



**REPUBLIC OF KENYA**

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

**MISC APPLICATION NO. 44 OF 2018**

**MOSES MURIUKI**

**ALBAN NTULULU MUKIRE**

**LUCY KAGENDO**

**JOSEPH MUTIUNGO**

**DANIEL KABARUA.....APPLICANTS**

**-VS-**

**ANKAMIA WATER PROJECT (SUING THROUGH ITS OFFICIALS)**

**JACOB BASITHI**

**SILAS KATHUR**

**HARRIET MUKAME.....RESPONDENTS**

**RULING**

1. Before me is a Motion on Notice dated 5<sup>th</sup> March 2018, pursuant to **Sections 65 (1) and 79G of the Civil Procedure Act Cap 21, Laws of Kenya, Order 42 Rule 2, Order 50 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010** in which the Applicants seek extension of time for filing the Memorandum of Appeal against the judgment made on 9<sup>th</sup> October, 2017 by Hon. Ambasi C.M in Meru CMCC No. 416 of 2014 between the parties herein.

2. The grounds upon which the motion is grounded upon were set out in the body of the Motion and two affidavits sworn in support thereof. In the affidavit sworn by Charles Benedict Mwangela, Advocate who has the conduct of the matter on behalf of the applicants, it was deposed that, being aggrieved and dissatisfied with a judgment delivered by the lower court on 9<sup>th</sup> October 2017, the applicants instructed his law firm to appeal against the subject judgment. That he thereupon instructed his associate and resident advocate, Meru office branch, Miss Gloria Kaimuri to carry out the instructions of filling a Memorandum of Appeal in the High Court. That he was at the time overwhelmingly engaged in various election petitions which were time bound.

3. That he discovered that no memorandum had been filed on 27<sup>th</sup> February 2018, when his Meru branch office emailed him a copy of certificate of stated costs by advocates for the plaintiffs in the lower court. On enquiring, his said associate he informed him that she had not filed the Memorandum of Appeal because she was still waiting to be supplied with certified copies of the proceedings. That it was evident that his associate had misapprehended the law on what documentation was required to lodge the Memorandum of appeal. He swore that the intended appeal raises triable issues with reasonable chances of success and thus urged the court to allow the application.

4. The second Affidavit was sworn by Moses Muriuki, the 1<sup>st</sup> Applicant, on 5<sup>th</sup> March, 2018. He swore that the applicants had given their Advocates prompt instructions to prefer an appeal against the impugned judgment. That at all times the applicants were of the mistaken belief that an appeal had been lodged. That the Respondents will suffer no prejudice if the orders sought are granted. He urged that the applicants should not suffer as a result of a mistake of their advocates.

5. The application was opposed vide a replying affidavit of Jacob Baithili Mutiria sworn on 20<sup>th</sup> March, 2018. He deposed that the application was an afterthought as it was being brought after 6 months of the delivery of the judgment. That Miss Gloria Mwilaria Advocate was in full conduct of the matter and at no time did Charles Benedict Mwangela appear in the proceedings. That in the premises, Mr. Mwangela's engagement in election petitions has no bearing in this case. That the judgment and decree which the Applicants were seeking to

challenge had been fully implemented and it would be an exercise in futility to allow the application. He urged that the application be dismissed.

6. I have considered the affidavits on record. This is an application for extension of time to file an appeal. **Section 79G of the Civil Procedure Act** gives the court the discretion to extend time and admit an appeal out of time if it is satisfied that there is sufficient cause for not filing the appeal within time.

7. In **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015) eKLR** the Court of Appeal stated that:-

***“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.*”**

***The parameters for the exercise of such discretion are clear. See MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486 and FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332 OF 2004 (unreported) where this court rendered itself 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 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.”(emphasis added).***

8. In the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** the Supreme Court of Kenya held that:-

***“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a court should consider in exercise of such discretion:***

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

9. Although both courts were dealing with applications under the Rules of those courts, the principles enunciated in those cases would in my view, be applicable in applications under **Section 79G of the Civil Procedure Act** or any other provisions of the law applicable in this court. In my view therefore the principles that will be applicable to an application for extension of time may be summarized as follows; that the relief is discretionary; the court will consider the period of delay; the reason for the delay; the chances of the appeal succeeding if the application is granted; the degree of prejudice to the opposite party if the application is granted and whether the matter raises issues of public importance.

10. In the present case, there was a delay of about 5 months. That was unreasonable delayed and required to be explained. The reason advanced was that the advocate in the law firm for the applicants who had been tasked to lodge an appeal failed to do so on the mistaken belief that she required certified copies of the proceedings. That may be a genuine mistake or plausible reason. However, the applicants failed to annex in their application a letter that bespoke the proceedings. It was also not disclosed whether Miss Mwilaria is a newly admitted advocate or is an experienced advocate for the court to assess the likelihood of an advocate of her standing making such a grave mistake.

11. As regards the chances of success, I have looked at the draft Memorandum of appeal annexed to the application and it seems to me to be arguable. As regards prejudice to the opposite party, while the applicants swore that none will be suffered, the respondents said nothing about it. They stated that the judgment has already been executed. There was no material on record to show how the judgment had been fully executed and how the execution cannot be reversed.

12. I have read the judgment sought to be appealed against. It only restrained the applicants from interfering with the the respondents operation of a water project. Allowing the orders sought and an appeal being filed will in no way disrupt the status quo. It is the same status quo that has been maintained from the time the suit was filed by way of an interim injunction. In the circumstances, I am satisfied that the

grant of the orders sought will in no way prejudice the respondents.

13. What is being sought is a discretionary relief. Mr. Mwangela Advocate has been candid in his affidavit that an associate in his law firm misinterpreted the law. Although I fault him for not producing the letter bespeaking the proceedings, the 1<sup>st</sup> applicant swore that they are not to blame for the failure to lodge the appeal in time. Indeed, he urged the court not to visit their advocates' mistake upon them. This court is aware that time and again advocates are bound to make wrong interpretations of the law. The Court of Appeal has held that genuine mistakes of an advocate should not be visited upon an innocent litigant. *SEE the case of Philip Chemwolo & Another Vs. Augustine Kubede [1982]-1988] KAR 1036.*

14. In view of the foregoing, taking into consideration that no prejudice has been shown that the respondents will suffer if the application is granted, and for the reason that an order for costs can compensate the respondents, I see nothing to prevent this court from exercising its discretion in favour of the applicants. The appeal is to be filed and served within 21 days today.

15. In the circumstances, I allow the application but award the respondents the costs of the application.

**DATED** and **DELIVERED** at Meru this 31st day of May, 2018.

**A. MABEYA**

**JUDGE**