



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MALINDI

CIVIL MISCELLANEOUS APPLICATION NO. 8 OF 2018

FIKIRI CHARO YAA.....APPLICANT

VERSUS

KILIFI CORAL BLOCKS LIMITED.....RESPONDENT

[An application for leave to appeal out of time from the judgement delivered by Hon. L. N. Juma, RM on 31st January, 2017 in Kilifi SRMCCC No. 424 of 2010, Fikiri Charo Yaa v Kilifi Coral Blocks Ltd]

RULING

1. Through the application dated 6th December, 2017 and filed on 6th April, 2018 which is brought pursuant to sections 1A, 3A, 79G and 95 of the Civil Procedure Act, Cap. 21, the Applicant, Fikiri Charo Yaa, prays for orders as follows:-

“1. That this Honourable Court be pleased to grant the Plaintiff/Applicant leave to file an Appeal out of time against the whole Judgment of Honourable L. N. Juma in Kilifi SRMCC No. 424 of 2010 (FIKIRI CHARO YAA VS KILIFI CORAL BLOCKS LIMITED) delivered on 31st January 2017.

2. That consequent to granting prayer one this Honourable Court do deem the attached memorandum of appeal herein as duly and properly filed.

3. That costs of this application be provided for.”

The application is supported by the grounds on its face and the supporting affidavit of the Applicant.

2.The Respondent, Kilifi Coral Blocks Limited, opposes the application through the grounds of opposition dated 16th July, 2018 as follows:-

“1. The Application is fatally defective, bad in law and an utter abuse of the court process as it offends the strict provisions of Section 1A, 1B, 3A, 79G of the Civil Procedure Act and is brought to court in bad faith by the Applicant.

2. The said Application is fundamentally and fatally defective as the orders sought cannot be sustained by the provisions of law appearing on the face thereof.

3. The Application has been filed after inordinate delay and the same is clouted with mischief as the Applicant herein has been indolent in taking appropriate steps to move the Court.

4. The Applicant’s letter dated 2nd June, 2017 and received in the court registry a month later on 6th July, 2017 shows that the Applicant was aware of delivery of judgment on 31st January, 2017. However, the said application has been filed a year later on 6th April, 2018 without sufficient reasons being given to the court for the delay.

5. This Court lacks jurisdiction to entertain this matter.”

3. The Applicant’s case as per the grounds on the face of the application and the affidavit in support of the same is that he had sued the Respondent in Kilifi SRMCCC No. 424 of 2010 for compensation as a result of injuries sustained while working for the Respondent. After conclusion of the trial there was a directive issued that all work-injury claims were to await the delivery of a judgment in a matter before the High Court at Malindi challenging the jurisdiction of the magistrates’ courts to handle such matters. When another directive was later issued for the matters to proceed, a search for the file in the registry disclosed that judgment had been delivered on 31st January, 2017 without notice to his counsel.

4. It is the Applicant's case that the delay in seeking leave to appeal out of time is neither unreasonable nor inordinate. Further, that he has an arguable appeal and no prejudice will be caused to the Respondent if his application is allowed.

5. The appeal was disposed of through written submissions. Counsel for the Applicant urged this court to allow the application since Article 159 of the Constitution requires determination of disputes on merit. Also cited in support of the proposition that matters should be decided on merit is the Ugandan case of **Branco Arabe Espanol v Bank of Uganda [1999] 2 EA 22** as quoted in **Chai Charo Ngoro v Elegant Holdings Limited [2016] eKLR** by Njoki Mwangi, J as follows:-

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on all their merits and that errors, lapses should not necessarily debar a litigant from the pursuit of his right and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.”

6. The Applicant's case is that the Respondent has not shown any prejudice it will suffer if the appeal is allowed to proceed.

7. The Respondent in opposition to the application submitted that the application has been filed after inordinate delay and the same is clothed with mischief as the Applicant has been indolent in taking appropriate steps to move the court. According to the Respondent, a letter annexed to the Applicant's application shows that the Applicant was aware of the delivery of the judgment by 2nd June, 2017 and has failed to give reasons why the application for leave to appeal out of time was filed one year later.

8. Counsel for the Respondent relying on the decisions in **Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] eKLR** and **Joseph Kangethe Kabogo & another v Michael Kinyua Ngari [2012] eKLR** urged this court to find that the Applicant has not provided any explanation for the delay and dismiss the application.

9. Extension of time is an equitable remedy available at the discretion of the court. The party seeking an extension of time has a duty of convincing the court that there were sufficient reasons for filing the appeal out of time. An application for leave to appeal out of time should also be brought without undue delay. Any inordinate and unexplained delay can easily be interpreted to mean that the Applicant is not serious.

10. There is indeed a letter dated 2nd June, 2017 attached to the application. Through the said letter the Applicant's counsel was applying for certified copies of proceedings and judgment. This application was filed on 4th April, 2018, ten months after the request for proceedings was made. No explanation has been given for the delay.

11. In **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR, Civil Application Nai 162 of 2002**, the Court of Appeal cited its decision in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, Civil Application No. Nai 255 of 1997** (unreported), as listing some of the considerations to be taken into account in determining an application for extension of time as follows:-

“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.”

12. The Court of Appeal went ahead and stated that as the power is a discretionary one, any other factor that is relevant to the determination of the application can be considered.

13. The Applicant submits that it has an arguable case because the trial magistrate did not assess the damages he was to be awarded had his claim succeeded. He cites the case of **Lei Masaku v Kalpama Builders [2014] eKLR** in support of the assertion that damages should be assessed even where the suit is dismissed.

14. Considering the pleadings and submissions in respect of the application, I find that the Applicant should be given an opportunity to pursue his constitutional right of appeal. He has a strong point that his intended appeal is arguable for failure by the trial court to indicate the damages he would have been awarded had his case succeeded.

15. I therefore allow the application for leave to appeal out of time and direct the Applicant to file the memorandum of appeal within 14 days from the date of the delivery of this ruling.

16. I have already mentioned the unexplained delay on the part of the Applicant in bringing this application. For that reason, the Respondent will have the costs of this application from the Applicant.

Dated and Signed at Nairobi this 7th day of May, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 20th day of June 2019

R. Nyakundi,

Judge of the High Court