwith and at any rate within 21 days from the date hereof.

It is so ordered.

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

**OLGA SEWE**

**JUDGE**