



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 130 OF 2018

BERNARD KISUA.....1ST APPLICANT

SAMMY MUTISYA MULWA.....2ND APPLICANT

DOMINIC MUTISO KIILU.....3RD APPLICANT

VERSUS

ANNA WAENI NTHANZE & JOSEPH MUTUNE NTHANZE

(Suing as administrators and personal representatives of the estate of

JUSTINA KASIVA NTHANZE-Deceased.....RESPONDENTS

RULING

1. This is an application by the Applicants seeking leave to enlarge time within which to file an appeal from a judgement given in **Machakos CMCC No. 644 of 2016**. The judgement was delivered on 8.2.18. The Applicants did not lodge this Application until 12.4.2018. This was more than thirty-one days after the lapse of the time allowed to lodge appeals.

2. The Applicants depose in the supporting affidavit that the delay was inadvertent due to an omission to instruct their advocate to file an appeal. They annexed a Draft Memorandum of Appeal exhibiting their grounds of dissatisfaction with the Learned Trial Magistrates judgement.

3. The explanation for the delay is not indicated in the affidavit in support of the application.

4. The Application is opposed. The Respondents find this application to be an abuse of the court process and ought not to be allowed. First, they point out that the applicants were aware of the judgement on 27.2.2018 and they never settled the decretal sum. Secondly, they find no explanation for the delay. Third, the 2 months delay is inordinate. In this regard, the Respondents relied on the case of **Antoine Ndiaye v African Virtual University [2015] eKLR**.

5. The Applicant seeks orders for enlargement of time to file Memorandum of Appeal out of time. The intended appeal is from a judgement delivered in Machakos CMCC No. 644 of 2016 on 8.2.2018. The Application is supported by a Supporting Affidavit by Sammy Mutisya Mulwa, the 2nd Plaintiff in the suit in the lower Court.

6. The Application was canvassed by way of written submissions.

7. The issue for determination is whether the Applicant is entitled to an extension of time to lodge his appeal.

8. Section 79G of the Civil Procedure Act is the law applicable in deciding whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

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.

9. The first point taken up by the Respondent is that the Application is an abuse of the court process and ought not to be allowed. This claim has not been demonstrated and thus I am unable to agree with the Respondents that the Application is an abuse of the court process and ought to be dismissed. Every litigant is entitled to approach the court for redress.

10. Having concluded that the Application is not an abuse of the court process, I will now consider the Application on its substance. Case law has provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised in their favour. This was stated in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others (2015) eKLR**

11. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR** listed the factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. They include the following:

- a. **The period of delay;**
- b. **The reason for the delay;**
- c. **The arguability of the appeal;**
- d. **The degree of prejudice which could be suffered by the Respondent if the extension is granted;**
- e. **The importance of compliance with time limits to the particular litigation or issue; and**
- f. **The effect if any on the administration of justice or public interest if any is involved.**

I will now consider the Applicants’ application for extension of time against these factors.

12. The Application was brought almost 2 months after time had run out and the applicant has not explained satisfactorily the reason for the delay. Nevertheless I find this delay not to be inordinate under the circumstances and inspite of the reasons being unsatisfactory. The applicants should be given an opportunity to ventilate their appeal.

13. Looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable. Of course, all that the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is **not** required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.

14. The respondents in their replying affidavit have stated that they are being hindered from realizing the fruits of their judgement, however they are not averse to the deposit of half of the decretal sum in court. I am alive to the apprehensions that they have, however in light of the fact that the applicants have indicated willingness to satisfy the decretal sum there is some semblance of adverse effects that refusing the order could have on the applicants.

15. Consequently, I will grant prayer 3 and 4 in the Applicants Notice of Motion but with the requirement that the Applicant pay the costs of this Application to the Respondents.

16. Next I will address the issue of stay of execution and Order 42 Rule 6 of the Civil Procedure Rules is the law applicable in deciding whether the prayer is merited.

17. The Respondents cited the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** that gave the guiding principles for stay orders, to wit

- a. **The Application was brought without undue delay**
- b. **Substantial loss occasionable to the applicant if the order is not granted.**
- c. **Security for performance**

18. I have looked at the application herein, and with regard to the condition of undue delay, as analyzed above, the delay is not inordinate. With regard to the issue of substantial loss, I am unable to find the substantial loss that the applicants shall suffer save that their right to be heard on appeal will be extinguished if the order is not granted. On the issue of security for performance, the applicants have indicated willingness to deposit security as court directs. Therefore I am satisfied that the applicant has met the basic requirements for grant of this order and to this end I grant prayer 5 of the Applicant’s application.

19. In the result the Applicant’s application dated 12/4/2018 is allowed in the following terms:-

- (a) **An order of stay of execution of the judgement and decree in Machakos CMCC No. 644 of 2016 delivered on 8/2/2018 is granted subject to the Applicants paying half of the decretal sums to the Respondent while the other half to be deposited in a joint**

interest earning account in the names of both advocates within the next thirty (30) days from the date hereof failing which the stay shall lapse.

(b) The Applicants are granted leave to appeal out of time against the judgment in Machakos CMCC No.644 of 2016 and that the Memorandum of Appeal annexed to the application be deemed as duly filed and served upon payment of the requisite fees which should be regularized within the next ten (10) days from the date hereof.

(c) The costs of the application are awarded to the Respondent.

It is so ordered

Dated and delivered at Machakos this 24th day of April, 2019.

D.K. KEMEI

JUDGE