



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

MISC. CIVIL APPLN. NO. 19 OF 2017

PHILIP O. MATUNGA.....APPLICANT

-VERSUS-

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

RULING

1. Before me is an application by way of the Notice of Motion dated 21/08/2017 seeking leave to file an appeal out of time.
2. The application was made on the grounds as appearing on the face thereof and was supported by the Affidavit sworn by the Applicant's Counsel on 21/08/2017.
3. The Respondent opposed the application by filing Grounds of opposition on 12/09/2017.
4. The application was thereafter heard by way of written submissions and Counsels filed their respective submissions and referred to several judicial decisions thereby culminating into this ruling.
5. The jurisdiction of this Court in dealing with an application for leave to lodge an appeal out of time is *inter alia* donated by **Section 79G of the Civil Procedure Act**, Chapter 21 of the Laws of Kenya. That jurisdiction however must be exercised upon reason since it is discretionary and dependent upon the fulfillment of settled cardinal principles. (See: ***Mwangi Kimenyi Mugwe vs A.H. Kamau, Court of Appeal Civil Appeal No. NAI. 357 of 2003 at Nakuru (unreported)***).
6. Judicially speaking, the principles for consideration in applications for leave to appeal out of time are now well settled. The Court of Appeal in considering an application for extension of time to file and serve a Record of Appeal under the Court of Appeal Rules (which principles equally apply in the current instance) in ***Gachero & Ano -vs- Poiner Holdings (A) Ltd & Ano.(2008) KLR 315*** had the following to say:

“The powers of the Court (of Appeal) in an application for extension of time (under the Court of Appeal Rules, Rule 4) were discretionary and unfettered. However in executing its discretion, this Court would consider the length of the delay, the explanation or reason given for it (and) whether the intended appeal was arguable.....”

The above was restated in the decision of M.S.A Makhandia, J (as he then was) in ***Benjamin G. Ndegwa vs C. N. Murungaru (2009) eKLR***.

7. Other factors for such consideration were stated by the Court of Appeal in ***Civil Application No. Nai. 41 of 2014 Samiyan Kaur Devinder Singh vs Speedway Investment Ltd & CFC Stanbic Bank Limited (UR 31/2014)*** to include: -

- (a) **The effect of the delay in public administration of justice;**
- (b) **The importance of compliance with time-lines in litigation;**
- (c) **The resources of the parties;**
- (d) **Whether the matter raises issued of public importance;**
- (e) **If the Applicant has been diligent.**

8. The net effect of all the above considerations is to foster a quicker, fair and equitable disposal of disputes between parties, a calling which all persons and this Court is constitutionally-bound to uphold. However, in doing so this Court must endeavor to do justice to the parties.

9. The Applicant's Counsel avers that he did not attend court on the day of judgment, that is 17/05/2017, since he had inadvertently forgotten to diarize the matter. That, he only learnt at the court Registry on 27/06/2017 of the delivery of the judgment and immediately informed the Applicant who then instructed the Counsel to lodge an appeal hence the current application. Counsel prayed that he be excused as the mistake was purely human and unintended. He annexed a copy of the intended Memorandum of Appeal; a copy of a letter requesting for the proceedings and the judgment and copies the proceedings and the judgment as exhibits.

10. The Respondent opposed the application and contended that no sufficient grounds were given to warrant the opening of a matter long settled.

11. I have considered the application against the above considerations and the various decisions referred to. The reason for the delay was purely on the part of the Counsel and the Counsel owned up. He even prayed for pardon and undertook to quicken the hearing of the appeal in the event the application is allowed. Counsel has already obtained copies of the judgment and proceedings. The period of the delay is around 3 months. I find that the Counsel has sufficiently explained the delay. That kind of mistake can occur to anyone. It is therefore excusable more so given that the Counsel moved with speed upon learning of the judgment and has since taken proactive steps in the intended appeal. I hence find that the client ought not to suffer for the error on the part of his Counsel.

12. In light of the above this Court do hereby make the following orders:

(a) The Applicant herein be and is hereby granted leave to file and serve the Memorandum of Appeal within 10 (ten) days of today.

(b) The Applicant herein shall file and serve the Record of Appeal within the next 30 days of (a) above.

(c) The Appeal shall be listed for directions within 30 days of compliance of (b) hereinabove.

(d) The Applicant shall bear the costs of the application.

(e) This matter be and is hereby marked as closed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of March 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. E. Oduk Counsel instructed by Messrs. Oduk & Company Advocates for the Applicant.

Miss Anyango Counsel instructed by Messrs. Otieno Yogo & Company Advocates for the Respondent.

Ms. Nyauke - Court Assistant