



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

MISC. CIVIL APPLICATION NO. 63 OF 2018

JACKSON NDWIGA.....APPLICANT

VERSUS

ELIZABETH THARA NGAHU.....RESPONDENT

RULING

A. Introduction

1. This ruling pertains to the application dated 23rd October 2018 in which the applicant seeks leave to appeal out of time against the judgement in Embu CMCC No. 190 of 2014 delivered on the 10/9/2018.
2. It is the applicant's case that the judgement sought to be appealed against was delivered on the 10th September 2018. On the 12th September 2018 the applicant said he applied for copy of certified proceedings and judgement so as to make an informed decision on whether or not to lodge an appeal. However, the typed judgement had not been availed by time which the requisite time to lodge an appeal had lapsed.
3. It is the applicant's case that the delay occasioned herein is not so inordinate as to be inexcusable and that the applicant will not suffer any prejudice if the application is allowed. The applicant further states that the respondent has already extracted the decree and certificate of costs.
4. The applicant also states that he has an arguable appeal with chances of success and that the respondent will not suffer any prejudice or damage that cannot be compensated by way of costs.
5. In rejoinder, it is the respondent's case that the instant appeal is an afterthought as the applicant should have served her advocate with the letter requesting for the proceedings in order that they would become aware of the intention to lodge an appeal before they proceeded to commence execution proceedings.
6. The respondent further states that the applicant should have applied for the decree or order of the court to enable him file a memorandum of appeal and not the proceedings as stated by the applicant.
7. The respondent further states that if the court is minded to allow the application, the applicant should be required to deposit the total decree amount of Kshs. 1,182,762 plus costs in a joint interest earning account in the names of the two advocates pending the outcome of the intended appeal.
8. The parties agreed to have the instant application determined by their affidavits.

B. Analysis & Determination

9. The singular issues for determination is whether the Applicant is entitled to an extension of time to lodge his appeal. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

“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 appellant 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.”

10. Therefore, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another v Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in **Daphne Parry v Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

11. Our case law has now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

12. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**. 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.**

13. I will now consider the Applicants’ application for extension of time against these factors. I note beforehand that this court is not favoured with the proceedings before the subordinate court.

14. Looking at all the factors in totality, I am unable to agree with the respondent that this application is an abuse of the court’s process.

15. It is noted that the application was brought on the 23rd October 2018 whereas the judgement was delivered on the 10th September 2018 which was only seventeen (17) later. A letter was annexed showing that on the 12th September 2018, the applicant’s advocate applied for copy of certified proceedings and judgements so as to enable the applicant make an informed decision on whether or not to lodge an appeal however the typed judgement had not been availed by time which the requisite time to lodge an appeal had lapsed. Accordingly, I find that this application was filed without undue delay.

16. Secondly, I am unable to see any prejudice that may be caused to the respondent should the orders sought be granted.

17. At this stage, all the applicants have to show is arguability of the appeal. At this point, the applicant is *not* required to persuade the appellate court that the intended or filed appeal has a high probability of success. I am convinced that the applicant has established that he has an arguable appeal.

18. Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense, for example, that the Constitution and the Elections Act place on the timelines for filing Elections Petitions.

19. The upshot of the above is that I find the application dated 23rd October 2018 to be meritorious. It is hereby ordered that;

- a. The applicant is granted leave to appeal out of time against the judgement of Honourable Court in Embu CMCC No. 190 of 2014 delivered on the 10/9/2018.**
- b. The appeal to be filed within seven (7) days failure to which the orders granting leave will be automatically vacated.**
- c. Each party to meet their own costs of this application.**

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Okwaro for Ithiga for Applicant