



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISC APPLICATION NO. 303 OF 2017**

**JTK (suing as the father of WR - Minor).....PLANTIFF/APPLICANT  
VERSUS**

**BONAYA GODANA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOHN MBUTHIA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

*(Application for leave to file notice of appeal out of time in an intended appeal from a judgment of the*

*Principal Magistrates Court at Kangundo (Hon E. Agade (MS.) dated 21<sup>st</sup> July, 2017*

*in Kangundo PMCC 98 of 2015.)*

**RULING**

1. This is an application for leave to file a notice of appeal out of time that was filed vide notice of motion indicated as being brought under Section 3A, 75, 79G of the Civil Procedure Act; Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules.
2. The applicant presumably had sued the defendant in the trial court. It is alleged that a judgement was delivered on 21<sup>st</sup> July, 2017 in which the applicant's case was dismissed.
3. This application was lodged in the registry on 5<sup>th</sup> October, 2017, almost one and half months after the expiration of 30 days within which a notice to appeal must be filed under Section 79G of the Civil Procedure Act.
4. The application is supported by an affidavit of Musili Mbiti an advocate from the firm in conduct of this case. In his affidavit the deponent averred that the judgement in the trial court that the applicant is dissatisfied with was delivered without notice and in the absence of the plaintiff and his counsel. He urged the court that the respondent will not suffer any injustice if the application is allowed and that the application has been brought without inordinate delay. He attached a copy of the draft memorandum of appeal.
5. The application was opposed by B.M. Ngugi, the advocate on record for the respondents who averred that the application is frivolous, misconceived, incompetent and an abuse of court process and should be dismissed. Learned counsel averred that there are no sufficient reasons why the appeal was not lodged within time and maintained that endless litigation should be discouraged.
6. The application was canvassed vide written submissions. Counsel for the applicant cited the case of **Aviation Cargo Support Ltd v St Mark Freight Services Limited (2014) eKLR** where the court observed that the court ought to exercise discretion in favour of an applicant where the application has been brought without inordinate delay. Learned counsel submitted that according to the supporting affidavit, the delay was occasioned by the difficulties of obtaining the court file since judgement was delivered without notice. Learned counsel cited the case of **Mwangi v Kenya Airways Ltd (2003) KLR** that listed 6 conditionalities to be considered in order to exercise discretion in allowing an application similar to the instant one.
7. The respondent had not filed any submissions by the time of writing this ruling.
8. The material part of Section 79G of the Civil Procedure Act, which confers on the court a limited power to extend time, reads as follows:

***“An appeal may be admitted out of time if the appellant satisfies the court that he had good reason for not filing the appeal in time”***

9. It is to be noted that the power can only be exercised if sufficient reason which relates to the inability or failure to take the particular step in time has been given — **Mugo v. Wanjiru, (1970) E.A.481, 485**. The matter being of discretion it is not possible to lay down an invariable rule, but it is necessary that time limits should be treated with respect, and in considering whether a time limit shall be extended, one has to have regard to the circumstances of the case and the merits of the excuse put forward for not adhering to the original time in the first instance.

10. The applicant's contention that the advocate had difficulties on obtaining the court file, in my opinion, was rightly criticized by the learned counsel for the Respondents. The applicant has not shown how he approached the court authorities of his intention to appeal and, or request for the necessary documents to be supplied to him. Learned counsel for the applicant did not refer to this argument in his reply. I can only presume that he deliberately delayed, not having any reasonable and convincing answer to it. If the said delay was the only reason advanced as an excuse, I would have had no difficulty in rejecting this application.

11. My concern at this stage is to identify any good reason for the delay. This has been stated in **Shanti v. Hindocha & Others, (1973) E.A.207** as follows:

“The position of an applicant seeking extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing ‘sufficient cause’ why he should be given more time and the most persuasive reason that he can show, as in **Kehar Singh & Anor v B. D. Bhatt [1962] EA 759**, is that the delay has not been caused, or contributed to by dilatory conduct on his part. But there may be other reasons and these are all matters of degree. He does not necessarily have to show that his appeal has a reasonable prospect of success or even that he has an arguable case, but his application is likely to be viewed more sympathetically if he can do so and if he fails to comply with the requirement set out above he does so at his peril.”

12. As noted earlier the explanation for delay is unsatisfactory. What constitutes factors to be considered were stated in the case of **Mwangi v Kenya Airways Ltd [2003] KLR**. The factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time, are:

*a. The period of delay;*

*b. The reason for the delay;*

*c. The arguability of the appeal;*

*d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;*

*e. The importance of compliance with time limits to the particular litigation or issue; and*

*f. The effect if any on the administration of justice or public interest if any is involved.*

13. From the record, a delay of one and half months is not inordinate. There is a draft memorandum of appeal annexed to the application and the same seemed to challenge the dismissal of a suit that was filed in the trial court. In order not to preempt the appeal, I would give the applicant a chance to argue the appeal despite not having shown the court the actual decision that was delivered. On the aspect of prejudice, there is absolutely no reason here shown to me how the Respondents will be prejudiced by the application; on the other hand, the Applicants risk being denied their right to be heard if the application is not allowed. Consequently I will allow this application for the extension of time and direct that the applicant moves with alacrity.

14. In the result it is my finding that the applicant's application dated 26<sup>th</sup> September 2017 has merit. The same is allowed as prayed in terms of prayer 2 thereof. The applicant is directed to file and serve his memorandum of appeal within ten (10) days from the date of this ruling. There will be no order as to costs.

It is so ordered.

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

**D. K. Kemei**

**Judge**