



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 143 OF 2018

TOWET MUINDI.....APPLICANT

VERSUS

MUSILI MUTWIWA

MBEKE MUTWIWA.....RESPONDENTS

RULING

1. The applicant has filed an application dated 24.4.2018 seeking to be granted leave to file an appeal out of time in respect to the judgement by Hon Lorot dated 21.2.2018 in Machakos Cmcc No. 533 of 2000. The application is brought under Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is supported by the affidavit of Towet Muindi.
2. The background to the application, as gleaned from the pleadings and the annexures thereto, relates to a **Civil Suit 533 of 2000** in Machakos where judgement was delivered on 21.2.2018. There is a copy of a request for proceedings and judgement as well as 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 21.2.2018 and that the applicant applied and paid for typed proceedings in respect of the judgement which copy was availed on 14.3.2018 after which the stipulated time for appeal had lapsed. The applicant averred that there will be no prejudice suffered by the respondent if the orders sought are granted.
4. In opposition to the application, are grounds of opposition filed by Nzei & Co Advocates dated 3.7.2018. The respondent views the application as being at the instance of an indolent litigant and that the applicant has not demonstrated that he has an arguable appeal.
5. The court directed that the matter be canvassed vide written submissions. Vide submissions filed on 16.5.2019, learned counsel for the applicant relied on the evidence presented vide the supporting affidavit and urged the court to allow the application.
6. In response, learned counsel for the respondent cited Section 79G of the Civil Procedure Act. From the lens of counsel, there is no good reason to allow the application.
7. The issues for determination in this application are firstly whether the applicant has established sufficient reasons for the court to extend the time in which to lodge the appeal. Secondly whether the applicant is guilty of dilatory conduct 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 in 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] KLR**. listed the factors which aid our courts in exercising the discretion whether to extend time to file an appeal out of time, 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 contents of the grounds of opposition in my view, does not inform the court the specific reasons why the respondent is opposed to the application. To my mind, the respondent has not challenged the evidence presented in the application for leave, and in the absence of factual evidence to oppose the same, I am inclined to believe what is before the court. I must observe that an affidavit filed in support of a motion like in this case contains evidence which the applicant seeks to rely on to support his/her case. Documents attached thereto are part of that evidence. Therefore it will not be incorrect to hold that there is no evidence of an arguable appeal and it would be inconceivable not to believe that the applicant applied for a copy of the proceedings but was unable to meet the strict deadlines within which to file the appeal.

12. In this case, the application was filed on 26.4.2018 that is about two months after the judgement was delivered. I find the delay not to be inordinate and the explanation is satisfactory. I am unable to see the prejudice that the Respondent will suffer if the application is allowed as the applicant has easily met the test for grant of order for extension of time within which to file the appeal. The applicant has expressed his wish to prefer an appeal and it would be unfair to deny him that right.

13. Consequently, I will grant prayer one (1) in the Applicants Notice of Motion but with the requirement that the Applicant files his appeal within thirty (30) days from this ruling. The costs shall abide in the appeal.

It is so ordered.

Dated and delivered at Machakos this 18th day of December, 2019.

D. K. Kemei

Judge