



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANOUS CIVIL APPLICATION NO 119 OF 2016

**MAINGI MUTUA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF
RAYMOND MUTUA KIKWA-DECEASED.....APPLICANT**

VERSUS

RICHARD MUTISYA KITHINJI.....RESPONDENT

RULING

The Application

Judgment was delivered in the Respondent's favour on 16th December 2015 in Machakos Chief Magistrate's Court Civil Suit No 80 of 2015. On 2nd June 2016 the Applicant filed a Notice of Motion of the same date in this Court. seeking orders that he be granted leave to file an appeal against the said lower Court's judgment out of time, and that an attached Memorandum of Appeal be deemed to be duly filed upon payment of the Court fees.

The application is premised on the grounds in the face of the Notice of Motion, and in the supporting affidavit sworn on 2nd June 2016 by the Applicant. The Applicants' Advocates, O.N Makau & Mulei Advocates, also filed submissions on the application dated 30th March 2017.

The grounds for the application are that there was an inadvertent delay on the Applicant's part in giving instructions to his counsel to institute an appeal, which delay is not inordinate. Reliance was placed upon Articles 47 and 159 of the Constitution on access to justice, section 79G of the Civil Procedure Act, and the decisions in **Peter Waweru Mwenja vs Kiarie Shoe Stores Limited, (2014) eKLR** and **Teresia Wangari Ndungu vs Paul Kamau Mwaniki, (2014) eKLR** for the argument that the Court should exercise its discretion in the Applicant's favour in the interests of justice, and as he has an arguable appeal.

The Response

The Respondent opposed the Applicant's application in a replying affidavit he swore on 16th October 2016. The said deponent averred that there has been inordinate delay in filing the application, and the same is vexatious and an abuse of the process of court. Further, that the judgment was delivered in the presence of the Applicant's Advocate, and no reasons have been given as to why the appeal was not lodged on time. That there was therefore laxity on the part of the Applicant, and the intended appeal has no chances of success. These averments were reiterated in submissions dated 21st March 2017 that were filed by the Respondent.

The Determination

The parties sought a ruling on the basis of the pleadings and submissions filed, which I have read and carefully considered. The issue to be determined is whether the Court should exercise its discretion in favour of the Applicant and grant leave to appeal out of time.

The law as regards the filing of appeals in the High Court is found in section 79G of the Civil Procedure Act which 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.”

The grant of leave to file an appeal out of time is a matter of judicial discretion, which principle was espoused in the case of **Machira & Company Advocates vs Mwangi & Another**, (2002) e KLR and expounded in **Kenya Shell Ltd vs Kobil Petroleum Ltd**, (2006) 2 EA 132. The Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat – vs – IEBC & 7 Others**, (2014) eKLR laid down the principles for extension of time for filing an appeal as follows:

- 1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- 3) Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis;
- 4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- 5) Whether there will be any prejudice suffered by the respondent if the extension is granted
- 6) Whether the application has been brought without undue delay; and
- 7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

The Applicant's main reason for the delay in filing their appeal is that by the time he gave instructions to the filing of an appeal, the time for lodging an appeal had lapsed. I note that judgment was delivered on 16th December 2015, and while the time for lodging an appeal lapsed on 15th January 2016, the instant application was eventually filed on 2nd June 2016, about five months later. This Court finds that the delay in filing the application was not inordinate in light of the reasons advanced by the Applicant. In any event any prejudice suffered by the Respondent can be adequately mitigated by costs. I will therefore allow the Applicant's prayer for leave to appeal out of time for the foregoing reasons.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Applicant's Notice of Motion dated 2nd June 2016 is allowed, and the Applicant be and is hereby granted leave to file and serve his Memorandum of Appeal out of time within 14 days from the date of this ruling.

The Applicant shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 27th day of June, 2017.

P. NYAMWEYA

JUDGE