



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL APPLICATION NO 29 OF 2019**

**MWANGANGI MUTUA.....APPLICANT**

**VERSUS**

**PETER GATHUNGU t/a**

**DAYSTAR AUCTIONEERS .....1<sup>ST</sup> RESPONDENT**

**WARRA ALI MUHORO.....2<sup>ND</sup> RESPONDENT**

**(Being an application for extension of time to file an Appeal out of time against the Judgment and Orders of Honourable Mrs Usui (SRM) dated 9<sup>th</sup> May 2018 in Chief Magistrate's Civil Case No 7141 of 2013)**

**RULING**

**INTRODUCTION**

1. The Applicant's Notice of Motion application dated 22<sup>nd</sup> January 2019 and filed on 23<sup>rd</sup> January 2019 was filed pursuant to the provisions of Sections 79G & 95 of the Civil Procedure Act, Order 50 Rule 6 of the Civil Procedure Rules 2010 and all the enabling provisions of the law. It sought the following orders:-

**1. THAT the Applicant herein be granted extension of time to appeal the Subordinate Court's judgment delivered on 9<sup>th</sup> May 2019.**

**2. THAT the costs of this application be provided for.**

2. His undated Written Submissions were filed on 8<sup>th</sup> April 2019 while the 1<sup>st</sup> Respondent's Written Submissions were dated 26<sup>th</sup> April 2019 and filed on 29<sup>th</sup> May 2019. The 2<sup>nd</sup> Respondent did not file any Written Submissions.

3. Parties requested the court to render its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPLICANT'S CASE**

4. The present application was supported by his Affidavit that he swore on 22<sup>nd</sup> January 2019.

5. He stated that his advocate informed him that Judgment which he sought to appeal against was scheduled to be delivered on 29<sup>th</sup> May 2019. He averred that on 5<sup>th</sup> June 2018, the Trial Court read all the judgments except his. He said that his advocate left his contact with the Trial Court's court clerk so that he could be informed when judgment was to be delivered.

6. He contended that the court clerk subsequently informed his advocate that judgment was delivered on 9<sup>th</sup> May 2018 when his case was dismissed with costs. It was his contention that his advocate only informed him of the delivery of the judgment on 13<sup>th</sup> August 2018.

7. He said that he was aggrieved with the said judgment and wished to appeal against the same. He was emphatic that he had an arguable appeal.

8. He explained that his application for leave to appeal out of time filed on 29<sup>th</sup> August 2018 was dismissed on 23<sup>rd</sup> November 2018 on the ground that the subordinate court had no jurisdiction to extend time to file the appeal.

9. It was his averment that it was only fair that his application be allowed because the misfortunes that had caused the delays herein, were out of his control.

### **THE 1<sup>ST</sup> RESPONDENT'S CASE**

10. On 30<sup>th</sup> January 2019, the 1<sup>st</sup> Respondent filed Grounds of opposition in response to the present application. They were dated the same date. The grounds of opposition were as follows:-

- 1. That the application as filed was misconceived and an abuse of the court process that ought to be struck out with costs.**
- 2. THAT the same was a deliberate attempt by the Applicant to delay the process of execution to recover costs in order to defeat the 1<sup>st</sup> Respondent from enjoying the fruits of his judgment which was obtained lawfully.**
- 3. THAT the reasons granted for failure to appeal on time were not satisfactory and no evidence had been tendered to prove the same.**
- 4. THAT the judgment being a money decree, the Applicant should have deposited the entire costs of Kshs 79,130/= (decretal amount) in a joint account to be held pending the outcome of the intended appeal which in any case had no good chances.**

### **THE 2<sup>ND</sup> RESPONDENT'S CASE**

11. The 2nd Respondent filed Grounds of opposition in response to the present application. The grounds were as follows:-

- 1. THAT the said application was misconceived, an afterthought and generally amounted to an abuse of the court process in that:-**
  - i. There was no reasonable or plausible explanation for the inordinate delay that had been offered.**
  - ii. THAT the applicant's approach and conduct in regard to the matter and specifically the application was cavalier at best and generally off hand.**
  - iii. THAT plaintiff's applicant had not placed before this Honourable Court anything to support the reasons advanced for the delays in filing the appeal.**
- 2. THAT the applicant had not demonstrated to this court that they had any reasonable appeal or grounds of appeal as claimed in the application.**

### **LEGAL ANALYSIS**

12. The Applicant referred this court to the case of **Mohamed & Another vs Haidena [1972] EA 166** where it was held that facts that are not denied in an affidavit ought to be deemed to have been admitted.

13. He relied on the cases of **Phillip Keipto Chemwolo & Another vs Augustine Kubende [1986] KLR 495**, **Branco Arabe Epanol vs Bank of Uganda [1999] 2 EA 22**, **Apa Insurance Limited vs Michael Kinyanjui Mutua [2016] eKLR** amongst other cases and Article 159(2)(d) of the Constitution of Kenya, 2010 to buttress his argument that litigation should be fostered and not hindered and that justice should be administered without undue regard to procedural technicalities.

