



**REPUBLIC OF KENYA**

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

**MISC APPLICATION NO. 465 OF 2017**

**SIMON NYAKUNDI NYANGAU.....APPELLANT**

**VERSUS**

**HAJAR ENTERPRISES.....1<sup>ST</sup> RESPONDENT**

**JULIUS KARIUKI.....2<sup>ND</sup> RESPONDENT**

**ROBIN KITUNYI MUKHWANA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This is a ruling on application dated 6<sup>th</sup> November 2017. It seeks leave to file appeal out of time. Grounds on the face of the application are that judgment was not issued on 12<sup>th</sup> January 2017 as scheduled and the applicant's advocate followed up through letters with no avail and on perusal of the court file on 13<sup>th</sup> March 2017, the applicant found that judgment had been delivered on 8<sup>th</sup> February 2017 without notice.
2. That by the time the applicant become aware of delivery of judgment period stipulated for filing appeal had passed. That the respondent will not be prejudiced beyond the scope of costs if this application is allowed.
3. This application is supported by affidavit sworn by **Simon Nyakundi Nyangau** the applicant herein. He averred that he instructed an advocate to file suit seeking compensation for accident. He restated ground of the appeal committed to abide by any conditions by the court and sought to be allowed to ventilate his appeal.
4. In response, the respondent filed replying affidavit dated 18<sup>th</sup> April 2018 sworn by **Pauline Waruhiu** and notice of preliminary objection dated 22<sup>nd</sup> November 2018. She averred that the application is not made in good faith and is aimed at delaying or prolonging litigation.
5. That the appellant has not advanced reason to appeal out of time. She averred that the suit was dismissed on 8<sup>th</sup> February 2017 and the applicant filed this application on 13<sup>th</sup> November 2017 and there is no explanation for delay for a period of 7 months; that the delay in filing this application give rise to substantial risk to fair trial and causes serious prejudice to the defendant/respondent herein; that the applicant's indolence should not be visited on the respondent.
6. Preliminary objection dated 22<sup>nd</sup> November 2018 is on the ground that the application is frivolous and abuse of the court process as the same is filed on appeal that does not exist and that it seeks prayers that are incapable of being granted as appeal is based on appeal not filed contrary to **Section 79G** of the **Civil Procedure Act**.
7. Parties agreed to proceed by way of written submissions. Applicant restated grounds on the face of the application and averments in the supporting affidavit
8. Appellant submitted that on 12<sup>th</sup> January 2017 when the matter was coming for judgment in the lower court it was not delivered on ground that it was not ready and the magistrate indicate that it would be delivered on notice and no notice was served on the applicant prior to delivery and only found out that it was delivered on 13<sup>th</sup> July 2017 after follow up letters to the court.
9. Applicant in written submission indicated that a copy of the said judgment has not been availed to the applicant hence it was not annexed to the affidavit in support of the application. The applicant later filed further affidavit on 14<sup>th</sup> May 2019 and annexed a hand written judgment
10. On the preliminary objection, the applicant submitted that **Section 79G** of the **Civil Procedure Rules** provide that appeal from

subordinate court shall be filed within 30 days and further states that appeal may be admitted out of time if the appellant satisfies court that he had good and sufficient case for not filing the appeal in time; that it does not specify that the appellant must have filed the intended memorandum of appeal before being granted leave to lodge appeal out of time; thus the application herein is neither frivolous or vexatious.

### **ANALYSIS AND DETERMINATION**

11. On the issue of failure to attach judgment giving rise to the intended appeal, the applicant filed further affidavit indicating that the judgment was not available at the time of filing this application and has annexed a hand written judgment to the supplementary affidavit. There is therefore no doubt that a judgment was delivered which the applicant feel aggrieved of and seeks to file appeal out of time.

12. In respect to knowledge of delivery of judgment by the applicant, the respondent has not demonstrated whether notice for delivery of judgment was served on the parties by the trial court. I agree with sentiments of **Ngugi J.** in the case of **Efraim Yossef V Rosemary W.Kihiu [2018]eKLR** where he stated as follows:-

**“First it is important to point out that parties are not expected to discover dates... it would be unfair to blame a party for not discovering a judgment that was delivered without notice to the parties”**

13. In the instant case, no notice of delivery of judgment has been attached to confirm that the applicant was aware of its delivery. It would therefore be unfair to blame the appellant for delay in lodging appeal.

14. Lastly, I wish to consider the effect of filing this application without filing the intended appeal. **Section 79G** provide for time for filing appeals from subordinate courts:-

**“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 [Rev. 2012] CAP. 21 Civil Procedure 35 [Issue 1] 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.”**

15. The provision above has not made it mandatory for memorandum of appeal to be filed before leave is sought. What is expected of the applicant is to demonstrate reason for delay to the satisfaction of the court. Appeal is a right accorded to any party who is aggrieved with the decision of the court.

16. From the foregoing, I find explanation for delay in filing the intended appeal satisfactory. I do not see merit in the preliminary objection raised.

### **17. FINAL ORDERS**

1. Application 6<sup>th</sup> November 2017 is hereby allowed. Appellant granted leave to file appeal out of time.
2. The intended appeal to be filed within 7 days from today's date
3. Costs in the cause.

**Ruling dated, signed and delivered at Nakuru this 26<sup>th</sup> day of Sep. 2019.**

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Jeniffer Court Assistant

Ms Ogame Counsel for Applicant.

No appearance for Counsel for Respondent