



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**MISC. APPL. NO. 44 OF 2019**

**BETWEEN**

**BOARD OF GOVERNORS NDIRU SECONDARY SCHOOL.....APPLICANT**

**VERSUS**

**C.F.C STANBIC BANK.....RESPONDENT**

**RULING**

1. By a notice of motion dated 02.04.19 brought under Sections 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules, the applicant prays for orders that

***1) The Applicant be granted leave to appeal out of time against the whole of judgment of Hon. A.Odawo (RM) in KISUMU CMCC NO. 272 OF 2016 BOARD OF GOVERNORS NDIRU SECONDARY SCHOOL VERSUS C.F.C STANBIC BANK delivered on 23<sup>rd</sup> January, 2019***

***2) THAT upon granting leave, the Applicant be given 7 days within which to file and serve its Memorandum of Appeal***

***3) That the costs of this application be provided for***

2. The application is based on the grounds among others that the judgment was delivered on 23<sup>rd</sup> January, 2019 in the absence of the parties; that the Applicant instructed counsel to file an appeal on 5<sup>th</sup> March, 2019; that the appeal is arguable and that the Applicant is ready and willing to provide security as maybe decreed by the court.

3. The application is supported by the affidavit sworn on 02<sup>nd</sup> April, 2019 by Laura Bagwasi, advocate for the applicant in which she reiterates the grounds on the face of the application. The deponent avers that delay in filing the appeal was not deliberate and urges the court to find that the Respondent will not be prejudiced if the orders sought are granted.

4. The application is opposed on the basis of a replying affidavit sworn on 3<sup>rd</sup> May, 2019 by Hamilton Suba who describes himself as the Respondent's Legal Recoveries and Rehabilitation Manager. He avers that this application was brought more than 60 days from the date of delivery of the impugned judgment and does not meet the threshold set out in Section 97G of the Civil Procedure Act since Applicant has not filed the appeal it seeks to have admitted out of time. The Respondent contends that the delay has not been explained and that the Applicant has not demonstrated that it has an arguable appeal and has urged the court to dismiss the application in *toto*.

**Analysis and Determination**

5. I have considered the application in the light of the affidavits on record and submission filed on behalf of both parties.

6. I have also considered the provisions of Section 79G of the Civil Procedure Act which has been interpreted to mean that an applicant seeking leave to have an appeal admitted out of time must in effect file such an appeal and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time (See **Gerald M'limbine V Joseph Kangangi [2009] eKLR**). The foregoing notwithstanding, I find that failure to file the intended appeal before seeking leave to file is a procedural technicality that the court should overlook for the sake of substantive justice pursuant to Article 159(2)(d) of the Constitution of Kenya.

7. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered.

8. The parameters for exercise of court's discretion were concisely laid out in the case of Mwangi v Kenya Airways Ltd [2003] KLR where the Court of Appeal expressed itself thus: -

**“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”. (Emphasis added).**

9. In determining this application; I will endeavor to address each of the principles laid down in the above cited case as follows:

i. **Length and reason for the delay**

10. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which 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 anytime 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”.**

11. The Applicant's counsel avers that she did not attend court on the date of judgment because she had matters in other courts and did not become aware of the judgment until late February, 2019. It was not however until 02.04.19 that the present application was filed. There is no explanation why the Applicant did not move the Court soon after February 2019 when counsel became aware of the judgment or why it had to wait for another 2 months to move the court. I am of the considered view that counsel blundered but nonetheless find that the Applicant should not suffer for mistakes of its counsel. In arriving at this decision, I find fortification in the court of Appeal decision in **PHILLIP CHEMWOLO & ANOTHER –VS- AUGUSTINE KUBEDE [1982-88] KLR 103**.

ii. **The chances of appeal succeeding**

12. I have considered the issues raised in the draft memorandum of appeal and it is apparent that the Applicant is aggrieved by the decision of the trial court. Whether or not the appeal will succeed is not for determination at this stage but this court has a duty to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

iii. **Prejudice to be suffered by the Respondent**

13. It has not been demonstrated that the Respondent is likely to suffer any prejudice if the orders sought are granted. I am alive to the fact that the length of delay in preferring the appeal is itself prejudicial, but the prejudice in my considered view can be adequately compensated by an award for costs.

14. Under the provisions of Section 3A of the Civil Procedure Act Cap 21 Law of Kenya, this court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Consequently, and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise discretion in favour of the Applicant so that it can get an opportunity to ventilate its intended appeal.

15. In the end, the notice of motion dated 02.04.19 is allowed on the following terms:

**1) The Applicant is granted leave to appeal out of time against the whole of judgment of Hon. A.Odawo (RM) in KISUMU CMCC NO. 272 OF 2016 BOARD OF GOVERNORS NDIRU SECONDARY SCHOOL VERSUS C.F.C STANBIC BANK delivered on 23<sup>rd</sup> January, 2019**

**2) The Applicant is granted 7 days within which to file and serve its Memorandum of Appeal**

**3) The Applicant is condemned to pay thrown away costs in the sum of Kshs. 20,000/- to the Respondent within 14 days from today's date**

**DATED, DELIVERED AND SIGNED THIS 27<sup>th</sup> DAY OF June 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

For the Applicant - Ms. Adwar hb for Mr. Olel

For the respondent -Mr. Mbeka hb for Mr. Githaiga