



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. APPLICATION NO. 18 OF 2019

FRANCIS MWANGI KIMANI.....APPLICANT

VERSUS

DANIEL KIMANI NJIHIA.....RESPONDENT

RULING

1. For determination is an application by way of notice of motion filed on 24th January, 2019 and brought under Order 50 Rule 6 of the Civil Procedure Rules seeking for an order:

a) That the time within which the Applicant may file appeal against the Judgment delivered on 12th September, 2018 in Thika PMCCC NO. 907 of 2008 be enlarged.

2. The application is based on the key ground that copies of the proceedings and of the judgment were supplied after the expiry of the time allowed to file an appeal. The application is supported by the affidavit of **Francis Mwangi Kimani**, the Applicant herein who deposed that he was dissatisfied with the judgment delivered in Thika PMCCC NO. 907 OF 2008 where he was the Plaintiff. He contended that he applied for a copy of the proceedings and judgment on 24th September, 2018 and that the said copies were furnished to him on 5th December, 2018 after the expiry of the time allowed to lodge the appeal. He deposed that the failure in the timely furnishing of proceedings and judgment occasioned the delay in filing the appeal on time.

3. **Daniel Kimani Njihia**, the Respondent (and erstwhile Defendant in the lower court) opposed the motion by swearing a replying affidavit filed into court on 4th February, 2019. He contended that the application lacks merit and is an abuse of the court process; that the issues raised herein have been litigated in several suits, between the same parties in different courts, from the High Court to the Supreme Court including Nairobi HCCC NO. 6085 of 1990, Court of Appeal Civil Application (Nairobi) No. 146 of 2010 and Supreme Court Civil Application No.3 of 2014 and; and as such, the application is a waste of judicial time. It was stated that the Applicant herein does not explain the inordinate delay of fifty days from the date when he was supplied with the proceedings to the time of filing the instant application. The Respondent contends that there should be an end to litigation.

4. The court directed that the application be disposed of by way of written submissions. The Applicant through his advocate submitted that matters raised in PMCCC NO. 907 of 2008 have never been adjudicated in any other suit as alleged by the Respondent. He contended that the subject of the intended appeal is the order dismissing his claim for damages in respect of alleged wrongful registration by the Respondent, of an inhibition order, against his parcel of land, namely, **LR. No.LOC.1/MUKARARA/253**, an issue that has never been tried at all, but which the lower court declared to be *re judicata*. The court was urged to take judicial notice of the fact that the month of December has many holidays, hence the delay. The court was urged to exercise its power to enlarge time to enable the Applicant file his appeal, which has merit and that an award of costs will suffice to compensate the Respondent for any loss .

5. For his part, the Respondent's counsel asserted that the Applicant is guilty of inordinate delay of fifty days which has not been explained. The case of **James Omwonyo Nyangau v Heritage Insurance Company Limited (2016) eKLR** was cited as to the principles applicable in deciding whether to grant extension of time. It was also submitted that the purported draft memorandum of appeal does not raise any substantive ground of appeal as the issues raised have been litigated between the same parties and that, litigation should come to an end.

6. Order 50 rule 6 of the Civil Procedure Rules which the Applicant has invoked empowers the court to enlarge the time fixed for doing any act or taking any proceedings. For purposes of enlargement of time to file appeal, the other relevant provision is Section 79G of the Civil Procedure Act provides that:

“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 been requisite for the preparation and delivery to the appellants 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.”

7. The successful applicant must demonstrate **“good and sufficient cause for not filing the appeal in time.”** In **Thuita Mwangi v Kenya Airways [2003] eKLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** 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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.” See also **James Omwonyo’s** case.

8. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.

9. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;

6. Whether the application has been brought without undue delay.

7.”

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

10. While the Applicant has attempted to explain the delay between 24th September 2018 and 5th December, 2018 but without any supporting evidence, he is completely silent on subsequent delay. Notwithstanding the period of about 23 days when , pursuant to Order 50 Rule 4 of the Civil Procedure Rules, time does not run, there are 26 or so days of delay for which no explanation is given. This period is not insignificant, given the 29-year history of the dispute between the parties over the suit property, and the fact that the suit in respect of which the appeal is intended was filed in 2008. It behoved the Applicant, in the circumstances to move with alacrity upon receiving the proceedings.

11. The Respondent clearly stands to be prejudiced by the extended litigation relating to the suit property, whether or not new issues were pleaded in the dismissed suit. Considering the draft memorandum of appeal in the context of the undisputed past decisions made in different courts concerning the dispute, the Court is not altogether persuaded of the chances of success of the intended appeal. Litigation must come to an end. In view of all the foregoing, it is my considered view that the application filed on 24th January 2019 ought to be disallowed, with costs to the Respondent. It is so ordered.

DELIVERED AND SIGNED AT KIAMBU THIS 20TH DAY OF DECEMBER 2019.

C. MEOLI

JUDGE

In the presence of:

The Applicant.

The Respondent.

C/A Nancy