



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**MISC. CIVIL APP NO. 14 OF 2019**

**COAST WATER SERVICES BOARD.....APPLICANT**

**VERSUS**

**REHEMA CHARO KAHINDI & KACHE CHARO MRAMBA**

**(Legal representative of estate of FREDRICK CHARO KADENGE)...1<sup>ST</sup> RESPONDENT**

**ORIENTAL CONTRUCTION & CO. LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

*(application for leave to appeal out of time-substantive justice-article 159- section 79G, 3 A & 97-Civil Procedure Act)*

**BACKGROUND**

1. Before is a Notice of Motion Application dated 13<sup>th</sup> May, 2019, seeking leave to file a memorandum appeal out time and that the cost for the same be provided for.

2. The Application is supported several grounds couched on its face. The summarized grounds are that the Applicant was aggrieved by a ruling delivered in the instant matter by Hon. Julie Oseko, that the Applicant was required to set off the appeal process by filing a memorandum of appeal within 30 days from the date of delivery of the ruling which period of time has already lapsed.

3. The Applicant outlined the reasons for the delay in filing the appeal which he believes are inadvertent and excusable. This is inclusive of the reasons that the delay is not unreasonable, that vide a letter dated 15<sup>th</sup> April 2019 requested the Executive Officer for copies of the proceedings, order and ruling to enable the Applicant to lodge the appeal and is yet to receive the same, that the appeal raises serious arguable grounds, that the Respondents will not suffer any prejudice if the appeal out time is allowed, among others reasons.

**Applicant's Case.**

4. The Notice of Motion Application is further supported by the supporting affidavit of **ALEX MASAKE** dated and filed on the 13<sup>th</sup> of May 2019. The said affidavit in support of the application simply reiterates the abovementioned grounds.

5. The Applicant also filed submissions dated 17<sup>th</sup> May, 2019 in support of the instant application. In the said submissions, it is indicated that the applicant's advocate inadvertently miscalculated the days within which to file the appeal, that the application for extension of time has been made without unreasonable delay.

6. In advancing the foregoing position, the Counsel for the Applicant cited the cases of **Thuita Mwangi vs Kenya Airways Limited (2003) eKLR; Noah Misiko & 26 Others vs Registered Trustees of Christ the King Catholic Church Kibera & 2 Others (2015) eKLR**. Further reliance was placed in terms of **Section 79G** of the Civil Procedure Act and **Section 3A & 95** of the Civil Procedure Act.

**The Law**

7. Orders allowing an applicant to appeal out time are exercisable as per the discretion of the court. The court may invoke its inherent powers to ensure justice has been dispensed in terms of **Section 3A** of the Civil Procedure Act. It stipulates that;

***“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court”***

8. The discretion to enlarge fixed timelines is encapsulated in terms of Section of 95 of the Civil Procedure Act. It provides as follows:

***“Where any period is fixed or granted by court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”***

9. There are severally cases which enshrines the principles which ought to be taken into account by a court considering whether to allow an applicant to appeal out of time. **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.”***

10. 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.”***

11. 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.”***

#### **Discussion and Analysis**

12. I look at the instant the notice of motion application. I have considered its grounds and the fact incorporated in the affidavit in support of it. I have also considered the Applicant’s submissions in support of the application and I take the following view of the matter.

13. The ruling of by the Honorable Chief Magistrate’s Court in Civil Case No. 250 of 2016 was entered on 28<sup>th</sup> March 2019 and the Applicant attempted to file the appeal on the 8<sup>th</sup> of May 2019. The applicant were two days late. This application for leave to appeal out of time was filed on the 13<sup>th</sup> of May, 2019. Thus, in my view the delay cannot be said to be unreasonable and/or inordinate.

14. I have also perused the grounds of appeal encapsulated in the intended memorandum of appeal and I’m satisfied that the Applicant has an arguable case with a probability of success. Since no Respondents did not file any response in opposition of this application, the court assumes that the Respondents will not suffer any prejudice if the application is allowed.

15. In terms of **paragraph 5 (c)** of the application, It is indicated therein that the applicant wrote to the Executive Officer for copies of the proceedings, order and Ruling to enable the Applicant to lodge an Appeal and the same is yet to be availed to the applicant. The same was found to be a plausible ground for allowing an application to appeal out of time in terms of **Angote, J.** in **Malindi High Court Civil Appl. No. 45 of 2012 (supra)**.

16. **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.

#### **Conclusion**

17. The upshot is that the Application dated 13<sup>th</sup> May, 2019 is meritorious. In accordance with this ruling, it shall be disposed as follows:

**a) The Applicants shall file and serve a Memorandum of Appeal within seven days of the date hereof.**

**b) The Applicants shall file the Record of Appeal within thirty days from the date hereof.**

**c) The Applicants shall write to the Deputy Registrar requesting him to place the Appeal before the Judge for directions within fourteen days of the filing of the Record of Appeal.**

18. The costs of this Application will abide by the outcome of the Appeal.

Orders accordingly.

**Dated, signed and delivered at Malindi this 30<sup>th</sup> day of May, 2019.**

**REUBEN NYAKUNDI**

**JUDGE**

**Representation:**

Ms.Sidinyu holding brief for Kibara for applicant present

Ms Ruto for Wambua Kilonzo for respondent present