



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISCELLANEAOUS APPL NO. 36 OF 2016

**BERTHA KARAMUTA M'IKIAO (SUING AS LEGAL REPRESENTATIVE
OF ESTATE OF MARTIN BUNDI, DECEASED).....APPLICANT**

VERSUS

JEFFER MAINGI.....RESPONDENT

RULING

Enlargement of time to file appeal

[1] The significant order sought in the Notice of Motion dated 30th March, 2016 is enlargement of time to file an appeal against part of the judgment delivered in GITHONGO SRMCC NO 21 OF 2015 on 16.12.2015.

[2] The application is expressed to be brought pursuant to Sections 1A, 1B and 79G of the Civil Procedure Act CAP 21 of the Laws of Kenya, Order 50 Rule 6 Order 51 Rule 1 of the Civil Procedure Rules 2010. The application is based on the grounds set out in the application, the submissions filed herein as well as the supporting affidavit sworn by the Applicant.

Applicant's case

[3] In a nutshell, the Applicant intends to file appeal against deduction of Kshs. 190,000 under Law Reform Act instead of Kshs. 100,000. The Applicant's advocates wrote to the Respondent's advocates pointing out this alleged error on 5th January 2016 but the said advocates has not responded to that letter hence the delay in filing appeal. The Applicant stated that instead of responding to the proposal to rectify the anomaly, the Respondent's advocates sent consent through letter dated 10th March 2016 marking matter as settled which prompted this application- which application the Applicant said was made without delay. She is desirous of appealing part of the judgment and so she pleads with the court to extend time.

[4] The Applicant submitted that the source of delay was the Respondent's advocate. In any case, it was submitted that the appeal raises arguable issues of law on damages awardable under Law Reform Act and Fatal Accidents Act. Accordingly, the Applicant urged that she should not be denied the right to appeal. They cited a number of judicial decisions in support of their position namely; **(1) APA INSURANCE LIMITED vs. MICHAEL KINYANJUI MUTURI [2016] eKLR; (2) NICHOLAS KIPTOO ARAP SALAT Vs. IEBC [2014] eKLR; (3) EDWARD KAMAU vs. HANNAH MUKUI [2015] eKLR.**

[5] The Respondent opposed the application and filed a Replying Affidavit and submissions in opposition thereto. The gist of their argument was that there has been prolonged delay in filing the application since

the judgment was delivered. Secondly, they argued that she accepted the settlement as per judgment and she cannot be heard to complain. That is not all. the Respondent stated that the Applicant submitted in the lower court that the sum awarded under the Fatal Accidents Act should be subtracted from the award under the Law Reform Act i.e. Loss of Dependency. The proposed appeal is, therefore, an afterthought.

DETERMINATION

[6] I have carefully considered this application and the rival submissions by the parties. Submissions were made by the Respondent on the scope of section 79G of the Civil Procedure Act. I need not engage much on those arguments as nothing much will turn on them except to state that this court has jurisdiction to extend time for filing of appeal as long as the intended appellant has satisfied the court that he had good and sufficient cause for not filing the appeal in time. Thus, the remedy of extension of time is not granted as a matter of right; it is a matter of discretion of the court. And like any other discretion the court must exercise it upon defined principles of law; not capriciously or whimsically or out of sympathy. I will set out the principles of law which govern the exercise of discretion in extension of time which are now abundantly clear. I will summarize them to be:

- (a) The period of delay, and the reasons for the delay,*
- (b) The degree of prejudice to the respondent and interested parties if the application is granted,*
- (c) The possibility or chances of the success of the appeal, and*
- (d) Whether the matter raises issues of public importance.*

On this see the case of **NICHOLAS KIPTOO ARAP KORIR SALAT v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR** (Ibrahim, & Wanjala SCJJ); Court of Appeal **CIVIL APPLICATION NO. NAI 259 OF 2014 NATIONAL CEREALS AND PRODUCE BOARD V PETER GITHINJI** and **COURT OF APPEAL PAUL WANJOHI MATHENGE v DUNCAN GICHANE MATHENGE[2013] eKLR**.

[7] I will now place the facts of this case of the above legal scale. The decision that the Applicant intends to appeal against was delivered on 16.12.2015 whereas the instant application was filed in court 17th May, 2016. This was approximately a gross period of 5 months or over 150 days from the date of the impugned judgment. When I consider the provisions of Order 50 Rule 4 of the Civil Procedure Rules 2010, the delay would still be over 4 months. The Applicant blames the delay on failure by the advocates for the Respondent to respond to her proposal to resolve the alleged error by consent and post judgment. But on 2nd February 2016, the decretal sum was paid through fund transfer and was accepted by the Applicant. It took the Applicant up to 19th March 2016 to write again on the error and the amount of decretal sum in accordance with her calculations. Again, after payment of the decretal sum, the Respondent wrote on 10th March 2016 forwarding consent to mark the matter as settled. The letter made reference to the payment by RTGS which it clearly stated to be in full settlement of the decree herein. But despite the payment of the decretal sum on 2nd February 2016 and the letters forwarding the consent on 10th March, 2016, the Applicant still insists in paragraph 7 of her affidavit that the Respondent never responded to her letter dated 5th January 2016. The Respondent was categorical that they have paid the decretal sum as per the judgment and even forwarded consent to mark the matter settled as such. What else or kind of reply did the Applicant expect from the Respondent? Therefore, going by the actions of the Respondent, I do not think a vigilant litigant would still think that there existed any serious out of court negotiations on the concerns by the Applicant. And, therefore, nothing would justify the Applicant's failure to act on her rights. In any event, the consent was forwarded on 10th March 2016 made clear the position taken by the Respondent on the matter; yet took her sweet time and only filed this application in court on 17th May 2016. This was inordinate delay which has not been explained. I must state that I am not satisfied by the explanation given by the Applicant on the delay. I also note that the judgment was settled by the Respondent- at least the Applicant did not deny that fact. In sum, I am persuaded to agree with the Respondent that this application is an afterthought in the guise of exercising right of appeal which if

allowed will be prejudicial to the Respondent. There is really no basis of extension of time in this application. I, therefore, dismiss the application dated 30th March 2016. But I will not condemn the Applicant to pay costs given the circumstances of this application.

Dated, signed and delivered in open court at Meru this 31st day of January 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Mwirigi advocate for applicant

Mr. Munene advocate for respondent

F. GIKONYO

JUDGE