



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 250 OF 2019**

**BISMARCK CARRIERS LTD..... APPELLANT/APPLICANT**

**VERSUS**

**LEONARD MUTUA KINGU'U..... RESPONDENT**

**RULING**

1. What remains for determination in this application dated 8.5.2019 are prayers for an order for enlargement of time within which to file an appeal and leave to file the memorandum of appeal out of time. The application is brought under Order 50 Rule 5, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 3A, 3B and 79G of the Civil Procedure Act. It is supported by the affidavit of Jacqueline Ndirangu.
2. The background to the application, as gleaned from the pleadings and the annexures thereto, relates to a civil suit 767 of 2017 in Mavoko where judgement was delivered on 20.3.2019. There is a copy of a draft memorandum of appeal.
3. The grounds were stated briefly in the Notice of Motion and laid out in detail in the affidavit in support of the application where the applicant averred that judgement in the lower court was delivered on 20.3.2019 and the applicant's insurer was not able to trace the original file that was located on 2.5.2019 after which the stipulated time had lapsed. The applicant averred that there will be prejudice suffered if the orders sought are not granted.
4. In opposition to the application, is a replying affidavit dated 14.5.2019. The respondent finds the applicant to be untruthful in averring that the suit file could not be traced as there was communication between the parties with a view to settlement of the judgement decree hence the application lacks merit.
5. The court directed that the matter be canvassed vide written submissions that have been duly filed. Vide submissions filed on 7.6.2019, learned counsel for the applicant in addressing the prayer for enlargement of time placed reliance on Section 79G of the Civil Procedure Act and submitted that there was need to demonstrate that there was no inordinate delay. Counsel cited the case of **Thuita Mwangi v Kenya Airways Limited (2003) eKLR**. According to counsel, the appellant had an arguable appeal, that no prejudice will be suffered by the respondent if the application is allowed and thus urged the court to allow the application.
6. In response, learned counsel for the respondent submitted that the respondent will be prejudiced if the application is allowed and that the same should be dismissed.
7. The issues for determination in this application are firstly **whether the applicant has established sufficient reasons for the court to extend the time within which to lodge the appeal; Secondly whether the applicant should be granted leave to file the appeal out of time and finally whether any injustice will be caused if the application is not granted.**
8. This Court has the discretion, for sufficient cause, to extend time under Section 79G of the Civil Procedure Act. Sufficient cause should relate to the inability to do a particular act.

Section 79G provides as follows:-

***“ 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.”***

9. The above principles were earlier considered by Duffus P in the case of **Mugo & Others v Wanjiru & Another [1970] EA 481** at p.484 where he stated thus;

***"Each application must be decided on the particular circumstances of each case but as a general rule the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal or***

*granting of the application.”*

10. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] eKLR**. Listed the factors which aid our courts in exercising the discretion whether to extend time to file an appeal out of time and they include the following:

*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.*

11. I will bear the above principles in mind as I proceed to determine this application. It is therefore not in dispute that the applicant is aggrieved with the decision of the trial court and has a draft memorandum of appeal annexed to the application. A careful perusal of the replying affidavit does not inform the court the specific reasons why the respondent is opposed to the application save that he is apprehensive that the fruits of his judgement are at risk.

12. In this case, the application was filed on 8.5.2019 that is about one and half months after the judgement was delivered. I find the delay not to be inordinate. I am unable to see the prejudice that the Respondent will suffer if the application is allowed. I therefore find that the applicant has easily met the test for grant of order for extension of time within which to file the appeal.

13. The Applicant has also sought for an order of stay of execution of the decree. I note from the correspondences between the advocates there had been hints at settling the matter. However in view of the applicant's quest to lodge an appeal it is necessary that the applicant should furnish security for the performance of the decree. There is need to balance the interests of the parties. I find an order that the decretal sums be deposited into an interest earning account in the Advocate's name within a certain timeline will be appropriate in the circumstances.

14. Consequently the application dated 8<sup>th</sup> May 2019 is allowed on the following conditions:

*(a) The applicant is granted leave to file and serve memorandum of appeal within 14 days from today.*

*(b) An order of stay of execution of the decree in Mavoko Cmcc 567 of 2017 is hereby granted upon the applicant depositing the decretal amount in an interest earning account in the names of both Advocates within thirty (30) days from the date of this ruling failing which the stay shall lapse.*

*(c) The costs hereof do abide in the appeal.*

It is so ordered.

Dated and delivered at **Machakos** this **18<sup>th</sup>** day of **December, 2019**.

**D. K. Kemei**

**Judge**