



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MERU

MISCELLANEOUS APPLICATION NO 12 OF 2015

MORRISON M'TETU INTENDED APPELLANT/APPLICANT

Versus

JAMES IRERINJAGI1ST PROPOSED RESPONDENT

GRACE WANJIKUKANYIBA 2ND PROPOSED RESPONDENT

R U L I N G

Leave to appeal out of time

[1] The significant prayer in the Motion dated 16/3/2015 is for leave to appeal out of time, which is essentially a request for enlargement of time. The reason given for not filing the appeal in time is that parties herein voluntarily entered into negotiations in a bid to compromise or circumvent an appeal. The Applicant says he was genuinely aggrieved by the judgment delivered on 19/12/2014 by Hon. C.K. Obara and intended to appeal were it not for those intervening negotiations which did not yield fruit. He contended that any extension of time to file appeal will not cause any prejudice to the Respondent. He also posits that, in any event the delay herein is for 31 days, thus, not inordinate and is excusable. On that basis, he beseeched court to extend time for him to file appeal. Those arguments and stated facts are explicitly expounded upon in the Supporting Affidavit sworn by the Applicant as well as by his Counsel in the written submissions filed herein. The Applicant also cited 3 judicial authorities which he filed in court on 18/6/2015 namely; **NAIROBI HCCC NO. 468 OF 2002; NBI HC MISC. NO.62 OF 2007** and **NBI MISC. NO.479 OF 2006** to show that courts have extended time for doing or taking a specified act or step in order to have the disputes between the parties resolved on merit.

Respondents opposed extension

[2] The Respondents opposed grant of any extension of time to file appeal. They gave their reasons for their opposition; those reasons are exemplified in the Replying Affidavit filed by James Ileri Njagi and written submissions filed in court. They also filed a list of judicial decisions to back their stand point on the matter. Of importance, the Respondents argued that section 79G of the Civil Procedure Act has not been complied with as no good and sufficient cause that has been shown for not filing the appeal in time. And, therefore, the discretion of court should not be exercised in favour of the Applicant in the absence of an explanation for the delay to the satisfaction of the court. According to the Respondents, the Applicant has deposed to untruths and misrepresentation in abid to obtain extension of time. They referred the court to the annexed text messages between the Applicant's advocates to the Applicant and the Respondents' which they said were primarily on payment of the sum awarded by court and not to

compromise any intended appeal as claimed by the Applicant. They said that from those text messages, the Applicant's advocates repeatedly promised payment but in vain. According to the Respondents, the Applicant's advocates even wrote to the effect that payment cheques were to be delivered to them by Applicant's insurer on 17/2/2015 for onward transmission to the Respondents. But the Respondents decried that the wait became long and anxious; no cheques were received by the Respondents counsel. After much correspondence, the Applicant's counsel eventually informed the Respondents' counsel that they will appeal which they believe was an afterthought. From these facts, the Respondents concluded that it is clear the negotiations between them were on payment of the decretal sum and not **"in lieu of the appeal herein"** as was argued by the Applicant. They therefore distinguished the case of **NBI HC MISC. APPEAL NO.476 of 2006** where there were actual negotiations when time ran out.

[3] The Respondent also took a swipe at the statement in the supporting affidavit and in particular that there had been a stay of execution for 30 days. They stated that none existed; and perusal of the judgment of the trial court will show that position. In sum, the Respondents hold the view that they will suffer prejudice if any enlargement of time is given in the circumstances of this case. They accused the Applicant of laches, indolence, inaction, indecision and delay for two calendar months. They said more; that no Memorandum of Appeal that has been annexed to demonstrate that their appeal shall succeed. Even if they demonstrated a good appeal, still it had to be filed within the prescribed time.

[4] The Respondents raised one more objection but to the Further Affidavit by Karomo Paul Ngugi who they stated is the advocate seized of this matter. They said that the said advocate has deposed to contentious and evidentiary matters that would deny him the privilege of an advocate. Toward that end, they cited the case of **KENYA INVESTMENT LTD & ANOTHER -VS- KENYA FINANCE CORP. LTD** by Ringera J. (as he then was). And based on that decision they applied for the Further Affidavit to be struck out. For all the above reasons, the Respondents have asked the court to decline the request for enlargement of time.

