



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CIVIL NO. 121 OF 2018

NATIONAL BANK OF KENYA LTD

KEYSIAN AUCTIONEERS.....APPLICANTS

VERSUS

SOLOMON NDIBUI NGECHU.....RESPONDENT

R U L I N G

1. Before me is an application by way of Notice of Motion filed on 11th June, 2018 and brought under Article 159 (2) (d) of the Constitution, Sections 1A, 3A, 75G and 95 of the Civil Procedure seeking an order that leave be granted to the Applicants to lodge an appeal out of time from the Ruling and order in Kiambu CMCC No. 103 of 2017 delivered on 26/04/2018.

2. The application is based on among other grounds that the failure to lodge an appeal within the stipulated time was as a consequence of factors beyond the control of the Applicants and their advocates. The application is supported by the affidavit of **Vincent Juma** the Applicants' advocate who deposed that the ruling to be appealed from was delivered on 26/4/2018 and that only the order part thereof was read out and parties were advised to obtain a copy thereafter. That after numerous requests they received a copy on 4/6/2018. He deposed that by this time the time for lodging an appeal had already lapsed on 26/5/2018. It was his contention that the failure to lodge the appeal within time was beyond their control; that the intended appeal raises arguable issues and that the application will not prejudice the respondent. Lastly, that the application has been filed without undue delay and that the applicants have demonstrated a good and sufficient cause for not filing the appeal within the stipulated time.

3. **Solomon Ndibui Ngechu** the respondent herein filed his replying affidavit on 17th September, 2018. He deposed that the application is fatally defective and an abuse of the Court process. He stated that ruling was delivered on 26/4/2018 and read out in open court and parties directed to obtain a copy and that the applicants did indeed obtain a copy on 3/5/2018 and subsequently failed to file the appeal. He deposed that the decision by the applicants to appeal is an afterthought. He stated that no reasonable explanation has been given by the applicants as to why they were not able to procure the certified copy until 29/5/2018. And further that no prejudice will be suffered by the applicants if the application is dismissed.

4. The application was canvassed by way of oral submissions. Mr. Juma counsel for the applicants submitted that he seeks extension of time to file appeal and placed reliance on his supporting affidavit in explaining delay. He submitted that the court exercises its discretion in granting leave to appeal out of time. He quoted the case of **Mwangi vs Kenya Airways [2003] e KLR** where the court stated that in such applications the court ought to consider period of delay, reason for delay, arguability of appeal and prejudice to the respondent. He urged the court to allow his application.

5. Mr. Musyoka submitted on behalf of the respondent that the ruling to be appealed from was delivered on 26/4/2018 and the Applicants only moved the court in May, and that the Applicants were in court during delivery thus the delay is of their own making. He submitted that the appeal lacks merit and ought not to be allowed.

6. The court has considered the material canvassed in respect of the instant motion. The application is expressed to be brought primarily under Section 79 G and 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules. The judgment that it is sought to be appealed from was delivered on 26th April, 2018.

7. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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

the 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 in time.

8. The successful applicant must demonstrate “good and sufficient cause for not filing the appeal in time.” In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari material* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

9. While the discretion of the court is unfettered, an Applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the invocation of the court’s discretion in his favor.

10. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. A party who seeks for extension of time has the burn of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7.”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

11. The delay of this case, in making the present application was about 15 days since the lapsing of the 30 day period allowed for filing an appeal. The delay is not inordinate in the circumstances. The reason for the delay, though not well substantiated appears reasonable, and on the face of it, the draft memorandum of appeal raises pertinent grounds of appeal. The latter requirement is not mandatory as the Court of Appeal stated in **Thuita Mwangi’s case**.

12. The Respondent has not demonstrated that he will suffer any prejudice if the motion is allowed. At any rate any prejudice can be compensated through costs. The main interest of the court at this stage is to do justice between the parties, and notwithstanding the delay herein, it is my view that justice can still be done between the parties. See **Ivita Kyumbu [1984] KLR 440**.

13. In the circumstances, I am inclined to grant the prayer for leave to file appeal out of time. Such appeal is to be filed within 14 days All costs occasioned by this application will be borne by the Applicant.

DELIVERED AND SIGNED AT KIAMBU THIS 28TH DAY OF MARCH 2019

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C. MEOLI

JUDGE

In The Presence of:-

Mr. Karanja holding brief for Mr. Kiarie for Respondent

Applicant – Absent

