



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HIGH COURT CIVIL APPEAL NO. 149 OF 2017

STANLEY OGUTA ATTAL.....APPLICANT

VERSUS

PETER CHEGE MBUGUA.....RESPONDENT

RULING

1. The Applicant seeks orders for enlargement of time to file Memorandum of Appeal out of time. The intended appeal is from a judgment delivered in Nakuru CMCC No. 459 of 2011 on 28/07/2017. The Application is supported by a Supporting Affidavit by the Applicant.

2. The Application is opposed. In opposition, the Respondent's advocate, Kinyanjui Theuri, has sworn a Replying Affidavit.

3. The facts are as follows. The Applicant instructed his advocate to file and prosecute the suit in the lower Court. He apparently changed his phone number and did not check in with his advocate on the progress of the case. The advocate had no other means to locate him. Meanwhile, on 28/07/2017, the judgment was given dismissing the suit. The advocate had says he had no contact with his client to get instructions and the client confirms as much. It was only on 25/10/2010 that the Applicant visited the lawyer's offices to get the unpleasant news that his suit had been dismissed. He immediately instructed his lawyers to file an appeal and find a way to perfect it. On 13/11/2017, the advocates filed a Memorandum of Appeal. One week later, they brought the present Application.

4. There is no doubt that the Memorandum of Appeal was filed out of time. The Applicant had until 27/08/2017 to launch his appeal. His Appeal was, therefore, about two-and-a-half months late.

5. The Respondent's first salvo against the Application is precisely that he filed it out of time without first gaining the leave of the Court to do so.

6. I will deal with this argument quickly. There appears to be two schools of thought on whether a party who has run out of time to file an appeal should first lodge a Memorandum of Appeal and then seek leave of the Court to have it admitted out of time or whether the party should first approach the Court for leave to file the Memorandum of Appeal out of time. The celebrated *Gerald M'Limbine v Joseph Kangangi* [2009] eKLR held that a textual reading of section 79G necessarily requires a party to first launch a Memorandum of Appeal and then approach the Court for leave to have it admitted out of time. This is what the Applicant did here; and it is not surprising that they relied on the *Gerald M'Limbine* Case for inspiration.

7. I summarized my views on the matter in *Samuel Mwaura Muthumbi v Josephine Wanjiru Nguji & Another* [2018] eKLR thus:

I am aware of this line of cases by the High Court on this question. I have, however, taken a different view of the provision. I do not take the phrase "an appeal may be admitted out of time" [in section 79G of the Civil Procedure Act] to mandatorily require that a party who is late to file an appeal must first file it and then approach the Court for the filed appeal to be admitted out of time. At best I find such a constrained reading of the statute to be an impermissible raising of a procedural technicality above substance. At worst, that reading of the statute is not in accord with our practice and may be out of place with the "mischief rule" of statutory interpretation in this case. It appears obvious that the intention of the statute was to provide a mechanism for a party who did not, for good cause, file an appeal on time, to approach the Court to be allowed to file such an appeal. To deny such a party leave to file the appeal merely because they did not, first, file the appeal which would have been, in the first place, out of time as a way of preserving their right to approach the Court seems a touch too formalistic for our jurisprudence in this day and age.

8. My view, therefore, is that taking too literal a view on the question whether a party first lodges a Memorandum of Appeal first or seeks the leave of the Court first is creating a fetish out of a technicality. The bottom line is that a party who is late to approach the Court with an appeal must satisfy the Court that he has good cause for the Court to exercise its discretion on his behalf. The Court is expected to decide that question functionally and on substantive grounds – not on technical perfection of the party approaching the seat of justice.

9. I will now turn to the question whether the Application should be granted on its merits. Section 79G of the Civil Procedure Act is the

operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section 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.

10. Our case law has now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

11. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR*. They include the following:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.

12. I would begin by pointing out that our Courts have a jurisprudential policy to determine, whenever possible, disputes on their merits. Indeed, the Applicant may as well have cited the Ugandan Supreme Court in *Banco Arabe Espanol V Bank of Uganda [1999] 2 EA 22* where it remarked that:

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.

13. The Respondent argues that the Applicant’s delay in this case is inordinate and inexcusable. He also says that the Applicant has not demonstrated that his appeal has merit. I agree that the Applicant was not, by his own admission, a paragon of diligence. However, the delay of three months is not, in the scheme of things, so inordinate as to warrant shutting off the Applicant from the opportunity to ventilate his grievances to an appellate Court.

14. I am also unable to say that the intended appeal is in-arguable. I must hasten to add that all the Applicant is required to show at this stage is arguability – not high probability of success. An Applicant is required to demonstrate that the Intended Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. I think the Applicant easily meets that standard considering that he intends a first appeal whose standard of review is de novo review and that he contests the factual findings of the Learned Trial Magistrate on both liability for the accident as well as quantum.

15. I am also moved to apply the Court’s discretion on behalf of the Applicant because I have not seen a demonstration of any substantial adverse effect the granting of this order will have on the Respondent other than permitting the Applicant to exercise a preciously cherished right of appeal. Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense, for example, that the Constitution and the Elections Act place on the timelines for filing Elections Petitions.

16. In the circumstances, I will allow the Application dated 10/11/2017 and make the following orders:

- a. The Memorandum of Appeal filed herein is deemed as duly filed and served.**
- b. The Applicant to file and serve the Record of Appeal within ninety (90) days of today’s date otherwise the Appeal will automatically expire unless the time is extended by an order of the Court.**
- c. The Applicant will pay the costs of this Application. The same to be paid before the Appeal is admitted for hearing.**

17. Orders accordingly.

Dated and delivered at Nakuru this 28th day of June, 2018.

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JOEL NGUGI

JUDGE