



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL CASE NO. 90 OF 2014

EVANS WAWERU.....APPELLANT

VERSUS

MOI UNIVERSITY.....RESPONDENT

RULING

The applicant filed an application on 15th August 2017 seeking leave to file the appeal out of time and have the memorandum of appeal deemed properly filed and served. It is based on the grounds that the judgment was delivered on two separate dates on two limbs hence the delay. One limb of the judgment was delivered on 27th February 2011 and another on 11th June 2014.

APPLICANT'S CASE

The applicant referred to *Section 79G* of the *Civil Procedure Act* which specified the circumstances under which the trial court may admit an appeal out of time.

The trial court delivered judgment in Eldoret CMCC 1243 of 2003 on 27th June 2011 and directed that the matter proceed for assessment of gratuity and the addendum judgment was delivered on 11th June 2014. The appellant could therefore not extract the decree to the 1st limb of the judgment that had been delivered as it would be incomplete. Without the decree or the order, the memorandum of appeal could not be lodged. The applicant relied on *Order 42 rule 2* of the *Civil Procedure Rules* on the importance of the decree. He also relied on *Section 95* of the *Civil Procedure Code*.

The applicant relied on the case of **Court of Appeal at Nakuru, Civil Application No. Nairobi 287 of 2014 (UR 213/2014), Joseph Mwangi (suing on their own behalf and on behalf of Twendawe Company Limited) vs Kanywamwe Trading Company Limited (2016) eKLR** on the exercise of discretion by the court. The applicant further relied on the *Stanley Kahoro Mwangi* case where the court pronounced itself on granting leave due to a delay that had been explained.

The applicant submitted that the fact that payment was received in settlement of the decretal amount does not hinder him from appealing the trial court's decision.

RESPONDENT'S CASE

The respondent submitted that there was no good cause for delay given. On this point it relied on the case of **Madison Insurance Co. Ltd. Vs Peter Munga Musla & Another [2005] eKLR** on the exercise of discretion to allow an appeal filed out of time.

The respondent submitted that there has been no explanation as to why the appeal was filed 3 years after the 2nd limb of the judgment had been delivered and the respondent had been satisfied that the matter had come to an end. The respondent relied on the case of **Gladys Wamuyu Ngira vs Mary Wamaitha Ruiru (2016) eKLR** on unreasonable delay.

On costs the respondent contends that the applicant bear the costs as per *Order 50 rule 6*.

The respondent acknowledged that the delay between the 1st and 2nd limbs of the judgment is wholly blamed on the trial magistrate. It submits that there was a replying affidavit filed by the then legal officer wherein he deponed that the matter had come to a close upon payment of the award. Further, that the respondent will suffer irreparable loss as settlement payments had already been made.

ISSUES FOR DETERMINATION

- a) Whether the delay in filing the application is inordinate

b) Whether the delay in filing the appeal has been adequately explained

c) Whether leave should be granted

WHETHER THE DELAY IN FILING THE APPLICATION IS INORDINATE

The application was filed on 1st August 2017. The memorandum of appeal was filed on 7th August 2014. The delay in filing the application for leave to file out of time has not been explained.

In *Gladys Wamuyu Ngira v Mary Wamaita Ruiru [2016] eKLR* the court cited *Jaber Mohsen Ali & Another vs Priscillah Boit & Another* where the court held: -

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgement could be unreasonable delay depending on the judgement of the court and any order given thereafter.”

In my opinion a delay of three years in filing the application seeking leave to file out of time amounts to unreasonable delay.

WHETHER THE DELAY IN FILING THE APPEAL HAS BEEN EXPLAINED

Section 79G of the *Civil Procedure Act* states;

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.

Though delay in filing the appeal has been explained, the delay in filing the application to enlarge time has not been explained.

WHETHER LEAVE SHOULD BE GRANTED

Order 50 Rule 6 of the *Civil Procedure Rules* states;

“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”

Section 79G (supra) states that an appeal can be admitted out of time if the court is satisfied that the appellant had good and sufficient cause for not filing it in time. However, the fact of three years in seeking enlargement of time cannot be ignored.

The other crucial issue for determination is whether the delay in filing the application if ignored will occasion injustice in the matter. In my opinion it will. 3 years' delay is inordinate delay and gives rise to abuse of the court process. If the applicant was indeed keen on prosecuting the appeal he would have filed the application soonest possible. He has not explained why it took 3 years to do so.

The decretal sum is already settled and the Respondent moved on satisfied that the matter has come to an end. Reviving it three years after, is unnecessarily stressing the Respondent and is most likely to occasion an injustice. For the reason the application lacks merit and is rejected with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 25th day of April, 2019.

In the presence of;

Ms Rutto holding brief for Mr. Omwenga for the applicant

Mrs. Koech for the Respondent

Mr. Etyang - Court assistant