DETERMINATION

[5] As I stated in the opening part of this decision, the request before me is one for enlargement of time. In law, the court has unfettered power to enlarge time limited for the doing of any act or taking any proceeding on such terms as the justice of the case demands, even though such enlargement of time is applied for after the expiration of the prescribed time. However, the discretion to enlarge time, just like all judicial discretions, must be exercised upon defined principles of law; not capriciously, not whimsically. And this has been explicated in a long string of judicial decisions which I do not wish to multiply. I will not even attempt to re-invent the wheel on the subject except to cite the law. Under section 796 of the Civil Procedure Act, the test for admitting an appeal filed out of time is that **good and sufficient cause for not filing the appeal in time must be shown to the satisfaction of the court**. The mandatoriness of an explanation of the delay is invariable in applications for extension of time despite the prospects of the intended appeal. On this point I am content to cite Omolo JA in the case of **RELIANCE BANK LTD (In liquidation) and SOUTHERN CREDIT LIMITED** that:-

"...even good appeals must be filed within the prescribed periods and when that is not done, some explanations must be given...for the delay".

This statement, although it was made within the framework of the Court of Appeal Rules, is true in the exercise of discretion under the Civil Procedure Act and Civil Procedure Rules in enlargement of time. However, in order to determine whether the explanation given **is good and sufficient cause for not filing appeal in time**, I think that the court should consider at least five things: (1) **the amount of delay**, (2) **the reasons for the delay**, (3) **the bona fides of the reasons given**, (4) **the prospects of the appeal** and (5) **the degree of prejudice to the Respondent if the application is granted**. I have set out **the bona fides of the reasons given** as a distinct ground because any explanation that is tainted with mala fides, ill motive, falsehoods, mis-representation or concealment of material and relevant facts is not **"good and sufficient cause"** for purposes of enlargement of time. I will apply this test to the facts of this case.

[6] Any inordinate delay in filing the appeal will be inexcusable and will deny the party applying any

relief in the form of extension of time. I am aware that there is no precise measure of what amounts to inordinate delay. But from the circumstances of the case one should be able to tell when the delay is prolonged or beyond acceptable limits; inordinate. This is seen within the doctrine of laches wherein the length of the delay and the prejudice that the Respondent will suffer if the application is granted are predominant factors. The delay herein was for 31 days but I do not want to jump into a conclusion that this delay is inordinate or not, or inexcusable or excusable before I consider all the other factors herein. Much has been submitted upon, especially by the Respondents that the Applicant is peddling untruths and misrepresentations of facts in order to obtain enlargement of time. The Applicant is accused of giving false impression that the delay occurred as a result of the intervening negotiations on how to compromise the appeal. I have looked at and considered the communication between the advocates herein and it is clear it related to promises to pay the entire decretal sum. There is nothing to show the communication was on the basis of or an attempt to obviate any intended appeal. Outright inference may safely be drawn from those circumstances that this application was made to only cause prejudice to the Respondent. In addition, I have not seen any Memorandum of Appeal which may give a hint on the prospects of the intended appeal. I think this consideration is important in this kind of application because under section 79B of the Civil Procedure Act, the court may even summarily reject a duly filed appeal. Therefore a draft Memorandum of Appeal or some arguments akin thereto are necessary and its absence may affect the exercise of discretion of the court. I could be wrong on this but it is not worthless venture to include a draft Memorandum of Appeal. But I will not base my decision on this consideration.

[7] Taking into account all the foregoing, has the Applicant shown good and sufficient cause as to be persuaded to enlarge time? I have not been given any bona fide, good and sufficient reason for not filing the appeal in time. Nothing prevented the Applicant from filing the appeal in time. Laches catches up with the Applicant who, from the material before me acted in sheer carelessness and arrogantly failed to enforce his rights to file appeal in time. It seems the Applicant had all along promised to make payment of the decretal sum but when he failed to do so, he pretended to have awoken from slumber, and now he wants leave to appeal out of time; he consciously decided to apply for enlargement of time which I think was a way of justifying his failed promises. The explanation given is not *bona fide* at all as there were no negotiations to compromise the intended appeal. The explanation given is not reasonable explanation for the delay. It bears repeating that any a party who seeks the help of court must seek it with clean hands; and he shall gladly receive relief; but he who seeks the court process to cause prejudice on the other party will be told: ***Behold; the process of court is for sanctity and justice***. Accordingly, the Applicant has not come with clean hands. By extending time for him to appeal will be injurious to the Respondent and the law given his apparent intentions. I, therefore, refuse to enlarge time to appeal. In the upshot, I dismiss the application dated 16/3/2015. In such application, the general rule is that the applicant is the author of the lapse he is trying to remedy, and so he must pay costs to the Respondent unless there are good reasons to depart from the rule. I find none and so I award costs of the application to the Respondents. It is so ordered.

Dated, Signed and Delivered in court at Meru this 21st day of January 2016.

F. GIKONYO

JUDGE

In the presence of:

Kaumbi for Kamunyori for Respondent

Kibicho for Applicant

Mwenda/Mark