



**REPUBLIC OF KENYA**

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

**MISCELLAENOUS CIVIL APPLICATION NO. 17 OF 2016**

**JULIUS MUGAMBI RINGERA.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE CHIEF REGISTRAR OF THE JUDICIARY....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The applicant **Julius Mugambi Ringera** who is the plaintiff filed an application dated 17<sup>th</sup> June, 2016 seeking leave to appeal out of time. The application is grounded on the facts that the applicant's counsel who was handling the matter resigned and failed to indicate on the Court attendance that judgment had been delivered. That it was only after a clerk was sent to Baricho Court on 11<sup>th</sup> May, 2016 that it was confirmed that judgment had been delivered on 9<sup>th</sup> March, 2016 and the 30 days within which he could have filed an appeal had lapsed. He further contends that he has an arguable appeal with high chances of success. He also asserts that he will suffer great prejudice if the application is not granted. He further supports the application with his sworn affidavit and a further affidavit contends that the delay in bringing this application was not in-ordinate. He deposes that he had applied for typed proceedings on 21<sup>st</sup> April, 2016 and they were supplied on 20<sup>th</sup> May, 2016.

2. The respondents, the Attorney General and Chief Registrar of the Judiciary filed grounds of opposition contending that the applicant has not explained the reason for the delay. The facts relied on are contradictory and largely portrays incorrectness likely to mislead the Court and cause prejudice and embarrassment to the respondents.

3. The application proceeded by way of written submissions. I have considered the rival submissions by both counsels. The decision whether or not to extend time for filing appeal out of time is an exercise of discretion. It is trite law that discretion of the Court must be exercised judicially. Such an exercise must be based on good and sufficient reasons but not whims and caprice. The Court considers the length of delay and the reasons which explain the delay which must not only be sound but also truthful. The Court must also consider the chances of the appeal succeeding and prejudice if any. That the respondent may suffer if the application is allowed.

4. The applicant deposes that the advocate who was on record failed to indicate that judgment had been delivered in the record of his attendance. This does not seem to be a truthful averment because at the same time the applicant has stated he had applied for typed proceedings and judgment on 21<sup>st</sup> April, 2016 and the same were supplied on 20<sup>th</sup> May, 2016. His contention that it was not until 11<sup>th</sup> May, 2016 that he came to learn that judgment was delivered on 9<sup>th</sup> March, 2016 cannot possibly be true. A question

arises as to how he applied for proceedings and judgment on 21<sup>st</sup> April, 2016 if he was not aware that it was delivered. The applicant is not candid and the reasons he is giving for the delay are not credible. The applicant has not given a plausible reason for the delay. **Section 79G Civil Procedure Act** provides: “Every appeal from subordinate court shall be filed within a period of 30 days from the date of decree or order appealed against.....”The applicant has not explained the reason for the delay of upto three months. Even after he obtained the certified copies of proceedings and judgment on 20<sup>th</sup> May, 2016 he took his time and filed the application a month later.

5. I find that the facts the applicant relies on are not only laced with falsehoods but are also contradictory. They do not meet the threshold stated above to warrant the Court to exercise discretion in his favour. The Court of Appeal in the case of **Paul Musili Wambua -V- Attorney General and three others** in an application for leave to file notice of appeal out of time stated:

**“.....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the Court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”**

This was also stated in **Nicholas Kiptoo Arap Korir V IEBC & 7 Others S.C. No. 16 of 2014** which laid down factors to be followed.

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

**ii. The party who is seeking for extension of time has the burden of laying a basis to the satisfaction of the Court.**

**iii. ....**

**iv. Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the Court.**

**v. Whether there will be any prejudice to be suffered by the Respondents if the extension is granted.**

**vi. The application should be brought without undue delay.**

**vii. ....**

The applicant does not deserve the exercise of discretion in his favor as he has failed to explain the delay of three months. The Memorandum of Appeal raises three grounds. The first and third are basically the same as they have impugned the finding of the trial magistrate on liability while second ground is on failure to appreciate the evidence tendered. I have perused the proceedings of the trial Court. On the face of it, this appeal is not arguable. The applicant has not annexed the judgment but from the evidence the appellant cannot be stated to have an appeal which is likely to succeed.

## **6. In Conclusion**

The applicant has not come to Court with clean hands. The Court of Appeal in **Kisii Petroleum Products Limited -V- Kobil Petroleum Limited and another Civil Application No. 218 of 2005** in an application seeking for extension of time it was stated:

**“In any case, for a court of law to ignore glaring aspects of what would very well amount to**

***attempt to mislead the Court, would mean a state of lawlessness where the more non-candid a party is the more successful in Court he becomes. I cannot be a party to such state of affairs.”***

The applicant has out rightly misled the Court as to the reason for the delay. He has not come to Court with clean hands. This Court cannot aid him. The applicant did not annex the judgment. The proceedings state that the judgment was to be on 21<sup>st</sup> January, 2016. Is the applicant by omitting to annex the judgment trying to hide the date the judgment was delivered? It is only the date on the judgment that can tell. The delay was unreasonable with no sound explanation. There would be prejudice to the respondent in the absence of a credible date when the judgment was entered and when the proceedings do not disclose an appeal with high chances of success. The application is without merits and is dismissed with costs.

***Dated and delivered at Kerugoya this 25<sup>th</sup> day of January 2018.***

**L. W. GITARI**

**JUDGE**

Read out in open Court, Mr. Miano holding brief for Mr. Kibongo for Applicant, M/S Kimotho holding brief for Respondent’s counsel, court assistant Naomi Murage this 25<sup>th</sup> day of January 2018.

**L. W. GITARI**

**JUDGE**

25.01.2018