



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 176 OF 2016

1. GK ASSOCIATES LIMITED

2. GEDION LISTER KAARIA..... APPELLANTS

VERSUS

NATIONAL BANK OF KENYA LIMITED..... RESPONDENT

RULING

1. The application before me for determination is dated 10th March, 2017. It has been brought under the provisions of section 79G of the Civil Procedure Act and all other enabling provisions of the law. It seeks the following orders:-

i. That this honourable court be pleased to grant leave to the intended appellant/applicant herein to file and lodge his appeal out of time against the judgment and decision of Honourable Njagi, SRM delivered on 29/4/2016 in SRMCC No. 3643 of 2006; National Bank of Kenya Ltd vs G.K. Associates Ltd and Gideon Lister Kaaria;

ii. That in the alternative, the appeal filed on 16th December, 2016, be deemed to be properly filed on time; and

iii. That the costs of this appeal, and those incidental to this matter do abide by the main appeal.

2. The application is supported by the grounds in support of it and the affidavit of Gideon Lister Kaaria sworn on 13th March, 2017. The respondent filed a replying affidavit on 4th April, 2017 to oppose the application.

3. Mr. Adhoch, Learned Counsel for the applicant stated that the reasons for delay in filing of the appeal are that the Judgment was delivered without notice on 29th April, 2016 by Hon. Njagi. Counsel submitted that the applicants got to know of the same on 15th December, 2016 after which they filed an appeal. He urged the court to allow the application in the interest of justice and explained that the circumstances of the case render the application to be well merited.

4. Ms Kiruriti, Learned Counsel for the respondent opposed the application by submitting that the appeal that was filed was defective as the law states that if time has elapsed for filing an appeal, the first step is to seek leave to appeal out of time. She made reference to a letter dated 4th November, 2016 and a certificate of posting dated 7th November, 2016 attached to the replying affidavit. Counsel stated that the letter was addressed to the Advocate who was on record for the applicant then, informing them that

judgment had been delivered and he was therefore on receipt of the said letter, aware of the said judgment in issue. Counsel submitted that in the event that the Court grants the application, an amount of Ksh. 2,093,871.00 should be deposited as security for costs.

5. In response to the foregoing, Mr. Adhoch submitted that it would be punitive to impose a condition on a person seeking a right to appeal whereas in this case no orders have been sought for stay of execution. Counsel pointed out that it took the respondent seven months to notify them of the Judgment and since the certificate of posting was dated 7th November, 2016, the letter is deemed to have been received within 4 days of posting. It was further submitted that the memorandum of appeal was filed on 15th December, 2016 thus they did not delay in filing the same after the said Judgment came to their attention. He prayed for the application to be allowed.

DETERMINATION

6. The use of the words “*ruling*” and “*Judgment*” interchangeably is not of the court’s doing but has been captured from the submissions of Counsel and the affidavits on record. An application of this nature is ordinarily granted apart from when the court is of the view that there has been inordinate delay in filing an application seeking leave to appeal out of time. In the present case, the ruling by Hon. Njagi, Senior Principal Magistrate was delivered on 29th April, 2016 without notice to the Advocates who were representing the parties therein. Indeed this is well captured in the said ruling in the following words “***ruling delivered in open court, dated and signed today 29/4/2016; in the presence of: Advocates absent.*** He then proceeded to write; “***E.O to inform the parties of the entry of the judgment.***”

7. In paragraphs 7 and 10 of the supporting affidavit, the deponent avers that he became aware of the ruling in December, 2016 when he requested his lawyer to follow up on the matter and therefore his failure to appeal within the stipulated 30 days from the delivery of the ruling was occasioned by the aforesaid circumstances which were beyond his control.

8. The respondent in paragraph 4 of the replying affidavit sworn by Peter Omwenga Advocate deposes that it took the applicant more than four months to file this application from the time that they were notified of the Judgment. Paragraph 6 of the said affidavit states that the applicant's Advocate was notified of the ruling of 29th April, 2016 via a registered mail of 7th November, 2016, a copy of which is attached to the affidavit.

9. Section 79G of the Civil Procedure Act 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”. (emphasis added).

10. In the present case, the applicant filed a memorandum of appeal on 15th December, 2016. Contrary to the argument by Counsel for the respondent, the applicants could not have filed an application for leave to appeal out of time in the absence of a memorandum of appeal. In **Gerald M. Limelane vs Joseph Kangangi** [2009] eKLR the court stated thus:-

“My understanding of the proviso to section 79G is that an applicant seeking an appeal to be admitted out of time, must in effect file such an appeal and at the same time seek leave of the court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the stipulated period. To do so would actually be an abuse of the court’s process under section 79B.”

11. The Supreme Court of Kenya in the case of **Nicholas Kiptoo arap Korir Salat vs IEBC and 7 others** [2014] eKLR, laid down the following principles for extension of time for filing appeals:-

- i. 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;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

12. I have considered the arguments of Counsel on record, the law and the authorities I have cited herein and I am satisfied that the reasons given by the applicants in failing to file an appeal within 30 days of delivery of the ruling are well supported by the record of the lower court and particularly, the delivery of the ruling in the absence of the parties. They are as such deserving of the orders sought. I decline to order the deposit of security in an application of this nature. The upshot of the foregoing is that the application is allowed. The memorandum of appeal filed on 15th December, 2016 is deemed to be properly on record. Costs are awarded to the applicants.

DELIVERED, DATED and SIGNED at MOMBASA on this 19th day of October, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Adhoch for the applicants

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant