



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC MISC CIVIL APPL. NO. 99 OF 2017

THOMAS MUINDI.....1ST APPLICANT

SUMBI THOMAS.....2ND APPLICANT

-VERSUS-

BETH NDAMBUKI.....RESPONDENT

RULING

1. By Notice of Motion dated 23/05/2013 the Applicant seeks orders;

1) That the Applicants be granted leave to appeal out of time against the ruling of the Principal Magistrate Court at Makindu delivered on 19th August, 2010 in Civil Suit No. 80 of 2007.

2) That the costs of this application be provided for.

2. The same is anchored on provisions of Order 51 Rule 1 & 4 Section 79G & 3A CPA Cap 21.

3. It is supported by Affidavit of Johnson Mitey sworn on 23/05/2013 and a further affidavit of Thomas Muindi sworn on 08/07/2014.

4. The Respondent opposes same via grounds of opposition dated 23/10/2013.

5. The grounds of opposition states that: -

1) That there has been inordinate delay which is inexcusable and the court exercises its jurisdiction.

2) The Applicant application is incomplete in that the Applicant have not bothered to attach a copy of the ruling to be appealed against and the Memorandum of Appeal and if the same was filed the same was not served upon the Respondent's Advocates.

3) That the Applicants have filed a suit at CMC Machakos No. 895/2011 against Josephat M. Mutua t/a Eastern Kenya Auctioneers on the same claim and the present application is a duplicity of cases on the same issue.

4) That the present application is vexatious and an abuse of the court process.

5) That judgement in the Makindu case was passed on 20th September, 2007 and the Applicants livestock sold by public auction and the livestock have been slaughtered.

6) That there was no objection by any Objector and the instant application is an afterthought.

6. The Applicant filed submissions but Respondent has not.

APPLICANT'S SUBMISSIONS

7. The Applicants through their Advocates on record, applied to the Makindu Law Courts for certified copies of proceedings on the 25th August 2010. This was only six (6) days from the day the Interlocutory Judgment was delivered.

8. Another letter was sent to the Principal Magistrates Court as a reminder, there was no response from the Principal Magistrate's Court at Makindu and furthermore, on the 8th day of April 2011, another reminder was posted to the court. This letter was never replied.

9. The Advocate on record for the Applicants posted a letter to the Principal Magistrate's Court at Makindu on the 20th day of July 2011. In the letter (attached to the affidavit of Johnson Mitey Advocate), the Applicants Advocates sought to have the court explain the reasons for not responding to the many letter addressed to it.

10. This was followed by another letter to the court on the 25th day of October 2011. The court did not respond to any of these letters from the Applicants Advocates.

11. It was not until the 2nd day of May 2013, when another letter was written by the Advocates that the court supplied the certified copies of proceedings. This was then hand-delivered by the 1st Applicant to the court.

12. Certified copies of proceedings are necessary for a party to lodge to prepare a Memorandum of Appeal, Nyamweya J. in **Peter Githiu Komu –Vs- Suleiman Ndua Kiarie & 3 Others, Nbi Misc. Civil Appl. No. 656 of 2010**, where Nyamweya J. stated that;

“While certified copies of the Judgment and proceedings are not a requirement when filing an appeal, they are necessary in order for an appellant to draft the Memorandum of Appeal required to be filed..... It is therefore evident that the delay in the filing of his appeal was contributed to by the Thika Law Courts registry which did not avail the certified copies of the proceedings and Judgment until 12th July 2000, despite an application for the same having been made on 27th July 1997. This shortcoming on the part of the court registry should not be visited on the Applicant.”

13. The certified copies of the proceedings and ruling on the Application dated the 29th day of September 2008, were delivered on the Applicant's Advocates on the 3rd day of May 2013. The 30-day period for the filing of an appeal had already lapsed. The Applicant's Advocates could not proceed without the documents. It is evident from the many letters to the court that the Applicants herein were keen to have the Appeal filed.

14. It was not until when a letter dated the 2nd day of May 2013, a letter hand delivered by the 1st Applicant to the court when the Advocates on record for the Applicants were supplied with certified copies of the proceedings from the Principal Magistrate's Court at Makindu.

15. By this time, the thirty (30) days period for filing an appeal from the date of the decrees or orders appealed against had lapsed. The Application before this Honorable Court was filed on the 23rd day of May 2013.

16. Angote, J. in **Malindi High Court Civil Appl. No. 45 of 2012**, in allowing an application to appeal out of time, stated;

“I find that the reasons given by the Applicants' Advocate that he delayed in filing the Memorandum of Appeal because he was pursuing the typed proceedings and Judgment to enable him frame the grounds for the Memorandum of Appeal to be plausible.”

17. It is their humble prayer that the Applicants be granted leave to file their appeal out of time as the Respondent will not be prejudiced.

18. Article 159(2) of the Constitution provides that the court should ensure that disputes are heard and determined on their merit and substance, and without undue regard to the technicalities.

19. It is submitted that it will only be just and fair that the parties herein to be allowed to lodge their appeal out of time.

20. In conclusion, it is submitted that it is only just and equitable that the Applicants to be allowed time to file their appeal out of time.

21. After going through the material before the court, I find the issues are;

i. Whether the Applicants have met the threshold of grant of orders sought?

ii. What is the order as to costs?

22. This Court has been called upon to exercise its discretion as a single Judge to extend time for filing a notice of appeal and also grant leave to appeal out of time.

23. In the case of **Leo Sila Mutiso –Vs- Rose Hellen Wangari Mwangi, (Civil Application No. Nbi. 255 of 1997)** (unreported); the Court stated thus regarding how such discretion is to be exercised;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are:-

- First, the length of the delay;

- Secondly, the reason for the delay;

- *Thirdly (possibly), the chances of the appeal succeeding if the application is granted and,*

- *Fourthly, the degree of prejudice to the Respondent if the application is granted.”*

24. See also Njuguna –Vs- Magichu & 73 Others 2003 KLR 507 where court held;

“The discretion exercisable is unfettered. The main concern of the court is to do justice between the parties. Nevertheless, the discretion has to be exercised judicially, that is on sound factual and legal basis.”

25. The above are the principles that I bear in mind in determining this application.

26. The Applicants say that they applied to the Makindu Law Courts for certified copies of proceedings on the 25th August 2010. This was only six (6) days from the day the Interlocutory Judgment was delivered.

27. The proceedings were supplied on 03/05/2013 and instant application dated 23/05/2013 was filed. There is no evidence of the payment of the proceedings upon application of the same.

28. The delay from 03/05/2013 to 23/05/2013 over 14 days after receipt of proceedings is not explained.

29. There is no demonstration of the chances of success of the intended appeal.

30. Already there is a suit over the attached and sold goods subject matter of the ruling to be impugned in the intended appeal.

31. Of course this will prejudice the Respondent by being subjected to multiple proceedings.

32. Further since 2013 the Applicant has not shown why the application has not been prosecuted.

33. Thus court finds that the application is an abuse of the court process and makes the following orders;

1. Application is dismissed.

2. No orders as to costs as Respondent did not file the submissions as agreed.

SIGNED, DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE