



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 563 OF 2018

PALACINA DEVELOPMENTS LIMITED.....1ST APPLICANT

BARTENO EDWIN KOECH.....2ND APPLICANT

VERSUS

PRESTIGE DISTRIBUTORS (K) LIMITED..... RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 5th November 2018 filed by *Palacina Developments Limited* and *Barteno Edwin Koech* (hereinafter the applicants) seeking that they be granted leave to file an appeal against the orders issued by the lower court on 9th August 2018 out of time.

2. The application is based on the grounds stated on its face and is supported by an affidavit sworn by *Mr. Patrick Muraguri*, learned counsel for the applicants. The applicants contend that they intend to file an appeal against the order made by the lower court dismissing a preliminary objection they had filed seeking that the respondent's suit be dismissed for being statute barred; that the time prescribed for filing the appeal expired as they waited to be supplied with typed copies of the lower court's proceedings and the order subject of their intended appeal; that the appellants have good grounds of appeal and they should be given an opportunity to file and argue their appeal on its merits; that if the application is allowed, the respondent will not suffer any prejudice that cannot be compensated by costs.

3. The motion is opposed through grounds of opposition dated 17th December 2018. The gravamen of the respondent's opposition to the motion is that there has been inordinate delay in the filing of the instant application which has not been satisfactorily explained and that the application is incompetent for not satisfying the requirements of *Section 79 G* of the *Civil Procedure Act (the Act)*. The requirements under *Section 79 G* of the *Act* which the applicants had allegedly failed to comply with were not disclosed.

4. The application was argued orally before me on 6th February 2019. Learned counsel *Mr. Maina* represented the applicants while learned counsel *Mr. Nguji* appeared for the respondent.

5. I have considered the application, the supporting affidavit, the grounds of opposition as well as the rival submissions made by counsel on record for the parties and the authorities cited. I have also considered the nature of the order subject of the intended appeal and the circumstances in which it was issued which are not disputed.

6. The law governing the filing of appeals to the High Court is governed by *Section 79 G* of the *Act* which states 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.”

7. The Court of Appeal in *Thuita Mwangi V Kenya Airways Limited, [2003] eKLR*, gave guidance on the factors a court should consider in the exercise of its discretion in deciding whether or not to grant an application for leave to file an appeal out of time. The court identified four factors as follows:

i. The length of the delay;

ii. The reason for the delay;

iii. The chances of the appeal succeeding if the application is granted; and

iv. The degree of prejudice to the respondent if the application is granted.

See also the Supreme Court's decision in ***Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others, [2014] eKLR***.

8. *Mr. Ngugi* in his submissions argued that the applicants' motion does not fall under the proviso to *Section 79 G* of the *Act* since the applicants have not filed an appeal out of time which can be validated by the court. He urged the court to dismiss the motion on that basis and because the applicants had not availed a certificate of delay by the lower court to certify that the delay in question was caused by the court's failure to process and deliver to the applicants copies of the proceedings and the impugned order.

9. I have read the authority of ***APA Insurance Limited V Michael Kinyanjui Muturi, [2006] eKLR*** which was cited by the respondent in support of its proposition that under the proviso to *Section 79 G* of the *Act*, the court cannot grant an applicant leave to file an appeal out of time but can only validate an appeal which had been filed out of time.

10. In my view, the court's discretion under the proviso to *Section 79 G* of the *Act* is wide and unfettered and is only subject to demonstration by the applicant that he/she had good and sufficient cause for not filing the intended appeal on time. The court's discretion can be exercised to either validate an appeal which had been filed outside the prescribed time or to grant leave for the filing of an intended appeal where the time limited for filing of appeals had expired.

11. In this case, the order sought to be appealed against was delivered on 9th August 2018. The annexure marked PMI shows that on 16th August 2018, the applicants' counsel wrote to the lower court's chief executive officer requesting for typed proceedings and a certified copy of the impugned order. Though dated 16th August 2018, the stamp appearing on the letter shows that it was received in the court registry on 15th October 2018. No explanation has been offered by the applicants for that discrepancy.

12. The above notwithstanding, I find that the period of delay in this case is slightly less than three months considering that the appeal ought to have been filed on or about 9th November 2018. The delay is not inordinate and is excusable. The fact that the applicants did not avail to this court a certificate of delay does not mean that their explanation for the delay does not merit this court's consideration. Under *Section 79 G* of the *Act*, a certificate of delay where one is available only goes towards the computation of the thirty day period prescribed for the filing of appeals but it cannot be used as a means of accounting for any delay in filing an intended appeal.

13. Given the facts disclosed in this application, I am persuaded to find that it would be in the interest of justice to allow the application. I thus exercise my discretion in favour of the applicants and allow the application on condition that the intended appeal is filed within the next 14 days. Costs of the application are awarded to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of April, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mrs. Githae holding brief for Mr. Musyoka Wambua for the applicants

Mr. Ngugi for the respondent

Mr. Salach: Court Assistant