



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 215A OF 2013

AMRI MCHORO MWAMURI.....PLAINTIFF/APPLICANT

VERSUS

THE INDIAN OCEAN BEACH CLUB....DEFENDANT/RESPONDENT

RULING

1. The application dated 22nd October, 2013 is premised on the provisions of Order 50 rule 5, Order 51 rule 1 of the Civil Procedure Rules, Sections 3, 3A, 1A, 1B, 63(e) and 79G of the Civil Procedure Act (Cap 21) Laws of Kenya and all enabling Acts and provisions of the law. It seeks the following orders:-

(i) That this Honourable Court be pleased to grant leave to the applicants herein to file an appeal out of time in respect of the judgment made on 8th August, 2012 in SRMCC No. 64 of 2010 (Kwale), Amri Mchoro Mwamuri vs the Indian Ocean Beach Club; and

(ii) That the costs of the application be provided for.

2. The application is supported by the affidavit of William C. Kenga Advocate sworn on 22nd October, 2013. The respondent filed its grounds of opposition on 15th September, 2014. The applicant's Counsel filed his written submissions on 13th October, 2014 and Counsel for the respondent filed his on 20th May, 2015.

3. This court has considered the written submissions filed by the Counsel for parties. The applicant's are to the effect that the Judgment the subject of the intended appeal was delivered on 8th August, 2012. His Counsel applied for certified copies of proceedings and Judgment on 22nd August, 2012 as per the annexure marked WCK-2 attached to the said Counsel's affidavit. The submissions indicate that copies of proceedings and Judgment were collected on 25th September, 2013 as shown by the certificate of delay attached to the said affidavit as annexure WCK-3. The present application was filed on 22nd October, 2013 which was within a month of receiving the certificate of delay.

4. The applicant's Counsel submitted that although the application is opposed, no prejudice will be suffered by the respondent if the orders are granted. He cited Nairobi High Court Miscellaneous Civil Application No. 656 of 2010, **Peter Githiu Komu vs Suleiman Ndua Kiarie and 3 Others** as well as Nairobi Court of Appeal No. 41 of 2014, **Samiyan Kaur Davinder Singh vs Speedway Investment Limited and Another**, to fortify his arguments. He prayed for the application to be allowed.

5. The respondent in its written submissions urged this court not to exercise its discretion in favour of the applicant for the reasons that the Judgment in issue was delivered on 8th August, 2012 in the presence of the applicant's Advocate. The submissions indicate that under Section 79G of the Civil Procedure Act, an appeal from the lower court to the High Court must be lodged within a period of 30 days from the date of the Judgment and a memorandum of appeal filed in accordance with Order 42 rule 1 of the Civil Procedure Rules. It was stated that the applicant was at liberty to file his memorandum of appeal within 30 days with or without a certified copy of the decree/order as per the provisions of Order 42 rule 2 of the Civil Procedure Rules. Counsel for the respondent relied on the case of **Joseph Kamau Ndungu and Another vs Peter Njuguna Kamau** [2014] eKLR to support his argument.

6. It was submitted for the respondent that the applicant failed to file an appeal for over 14 months. It was also stated that Section 79G of the Civil Procedure Act provides a period of 30 days to give the lower court time to certify a copy of the decree or order but the 30 days grace period has not been set aside for pursuing certified copies of proceedings and Judgment as the applicant did through the letter dated 22nd August, 2012. In the respondent's Counsel's view, the action taken by the applicant showed lack of diligence in taking the appropriate steps to file an appeal out of time. Counsel relied on the case of **Kyuma vs Kyema** [1988] KLR 185 that was quoted with approval in the case of **Jennifer Waruini Kamau vs Muturu Mwangi** [2014] eKLR, to demonstrate that under the provisions of Section 79G of the Civil Procedure Act, it was incumbent upon the applicant to apply for a copy of the order or a decree and obtain and file a certificate of delay

certifying the time taken to prepare and deliver the order or decree, where the appeal is filed out of time.

7. The respondent's Counsel argued that the respondent will suffer prejudice if it is dragged through an appeal for a decision that was made 2 years post the filing of the present application and 4 years after commencement of the suit before the lower court. Counsel invited the court to consider the case of **David Mathenge Muchiri vs M. K.** [2014] eKLR where the case of **Faraj Omar Mwinyikombo vs Telkom Kenya Limited** [2013] eKLR was cited with approval.

ANALYSIS AND DETERMINATION

The issue for determination is if sufficient cause has been shown for grant of leave to appeal out of time.

8. The first observation this court has made from the grounds of opposition filed by the respondent is that they relate to factual issues which should have been best captured by way of a replying affidavit.

9. The decision in Kwale SRMCC No. 64 of 2010, **Amri Mchoro Mwamuri vs The Indian Ocean Beach Club** was delivered on 8th August, 2012 where an award of Kshs. 77,499/= was made in favour of the applicant herein. On 22nd August, 2012 Counsel for the applicant wrote to the Executive Officer, Civil Registry Kwale Law Courts requesting for certified copies of the proceedings and Judgment for purposes of lodging an appeal, as per annexure WCK-2. A certificate of delay attached as annexure WCK-3 to the applicant's Counsel's affidavit indicates that the applicant applied for both typed and certified copies of the proceedings on 22nd August, 2012 and that the same were ready for collection on 19th September, 2013. They were collected on 25th September, 2013. Attached to the said affidavit is a draft memorandum of appeal marked as exhibit WCK-5.

10. The applicant's main line of argument is that the delay in filing a memorandum of appeal was as a result of delay in obtaining certified copies of the proceedings and Judgment as evidenced by the certificate of delay.

11. The respondent's objection to the application on the other hand is pegged on the argument that a certificate of delay is issued to certify the time that was required for preparation of a copy of decree or order of the lower court. Their second line of argument is that the applicant has not shown reasonable or sufficient cause to justify the grant of the orders sought.

12. Section 79G of the Civil Procedure Act 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.”

13. Order 42 rules 1, 2 and 3 provide as follows:-

“1. (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

2. Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.”

14. It is apparent that the applicant erred by applying for a certificate of delay in respect to the proceedings and Judgment. As submitted by Counsel for the respondent, Section 79G provides for issuance of a certificate of delay with regard to a decree or order as was held in the case of **Kyuma vs Kyema** (supra). Secondly, whereas the applicant filed an application seeking leave to appeal out of time, it failed to file a memorandum of appeal contemporaneously with the said application.

15. In **Gerald M'liumbine vs Joseph Kangangi** [2009] eKLR, Emukule J (as he then was) had the following to state with regard to the proviso to Section 79G of the Civil Procedure Act:-

“My understanding of the proviso to section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process which under section 79B states”

16. In addition to the above decision, I have considered the authorities cited by Counsel on record. I am persuaded by the arguments by Counsel for the respondent that the applicant did not pursue his application with due diligence. It is also apparent that if I grant the orders sought, the respondent will be prejudiced by being drawn into an appeal for a matter that was decided in the year 2012 in which no indication was given to it, that there was an intention of an appeal being filed a year after the delivery of the Judgment before the lower court.

17. It is therefore my finding that the applicant is not deserving of the orders sought. The application dated 22nd October, 2013 is hereby dismissed. Costs are awarded to the respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of April, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the applicant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant