



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISCELLANEOUS CIVIL APPLICATION NO. 5 OF 2018**

**KESI JINDWA KARUKU.....APPLICANT**

**VERSUS**

**STEEL MAKERS LTD.....RESPONDENT**

**RULING**

**[THE APPLICANT'S NOTICE OF MOTION APPLICATION DATED 8<sup>TH</sup> MARCH, 2018]**

1. In the application dated 8<sup>th</sup> March, 2018 brought under sections 1A, 3, 3A, 79G and 95 of the Civil Procedure Act, Order 42 Rule 6(2) and Order 50 Rule 1 of the Civil Procedure Rules, 2010 the Applicant, Kesi Jindwa Karuku seeks leave to file an appeal out of time against the judgement delivered on 19<sup>th</sup> December, 2017 in Mariakani SRM's Court Civil Case No. 300 of 2016, Kesi Jindwa Karuku v Steel Makers Ltd.

2. The Respondent opposed the application through grounds of opposition dated 9<sup>th</sup> March, 2018 as follows:

**“1. The Application has been made after an unreasonable delay.**

**2. That the application is an abuse of the court process.**

**3. That the law requires an Applicant to file an appeal first and then seek leave of the court to have the same admitted out of the statutory period of time.**

**4. The orders sought ought not be granted on a non-existent appeal”**

3. From the grounds on the face of the application and the supporting affidavit sworn by Pauline Awino Osino, judgement was delivered by the trial court on 19<sup>th</sup> December, 2017 but counsel for the Applicant only managed to access a copy of the judgement on 27<sup>th</sup> February, 2018.

4. According to the Applicant, the offices of his advocates were closed for the December holidays and reopened on 22<sup>nd</sup> January, 2018. Further, that counsel wrote to the court on 12<sup>th</sup> February, 2018 and only managed to get a copy of the judgement on 27<sup>th</sup> February, 2018.

5. The question to be answered in this ruling is whether the Applicant has satisfied the court that he had good and sufficient cause for not filing the appeal in time. A perusal of his application clearly shows that the Applicant sought a copy of the trial court's judgement and upon perusing the same discovered that his case had been dismissed. He immediately thereafter filed this application. There was therefore no undue delay.

6. The principles governing the grant of leave to appeal out of time were enunciated by the Court of Appeal in the case of **Stanley Kahoro Mwangi & 2 others v Kanyamiwi Trading Company Limited [2015] eKLR** thus:

**“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.”**

7. The instant application is in tandem with the stated principles and I find no reason as to why the application should not be granted. I say so because the Applicant has given satisfactory reasons for the delay.

8. The Respondent has however raised a pertinent ground of opposition namely that no appeal has been filed and leave to appeal out of time cannot be granted in respect of a non-existent appeal. This point finds support in the decision of Njoki Mwangi, J in **Casablanca Holdings Limited v Kenya Power & Lighting Co. Ltd [2017] eKLR** wherein the learned Judge cited the finding in the case of **Gerald M Limelane v Joseph Kengangi [2009] eKLR** that:

**“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 leave of the court to have 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 stipulated period. To do so would actually be an abuse of the court’s process under section 79B.”**

9. A perusal of the file herein shows that the Applicant has exhibited a copy of the Judgment he intends to appeal against and a proposed memorandum of appeal. He has thus demonstrated his seriousness to pursue the appeal and it would be unjust to deny him an opportunity to ventilate his grievances through an appeal. In the circumstances, I find that the grounds of opposition are without merit. The application succeeds. The Applicant is granted leave to file and serve his appeal within ten days from the date of this ruling. The costs of this application to abide the outcome of the appeal.

**Dated, signed and delivered at Malindi this 17<sup>th</sup> day of April, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**