14. On his part, the 1<sup>st</sup> Respondent submitted that the power to extend time to file an appeal under Section 79G of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules should be exercised judiciously.

15. It set out the factors the Court of Appeal developed for courts to consider when exercising their discretion in applications where leave to file appeal out of time had been sought in the case of **Mwangi vs Kenya Airways Limited [2003] KLR**. The same were as follows:-

- 1. A single appellate judge sitting alone and acting under rule 4 of the Court of Appeal Rules is exercising the powers vested in him alone on behalf of the whole court. A full court can only interfere with the exercise of those entirely discretionary powers for very specific reasons.**
- 2. The circumstances under which the full court would be entitled to interfere with the exercise of the discretionary power by a single judge are similar to those under which an appellate court would be entitled to interfere with the exercise of discretion by a trial judge.**
- 3. Before a full court can interfere with the exercise of a single judge's discretion it would have to be satisfied that in coming to his decision, the single judge has taken into account some irrelevant factor, or that he has failed to take into account a relevant**

***factor, or that he has not applied a correct principle to the issue before him or that taking into account all the circumstances of the case, his decision is plainly wrong.***

16. He argued that the present application was filed two hundred and twenty three (223) days after the time for filing an appeal had run out. It submitted that **“equity does not aid the indolent”** and that **“delay defeats justice.”**

17. It was also his submission that the Applicant failed to give a plausible reason to explain the delay and hence, his advocate should bear the consequences for having failed to inform him of the judgment immediately he got to know of the delivery of the same.

18. In that respect, he referred this court to the case of **Directline Assurance Company Limited vs Salima Salim Hassan [2014] eKLR** where the holding was that while mistakes of an advocate should not be visited on a client, there are certain instances when an advocate should bear the consequences.

19. He submitted that the case in the lower court was filed in 2013 and he should thus enjoy the fruits of his judgment. It was his contention that the Applicant was merely dragging the case in court and that the right to appeal must be weighed against a party's right to enjoy the fruits of his judgment as was held in the case of **Thomas Muthiani Masila & Another vs Muvila Raphael & Another [2018] eKLR.**

20. He emphasised the importance of complying with time limits and relied on the case of **Mohamed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat [2015] eKLR** in which it was held that Article 159(2) (d) of the Constitution of Kenya cannot shield a party from the requirement of law and that it **“is not meant to whitewash every procedural failing...”**

21. While Article 159(2)(d) of the Constitution of Kenya mandates courts to administer justice without procedural technicalities, it is not a panacea of all irregularities and omissions of procedure. It is intended to give a party the opportunity to fully present its case without prejudicing the opposing party out of that applying party's negligence, whether intentional and/or unintentional.

22. Indeed, **“equity aids the vigilant and not the indolent.”** It did appear to this court that there were great lapses in the handling of this case, post the hearing, on the Applicant's side. The court was unable to go into greater detail as his advocate did not swear any affidavit to explain the circumstances under which the judgment was not delivered on 25<sup>th</sup> May 2018, why his advocate went to court on 5<sup>th</sup> June 2018 when judgment was actually delivered on 29<sup>th</sup> May 2019 and his advocate's subsequent discovery on 13<sup>th</sup> August 2018 that judgment was actually delivered on 9<sup>th</sup> May 2018. His advocate left him to explain his (the advocates) omissions.

23. The said advocate caused even more delay by filing an application for leave to file the appeal out of time in the wrong court. Indeed, the subordinate court had no jurisdiction to grant leave to file an appeal out of time. That was a power that could only be exercised by the High Court. However, bearing in mind that the application seeking leave to file an appeal out of time was dismissed on 23<sup>rd</sup> November 2018, it was the view of this court that the filing of the present application about two (2) months later, on 22<sup>nd</sup> January 2019, was not inordinately long. This is because Christmas festivities when law firms are closed were on-going and time also stopped running from 21<sup>st</sup> December 2018 to 6<sup>th</sup> January 2019.

24. Notably, every person is entitled to have a fair trial as envisaged under Article 50(1) of the Constitution of Kenya. The said Article 50(1) of Constitution of Kenya provides as follows:-

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

25. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

26. Accordingly, having considered the parties affidavit evidence, their respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that there would be more injustice in the Appellant being denied an opportunity to ventilate its case on merit.

27. The court was, however, unable to direct the Applicant to deposit the decretal sum into a joint interest earning account in the names of the parties' advocates because no such order had been sought. It could not be granted by virtue of having been raised in 1<sup>st</sup> Respondent's Grounds of opposition.

## **DISPOSITION**

28. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 6<sup>th</sup> November 2018 and filed on 23<sup>rd</sup> November 2018 was merited and the same is hereby allowed in the following terms:-

**1. THAT the Applicant be and is hereby directed to file and serve his Record of Appeal within sixty (60) days from today i.e by 13<sup>th</sup> February 2020**

**2. THAT the Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the placing of the typed certified proceedings and lower court file to enable the Applicant comply with Paragraph 28 (1) hereinabove.**

**3. Costs of the application herein shall be in the cause.**

**4. Either party is at liberty to apply.**

29. It is so ordered.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of November 2019**

**J. KAMAU**

**JUDGE**