



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 159 OF 2017

EDWIN MUCHUGIAAPPLICANT

VERSUS

MAY AYALLO.....RESPONDENT

RULING

1. The application dated 20th March, 2017 seeks orders that this Honourable court be and is hereby pleased to grant leave to the Appellant to file Memorandum of appeal out of time.

2. It is stated in the grounds and the affidavit in support of the application that judgment was delivered on 2nd November, 2017. The Applicant is dissatisfied with the judgment and wishes to appeal. The delay in filing the appeal is blamed on failure by the trial court to inform the Applicant of the judgment date.

3. The application is opposed as per the grounds of opposition dated 17th July, 2017 which state as follows:

1. That the appeal lacks merit as the same argues that the figure awarded was Us Dollars 2000, interest of the amount prayed in the plaint of Ksh.170,000/=. At the time of filing the plaint the exchange rate for the Dollar to the shillings was Kshs.85/=.

2. That the Application is therefore frivolous, vexatious an afterthought and an abuse of the court process.

4. The parties agreed to dispose of the application by way of written submissions. The Applicant filed their submissions but the Respondent did not file any. I have considered the application, the response and the submissions filed.

5. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

6. The court therefore has the discretion to extend time within which to file an Appeal. As stated by the Court of Appeal in the case of **Aviation Cargo Limited v St. Mark Freight Services Limited [2014] eKLR:**

“....whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”

7. On the face of it, the impugned judgment reflects that it was delivered in the absence of the Applicant. This lends credence to the averments by Applicant that he was not aware of the judgment date. The explanation given for the delay is satisfactory.

8. I allow the application on condition that the decretal sum is deposited in an interest earning bank account of the counsels for the parties herein or in court within 30 days from date hereof. Appeal to be filed within 7 days from date thereof. Costs to the Respondent.

Dated, signed and delivered at Nairobi this 20th day of June, 2018

B. THURANIRA JADEN

JUDGE