



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 39 OF 2019**

**BETWEEN**

**MAUREEN AGUTU.....APPLICANT/APPELLANT**

**VERSUS**

**PAUL MBOYA..... RESPONDENT**

**DIRECTIONS**

1. By a notice of motion dated 27<sup>th</sup> March, 2019 and filed on 28<sup>th</sup> March, 2019 brought under Sections 3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya and Article 159 of the Constitution, the applicant prays for orders that

**1) The Honourable Court be pleased to extend limited for lodging of an appeal**

**2) That the costs of this application be provided for**

2. The application is based on the grounds among others that the delay in filing the appeal was purely inadvertent and is excusable.

3. The application is supported by the affidavit sworn by the Applicant on 27<sup>th</sup> March, 2019 in which she reiterates the grounds on the face of the application. The deponent avers that delay was occasioned by failure on the part of the court to supply certified copies of the proceedings and the judgment.

4. The respondent though served neither opposed the application nor appeared on the hearing date.

**Analysis and Determination**

5. The issue for determination is whether the applicants ought to be granted leave to appeal out of time. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered.

6. The law on extension of time is to be found in Section 95 of the Act which states as follows:

**“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”**

7. Order 50 of the Civil Procedure Rules on the other hand states that:

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed”**

8. The parameters for exercise of court’s discretion were concisely laid out in the case of **Mwangi v Kenya Airways Ltd[2003] KLR** where the Court of Appeal expressed itself thus:-

**“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 in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.**

9. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states: -

**“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 anytime which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order”.**

10. The impugned judgment was delivered on 14.11.18. The applicants had up to 15.12.18 to file the intended appeal. The present application was filed on 28.03.19 which is 4 ½ months outside the time limited for filing an appeal.

11. The Applicant’s assertion that the court went on vacation as the reason for not filing the appeal is untrue for the reason that the magistrate’s courts do not close except on gazetted public holidays.

12. Determining at this juncture that the appeal does or does not raise triable issues will amount to deciding on a matter not before this court. All that this court needs to determine at this juncture is whether the applicant has a *prima facie* case that is triable. (See **Nicholas Kiptoo Arap Korir Salat v. The Independence Election & Boundaries Commission & 7 Others, [2014] eKLR.**)

13. I have however considered the issues raised in the memorandum of appeal and I have no doubt that they are triable.

14. Although the 4 ½ months delay has not been explained to the satisfaction of the court, this court has power under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

15. Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicant.

16. As a result, the notice of motion dated 27<sup>th</sup> March, 2019 and filed on 28<sup>th</sup> March, 2019 is allowed on the following terms:

**1) The applicant is granted leave to appeal out of time**

**2) The Applicant is further directed to file the Appeal not more than 30 days from the date hereof**

**3) The Applicant shall deposit half the decretal sum in an interest earning account of both advocates not more than 30 days from the date hereof**

**4) Costs shall be costs in the Appeal**

**DATED, DELIVERED AND SIGNED ON THIS 18<sup>TH</sup> DAY OF DECEMBER 2019**

**T.W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Amondi/Okodoi**

**FOr the Applicant -**

**For the Respondent -**