



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL APPEAL NO. 172 OF 2014**

**PETER KAGO KARIUKI.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**CATHERINE NJERU KARIUKI.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**VERSUS**

**GEORGE KIMULI MWIKYA (Suing as the legal representative of the**

**Estate of MUTUKU KIMULI(Deceased).....RESPONDENT/APPLICANT**

**RULING**

1. The Respondent/ Applicant vide an application dated 1/2/2019 is seeking for an extension of time to file an appeal against the judgement of this court delivered on 7.11.2018. The application was filed in this court on 12.2.2019; almost 3 months after judgment had been delivered. It is supported by the affidavit of Danson Kisini Muema sworn on 1<sup>st</sup> February, 2019. The application is brought under Section 3, 3A of the Appellate Jurisdiction Act, Rule 75 of the Court of Appeal Rules, 2010.

2. The grounds upon which the application is premised are contained in the affidavit of the counsel for the respondent/ applicant and are:

- a) That Judgment was entered in Civil Appeal No. 172 of 2014 on the 7<sup>th</sup> November, 2018 in the sum of Kshs 226,184/-.*
- b) That the counsel for the applicant only got hold of the applicant on 14.12.2018 when the Applicant instructed him to file the appeal.*
- c) That the Applicant's appeal raises arguable issues and has high chances of success.*
- d) That the time within which to file a Notice of Appeal has passed necessitating an application to extend the time and that the court has discretion to extend time.*
- e) That the respondents will suffer no prejudice should this application be allowed.*

3. In the affidavit in reply sworn by Christine Wanjiru dated 19<sup>th</sup> June, 2019, she contends that the applicant has not annexed the draft memorandum of appeal and has thus not demonstrated that his intended appeal has chances of success. That the claims of the deponent explaining the delay are with no evidence as there is no evidence of attempt to locate the applicant; no evidence of instructions to file an appeal. She argued that the application be dismissed since the same is incompetent for failure to cite the relevant law.

4. The appellants thereafter approached this court vide an application dated 20<sup>th</sup> March, 2019 seeking that the funds held in Account Number 0152541430000 at Standard Chartered Bank Limited in the joint names of Muchui and Co Advocates and B.M. Mungata & Co Advocates be disbursed as follows; Kshs 316,457 be paid to B.M. Mungata & Co Advocates and the balance of Kshs 655,373/- plus all accrued interest be paid to Muchui & Co Advocates.

5. The application is brought under Section 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules and the same was filed on 25.3.2019.

6. The grounds upon which the application is premised are contained in the affidavit of Fredrick Otieno Mege and are:

a) *That in compliance with an order for stay pending appeal, the appellants deposited Kshs. 971,830/- vide cheque in the subject bank account as evidence by the cheque and bank statement annexed.*

b) *That the appeal court substituted the finding of the trial court and counsel for the appellant later wrote to counsel for the applicant seeking a refund of the balance as evidenced by letter dated 28<sup>th</sup> November, 2018.*

c) *That the court issued a decree as annexed to the affidavit and marked FOM8 but however the counsel for the applicant has refused to release the said balance hence the application.*

7. In reply to the application was a replying affidavit sworn by George Kimuli Mwikya on 11<sup>th</sup> April, 2019 where he averred that the reason for the refusal was the pending appeal that is yet to be determined. He averred that the monies sought to be released are not inclusive of interest because Section 26(1) of the Civil Procedure Act provides for 6% interest and therefore the amount to be released should include interest of 6% as from 18.7.2014 to date. He urged the court to dismiss the application.

8. The applications were canvassed vide submissions and Learned Counsel B.M. Mungata and Co Advocates cited Section 75 and Section 4 of the Appellate Jurisdiction Act. Section 4 grants the court power to exercise discretion to extend time whereas there is no Section 75 in the said Act. Learned Counsel cited the case of **Edward Njane Nganga & Another v Damaris Wanjiku Kamau & Another (2016) eKLR**, where the court exercised its discretion and granted the applicant time within which to file an appeal though he had filed the notice within time but not the record within the stipulated 45 days. On the application dated 20/3/2019, counsel submitted that the monies sought to be released are not inclusive of interest because Section 26(1) of the Civil Procedure Act provides for 6% interest and therefore the amount to be released should include interest of 6% as from 18.7.2014 to date. Further that the reason for refusal is the pending appeal.

9. Counsel for the appellants submitted that there is no decree with provision for interest and therefore Section 26(1) of the Civil Procedure Act is not applicable and no interest is payable to the applicant.

10. I have considered both applications and the two issues for determination are Firstly whether the court may enlarge the time within which the applicant could file a notice of appeal and Secondly whether the applicant has a lien over the funds held in Account Number 0152541430000 at Standard Chartered Bank Limited in the joint names of Muchui and Co Advocates and B.M. Mungata & Co Advocates.

11. From the evidence as per the affidavit in support of the application and from the reading of Section 7 of the Appellate Jurisdiction Act, this Court has discretion to enlarge the time within which a party to an appeal may do an act if sufficient reason is shown for the enlargement.

Section 7 provides that:

*'The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:.'*

12. The starting point, is to determine whether or not sufficient reason has been shown for the failure to act in time as per the case of **Edward Njane Nganga & Another v Damaris Wanjiku Kamau & Another (2016) eKLR**. According to the affidavit of counsel for the applicant, he only got in touch with the applicant on 14.12.2018. The applicant ought to have sworn an affidavit to that effect so as to convince the court; I am not satisfied with this reasoning. I further note that the applicant has not annexed a copy of the memorandum of appeal and therefore the court cannot establish for a fact that the intended appeal is arguable and hence this seems to disagree with the averment in paragraph 13 of the deponent's affidavit; I only see evidence of a dilatory conduct. I have considered the response to the application and the response does not indicate any prejudice that the appellants will suffer if the application is allowed save that the application was brought under the incorrect provision of the law. Taking this into account, I find that refusal to grant leave to extend time to file a notice of appeal would cause an injustice to the applicant since the delay was as a result of mistake of his Counsel which should not be visited on the innocent litigant. In the result, an extension of time being sought is hereby granted. The Notice of Appeal is to be filed within 7 days from the date hereof.

13. With regard to the 2<sup>nd</sup> issue, I am guided by the provisions of Section 34 of the Civil Procedure Act that provides that (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. The Appellants have annexed a copy of the decree passed by this court and have sought that part of the deposit that was made into Account Number 0152541430000 at Standard Chartered Bank Limited in the joint names of Muchui and Co Advocates and B.M. Mungata & Co Advocates be used to satisfy the same and the balance be released to counsel for the appellants. The applicant had averred that the intended appeal operates as a lien over the amount claimed and also averred that they are entitled to 6% interest on the amount. A look at the decree passed by the court does not provide for interest and therefore the claim for interest cannot be allowed; the court is *functus officio*. Similarly, there is not yet an appeal that has been filed and it would be unfair to allow the intended appeal to hold back the monies in the account as the same would amount to grant of security in pre-emption of an appeal (that has not been filed) and this court has no jurisdiction to grant the same. In this regard the application dated 20.3.2019 is allowed in terms of prayer 3.

14. Both applications having been determined, I order that each party to bear their own costs.

It is so ordered.

Dated and delivered at **Machakos** this 24<sup>th</sup> day of **September 2019**.

**D.K. Kemei**

**Judge**