



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 119 OF 2018

1. ALYKHAN SULEIMAN

2. ABUBAKAR SHARIF.....APPLICANTS

VERSUS

SARAIBANU HAROON HUSSEIN.....RESPONDENT

R U L I N G

1. Whether or not to extend time for a litigant to file an appeal out of time for a decision on the merits of the matter is at the discretion of the court and the applicant has no right to such orders but only the legitimate expectation that in considering the application the court appreciate that all discretions must be judicious calling for fair and conscientious application of the crystalized principles among them the need to protect people's right to access courts, the need for predictability and certainty in application of the law and need to bring litigation to a timeous conclusion with finality.

2. Before me is an application for an order for extension of time to lodge an appeal against the judgment of the trial court said to have been pronounced on the 13/12/2017.

3. The reasons for delay is said to have been the fact that counsel for the Applicant had been engage in endeavors of obtaining proceedings, judgment and decree of the trial court but the court file went missing up to the 16/4/2018 when it was traced and the letter bespeaking proceeding and judgment was received by the court. The only document exhibited to show that the applicant's counsel was seeking to get the proceedings and judgment in the letter annexed as same 2 and dated 16/4/2018. That scant explanation leaves the period between 17/12/2017 and 15/4/2018 totally unexplained. The law in this area is that where a party has a right to exercise but fails to do so, the onus and obligation is upon him to offer an explanation to the satisfaction of the want.

4. In **Nicholas Kiptoo Arap Korir Salat vs I.E.B.C & 7 Others**, the supreme underscored this duty and set the law as follows:-

“Extension of time being a creature of equity, once can only enjoy it being a creature of equity, one can only enjoy it if he acts equitably: *he who seeks equity must do equity*. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.

The applicant urged this Court to exercise its discretion under Rule 53 of the Supreme Court Rules and extend time within which to file the appeal. He submitted that the delay in filing the appeal was occasioned by facts beyond his control and pointed blame to his advocate for going to the wrong forum first, and delay in obtaining the proceedings from the Court of Appeal and the settling of the terms of the decree by the Court of Appeal”

5. I have not been availed any satisfactory explanation why the applicant took about 5 months without taking any steps to file the appeal. It is equally not alleged that the decision was rendered in the absence of the applicant. Consequently in the absence of an explanation there is no basis upon which the court can exercise its discretion in favour of the applicant. A judicial discretion to be exercised must be grounded on some reason and applied to established legal principles or else it ceases to be judicial discretion but something like whim or caprice. I refuse to be capricious and hold that the applicant has wholly failed to justify being entitled to the orders sought.

6. Additionally, even if it had been demonstrated that the delay was occasioned by the need to procure proceedings, judgment and decree, I hold the view that under the rules, a diligent litigant does not need the proceedings, judgment and/or a decree to file an appeal from lower court to this court.

7. My reading of the provisions of Order 42 is that a litigant desirous of appealing a decision of the lower court only needs to file a Memorandum of Appeal and has a period of upto the time the court gives direction to amend such memorandum of appeal without leave.

8. In fact the proceedings and judgment are only expected to be placed on the record of Appeal by the time the file is placed before a judge for perusal of the appeal to have it admitted to hearing or rejected in a summary manner.

9. The provisions of Order 42 rule 1 and 13(4) give me the impression that one need not have the typed proceeding nor certified judgment to lodge an appeal. Diligence would require that such a party listens to the judgment being delivered or just reads the judgment in the court file and comes with his grounds of Appeal.

10. The upshot is that the application is misconceived, lacks merit and cannot succeed but is hereby dismissed. I however note that the respondent though served did not file any papers nor attend court to oppose the application and therefore I make no orders as to costs.

Dated and delivered at Mombasa this 25th day of May 2018.

P.J.O. OTIENO

JUDGE