



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 50 OF 2017

JUSTINA ADONGO OFWA.....1ST APPLICANT

JOANES O. OFWA.....2ND APPLICANT

VERSUS

MARY AOKO OFWA.....RESPONDENT

RULING

1. By a notice of motion dated 5.7.17 brought under Sections 3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya, Article 159 of the Constitution and all enabling provisions of the Law, the applicants pray for orders that

1. This matter be certified urgent
2. The court be pleased to extend time limited for lodging of an appeal
3. The Memorandum of Appeal in Kisumu High Court Civil Appeal No. 50 of 2017 be deemed to have been duly filed
4. Costs of the application be in the cause

2. The application is based on the grounds among others that:

- a) The delay in obtaining documents required to file the appeal is not attributable to the applicants
- b) The intended appeal has merit and high chances of success

3. The application is supported by the affidavit of **Joanes O. Ofwa**, the 2nd applicant, sworn on 4th July 2017 in which he reiterates the grounds on the face of the application. Annexed to the supporting affidavit is the ruling delivered on 11th May, 2017 marked **JO01** which the applicants intend to appeal against and a copy of a Memorandum of Appeal marked **JO02**.

4. The application is opposed on the grounds set out in grounds of opposition filed on 25th July 2017 which state that the applicants are guilty of inordinate delay and that the intended appeal is intended to delay **Nyando SPM Civil Suit No. 274 of 2016 Mary Aoko Ofwa V Justina Adongo Ofwa & Joanes O. Ofwa**

5. When the application came up for mention on 25.7.17; the parties' advocates agreed to have it disposed off by way of written submission which they dutifully filed.

Issue for determination

6. The main issue for determination is whether the applicants ought to be granted leave to appeal out of time.

7. In support of this application, the applicants cited Section 7 of the Appellate Jurisdiction Act Chapter 9 Laws of Kenya, **Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] eKLR; Fakir Mohammed v Joseph Mugambi Kiara & 2 others [2010] eKLR; M/S Portreitz Maternity v James Karanga Kabia, Civil Appeal No. 63 of 1997; Monica Malel & Another v Republic & 2 Others [2009]** and **Haywood v Cope (1859) 25 BEAV 140**.

8. I have considered the Appellate Jurisdiction Act Chapter 9 Laws of Kenya. Section 7 states thus:

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired”

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

9. The above cited rule evidently applies to appeals from a judgment of the High Court and is therefore not applicable to the application in issue.

10. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered.

11. The parameters for exercise of court's discretion were concisely laid out in the case of **Mwangi v Kenya Airways Ltd [2003] KLR** where the Court of Appeal expressed itself thus:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.

12. In determining this application; I will endeavor to address each of the principles laid down in the above cited case as follows:

i. Length of delay

13. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states:-

“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”.

14. The 2nd applicant in his supporting affidavit deposes that there was delay in obtaining court proceedings and other documents.

15. The impugned ruling was delivered on 11th May, 2017 and the applicants had up to 10th June 2017 to file the intended appeal. The present application was filed on 28th June, 2017 which was 18 days outside the time limited for filing an appeal.

16. The applicants have not annexed any letter requesting for proceedings nor have they disclosed the

other documents that they required to file an appeal and which they could not obtain.

17. And even if the court were to accept the fact that there was delay in obtaining the proceedings, there is no explanation why the applicants did not move the Court soon after 10th June, 2017 (when the memorandum of appeal should have been lodged) for extension of time or leave to file the memorandum of appeal out of time.

18. Further to the foregoing; no certificate of delay has been issued to confirm that the delay was occasioned by the court. I am content to cite **CIVIL APPLICATION NO. NAI 98 OF 2013 AVIATION CARGO SUPPORT LIMITED v ST. MARK FREIGHT SERVICES LIMITED** where G.B.M. KARIUKI, J.A. held:-

Even where an appeal is meritorious, if the delay is too inordinate and has not been explained at all, leave ought not to be granted to lodge record of appeal out of time. An aspiring appellant ought to be zealous and to take the initiative to comply with the law.

19. From the foregoing; I find that the applicant has not explained the delay to the satisfaction of the court and is therefore guilty of indolence.

ii. The chances of appeal succeeding if the application is granted

20. I have considered the issues raised in the memorandum of appeal and I have no doubt that they are triable.

iii. The degree of prejudice to the respondent if the application is granted.

21. **Nyando SPM Civil Suit No. 274 of 2016 Mary AokoOfwa V JustinaAdongoOfwa&Joanes O. Ofwa** is a burial dispute. An appeal does not operate as a stay unless an order of stay is expressly granted. There is therefore no evidence that the respondent will suffer any prejudice if the application is allowed.

22. Although I have found the applicant guilty of unreasonable delay; the overriding objective of the court is to exercise latitude in its interpretation of the law so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

23. Section 3A of the Civil Procedure Act Cap 21 Law of Kenya provides that:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

24. Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicants.

25. As a result, the notice of motion dated 5.7.17 is allowed on the following terms:

- a. The applicants are granted leave to appeal out of time
- b. The Memorandum of Appeal in Kisumu High Court Civil Appeal No. 50 of 2017 be and is hereby deemed to have been duly filed
- c. For clarity purpose, the appeal shall not operate as a stay of proceedings in **Nyando SPM Civil Suit No. 274 of 2016 Mary AokoOfwa V JustinaAdongoOfwa&Joanes O. Ofwa**.
- d. Costs shall be in the cause

DATED AND DELIVERED THIS 14TH DAY OF DECEMBER 2017

T. W. CHERERE

JUDGE

In the presence of: -

Court Assistant -Felix

For the Appellant - Ms Abar

For the Respondent -N/A