



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 38 OF 2017

RIZIKI ENTERPRISES.....APPLICANT

VERSUS

SAFARI KADENGE KATHUPA.....RESPONDENT

RULING

[THE APPLICANT'S NOTICE OF MOTION APPLICATION DATED 30TH AUGUST, 2017]

1. Before this Court is the application dated 30th August, 2017 and filed on 1st September, 2017 by Riziki Enterprises Limited seeking two main orders: grant of leave to appeal out of time and stay of execution of the judgement intended to be appealed against. The application is supported by the grounds on its face, an affidavit sworn by Kelvin Mbura the Applicant's counsel on 30th August, 2017 in support of the application, a further affidavit sworn by the said Applicant's counsel on 13th October, 2017 and annexures to the affidavits.
2. The Respondent, Safari Kadenge Kathupa, opposed the application through a replying affidavit sworn on 29th September, 2017.
3. The background and basis of the Applicant's claim is that judgement in Malindi CMCC No. 326 of 2017, Safari Kadenge Kathupa v Riziki Enterprises Limited was delivered on 26th June, 2017 without notice to the Applicant as the judgement was not delivered on the scheduled date being 20th June, 2017.
4. Upon learning about the judgement, the Applicant's counsel through a letter dated 15th August, 2017 wrote to the Executive Officer of the Chief Magistrate's Court seeking certified copies of proceedings and judgement. The requested documents had not been supplied by the time of filing of the application.
5. According to the Applicant's counsel, he had visited the lower court's registry, perused the file and prepared a draft memorandum of appeal. The Applicant urged the Court to hold the said memorandum of appeal as duly filed and served upon the grant of leave to appeal out of time.
6. The Applicant asserts that it has an arguable appeal. According to the Applicant, the delay in filing the appeal was occasioned by the fact that the Applicant's advocates had to seek further instructions from the Applicant's directors and the delay by the court in supplying typed proceedings and a certified copy of the judgement.
7. On the request for stay of execution, it was averred on behalf of the Applicant that the Respondent had embarked on the execution process. Two letters from the Respondent's counsel, one dated 28th June, 2017 and the other one dated 1st August, 2017, were exhibited in support of the assertion. The Applicant stated that it was willing to abide by any conditions and terms the court will impose on the provision of security.
8. The Applicant filed submissions on 7th November, 2017 and cited the decisions in the cases of **Edward Njane Nganga & another v Damaris Kamau & another [2016] eKLR** and **Casablanca Holdings Ltd v Kenya Power & Lighting Company Limited [2017] eKLR** in support of the application.
9. The Respondent's position is that there was inordinate delay on the part of the Applicant in seeking extension of time to file an appeal and that the Applicant has not shown sufficient cause as to why the appeal was not filed within time.
10. It is the Respondent's position that if leave is granted to the Applicant to appeal out of time, the Applicant should be directed to deposit the entire decretal amount in a joint interest earning bank account in the names of the advocates for the parties.

11. Is the Applicant deserving of an extension of time to file an appeal? Section 79G of the Civil Procedure Act, Cap. 21 provides that appeals from subordinate courts to this court “**shall be filed within a period of thirty days from the date of the decree or order appealed against.**” There is a proviso 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.**”

12. In the case of **Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] eKLR** the Court of Appeal enumerated the principles guiding the grant of leave to appeal out of time. The Court stated that:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors.”

13. On the same issue, D.K.S. Aganyanya, JA in the case of **Monica Malel & anther v Republic & 2 others [2009] eKLR** opined that:

“Matters which the Court takes into account when considering whether or not to extend time are, generally:

- (a) The length of the delay**
- (b) The reason for the delay**
- (c) Possibly the chances of the appeal succeeding if the application is granted and**
- (d) The degree of prejudice to the respondent if the application is granted.**

The list of these factors as given above is not exhaustive.”

14. The Supreme Court’s input on the same issue is found in the case of **Salat v Independent Electoral & Boundaries Commission & 7 others [2014] KLR** wherein the Court stated that:

“17. The Court ought to consider the following principles in exercising the discretion to extend time for filing an appeal:

- 1. 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;**
- 2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case by case basis;**
- 4. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;**
- 5. Whether there would be any prejudice suffered by the respondents if the extension of time was granted;**
- 6. Whether the application had been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”**

15. In exercising the discretion as to whether to extend time to file an appeal, the court will be guided by the facts of the case before it. In my view, the conduct of the parties, as I shall shortly demonstrate, plays an important role.

16. The Applicant heaps blame on the lower court for the delay in filing the appeal. It is possible that the Applicant was indeed not notified of the date of the delivery of the judgement. However, through a letter dated 28th June, 2017 received by the Applicant’s counsel on 30th June, 2017 the Applicant’s counsel was notified of the delivery of the judgement. The Applicant did not take any action.

17. Again on 1st August, 2017 the Applicant’s counsel was reminded of the letter of 28th June, 2017. The Applicant’s counsel waited for two weeks before writing to the Executive Officer of the court seeking copies of proceedings and judgment. It is therefore clear that the Applicant’s claim that it was not aware of the delivery of the judgement by the trial Court is not correct. Leave to appeal out of time cannot therefore be granted on the basis that the Applicant was unaware of the judgement.

18. The conduct of the Applicant was lethargic. Its actions were prompted by the Respondent’s desire to reap the fruits of the judgement. The Respondent was entitled to demand the decretal amount from the Applicant. It is only after the Respondent asked for its dues that the Applicant took action.

19. There is no evidence placed on record to show that the filing of the appeal was delayed by the instructions that were being sought from the Applicant's directors.

20. In my view, this is not one case that merits the court's authority to file an appeal out of time. There was no intention to file an appeal and all the reasons given for the delay are mere excuses meant to attract the sympathy of the court. I decline the prayer for leave to file an appeal out of time.

21. Had I granted leave to appeal out of time, I would have directed the Applicant to deposit the decretal amount in court within 30 days of this ruling.

22. Otherwise, the application stands dismissed in its entirety. The Respondent will have the costs of the application.

Dated, signed and delivered at Malindi this 19th day of April, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT