



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 135 OF 2017

NANCY WANJIKU REUBEN.....APPELLANT

VERSUS

DAVID WAMBUA MUTHIANI.....1ST RESPONDENT

MUTUNGA MUUTU.....2ND RESPONDENT

RULING

1. By Notice of Motion dated 16/06/2017, the Applicant seeks orders for extension of time for filing the appeal *inter alia*.
2. Same is anchored on Section 79G, 95, 1A and 3A Civil Procedure Act.
3. The same is based on grounds that there was delay in supply of proceedings from trial court until period of filing of appeal lapsed.
4. The intended appeal is arguable. The appeal is supported by Affidavit of Andrew Makundi sworn on 16/06/2017 which state that the judgment was delivered on 22/09/2016. Proceedings were applied on 29/11/2016. Same proceedings were availed on 27/04/2017.
5. The Respondent has filed grounds of opposition to oppose the application.
6. The same states that the instant appeal is invalid as it purports to have been filed without leave or extension of time on 16/06/2017. The application is filed in an invalid appeal and no merit has been demonstrated.
7. The parties agreed to canvass appeal via submission which they filed and exchanged.

SUBMISSIONS BY THE APPLICANT

8. It is submitted that the principles that guide a court in considering an application for leave to file an appeal out of time were laid down by the Court of Appeal in the case of **STANLEY KAHORO MWANGI & 2 OTHERS -VS- KANYAMWI TRADING COMPANY LIMITED (2015) eKLR.**

“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.”

9. In the same breath, Section 95 of the Civil Procedure Act states;

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

10. Similarly, Section 79 G of the Civil Procedure Act Cap 21 Laws of Kenya provides that;

“Every appeal from a subordinate court to the High Court shall be filled 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 the court that he has good and sufficient cause for not filing the appeal in

time.”

11. The specific reason for the delay in filing the appeal out of time is said to be the delay occasioned in obtaining the typed proceedings which were availed on 27/04/2017.

12. In light of the foregoing, it is urged that the court to be guided by the sentiments of Aganyanya, JA in MONICA MALEL & ANOR - VS- REPUBLIC ELDORET CIVIL APPLN NO. NAI 246 OF 2008, where he stated;

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show The applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

13. The Respondents had no submissions.

ISSUES, ANALYSIS AND DETERMINATION

14. After going through the material before the court, I find the issues are:-

i. Whether the application and appeal are incompetent?

ii. If above is in negative, does the application have merit?

iii. What is the order as to costs?

15. The judgement intended to be impugned was delivered on 22/09/2016. The application for proceedings was made on 29/09/2016, seven days after delivery of judgement. No receipt of deposit is shown.

16. The proceedings were supplied on 24/04/2017 though no evidence is shown to confirm the same such as payment of the proceedings .from date of supply of proceedings to date of filing instant application on16/06/2017 it took span of about two months and no explanation is given for that delay.

17. The appeal was lodged on 16/06/2017 without leave together with the instant application, thus prayers to deem same as properly filed.

18. There are no provisions of laws which warrant lodging of an appeal in the High Court and then seek same to deem same as duly filed.

19. The leave can only be granted to file appeal out of time but not to validate on invalidly filed appeal.

20. The Notice of Motion herein ought to have been filed in a miscellaneous application file and upon leave being granted, an appeal file be opened on registration of the appeal.

21. In the circumstance the purportedly filed appeal is invalid and incompetent and so is the application filed therein.

22. In sum the court makes the following orders:-

1) The Appeal and the Notice of Motion dated 16/06/2017 are hereby struck out.

2) Costs Kshs.5, 000/- to be paid to the Respondents within 30 days and in default execution to issue.

SIGNED, DATED AND DELIVERED THIS 27TH DAY OF JUNE 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE