



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANOUS CIVIL APPLICATION NO 160 OF 2015**

**PETER NYAMAI MAKAU.....APPLICANT**

**VERSUS**

**BONIFACE MUTULA KATUKU.....1<sup>ST</sup> RESPONDENT**

**MUNYAO MUTUA KAVILO.....2<sup>ND</sup> RESPONDENT**

**CAR & GENERAL (TRADING) LTD.....3<sup>RD</sup> RESPONDENT**

**RULING**

**The Application**

The application before the court for determination is a Notice of Motion dated 24<sup>th</sup> July 2015. The Applicant is seeking the following orders:

1. That the Applicant be granted leave to appeal out of time against the whole judgment of Honourable D. H. Karani (PM) of 04/05/2015 in Kithimani Principal Magistrate's Civil Suit No. 2 of 2013
2. THAT the Memorandum of Appeal annexed to the application be deemed as duly filed and served.

The application is premised on the grounds that the judgment that is the subject matter herein was to be delivered on 27<sup>th</sup> April 2015 which was not done, and the said judgment was however thereafter delivered on 4<sup>th</sup> May 2015 without any notice whatsoever to the Applicant or his advocates on record. Further, that as a consequence of failure of notice of the date and delivery of judgment, the time allowed to file an appeal has run out, and that delay occasioned is not so inordinate as to be inexcusable.

The Applicant relied on an affidavit he swore on 24<sup>th</sup> July 2015 wherein he averred that the judgment in Kithimani Principal Magistrate's Civil Suit No. 2 of 2013 was delivered in favour of the proposed Respondents and against him, and that being aggrieved and dissatisfied by the said judgment he has instructed his Advocates on record to appeal against the same. The Applicant also stated that his advocates had requested the trial court through a letter dated 29/05/2015 to supply them with photocopies of the handwritten judgment in the matter. He annexed a copy of the proposed Memorandum of Appeal and the letter.

The Applicant's learned counsel, P.M Mutuku & Co. Advocates, filed written submissions dated 2<sup>nd</sup> December 2015 and reiterated therein that the Applicant was not aware that the judgment had been delivered and only became so aware on 6<sup>th</sup> May 2015, and that it was thus incumbent upon them to make an application pursuant to section 79G of the Civil Procedure Act for their appeal to be admitted out of time. Further, that the mistake was beyond the control of the Applicants, which is sufficient reason for not filing the appeal on time.

The Applicant distinguished the decisions in **Kyuma vs Kyema (1988) KLR 1986** and **JMM vs ANM (2014) e KLR** on the grounds that a certificate of delay was not required in their case as they were not aware that judgment had been delivered and therefore could not have applied for copies of the typed proceedings before then. The Applicant further submitted that he as an arguable appeal and that his right to appeal is a constitutional right pursuant to Articles 48 and 50 of the Constitution. Reliance was placed on the decisions in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Nrb Civil App;ication No. 251 of 1997** and **Peter Nderitu Muhuhu vs Esther Wairimu Ndungu, Nyeri Civil Application No. 22 of 2015** on the grounds upon which the Court will exercise its discretion to grant extension of time to file an appeal.

### **The Response**

The 1<sup>st</sup> Respondent opposed the Applicant's application in a replying affidavit he swore on 8<sup>th</sup> October, 2015, wherein he averred that the facts as presented by the Applicant are deceitful. He gave the facts of his case and denied ownership of the motorcycle which is the subject of this appeal and liability for the said motor cycle. He also denied knowing anything pertaining the accident in question.

The 1<sup>st</sup> Respondent also filed submissions dated 13<sup>th</sup> January 2016 wherein he again reiterated the facts of his case and averred that the judgment date of 04/05/2015 was communicated when all parties were present including the Applicant. Further, that the duration between the judgment and application dates is inordinate and inexcusable.

The 2<sup>nd</sup> Respondent did not file any response to the application.

The 3<sup>rd</sup> Respondent's response was in Grounds of Opposition dated 9<sup>th</sup> September 2015, and a replying affidavit sworn on 14<sup>th</sup> September 2015 by Joseph Mulwa Mwambi, its Logistics Co-ordinator, who gave an account of the proceedings in the lower court leading to a mention on 27<sup>th</sup> April 2015 when they were informed that the judgment will be delivered on the 4<sup>th</sup> May, 2015.

Further, that on the 4<sup>th</sup> May 2015 the judgment was duly delivered, and that the Applicant ought to have known very well of the judgment but made no efforts to lodge an appeal as is required by the Civil Procedure Act and has not given any reasons for the delay. The deponent also averred that the Applicant has not complied with the mandatory statutory requirements for either lodging an appeal or an application for extension of time to lodge the appeal.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions filed. The issue to be determined is whether this 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 V 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 his appeal is that he was not aware that the judgment in the lower court was delivered on 4<sup>th</sup> May 2015, which was when time effectively started to run for purposes of filing the appeal. I note that the letter dated 29<sup>th</sup> May 2015 by the Applicant’s Advocate seeking a copy of the judgment, which was annexed to the Applicant’s supporting affidavit as exhibit “PNM 1”, refers to a judgment date of 27<sup>th</sup> April 2015, which gives credence to the Applicant’s argument that he believed the judgment date to be 27<sup>th</sup> April 2015. This Court therefore finds this reason for the delay to be credible and reasonable.

In addition, I note that the instant application was eventually filed on 24<sup>th</sup> July 2015, and I do not find the delay in filing the application inordinate given that the Applicant became aware of the judgment on 29<sup>th</sup> May 2015. Lastly, the Respondents have not shown any real and substantive prejudice they will suffer if the Applicant’s appeal is filed.

In conclusion I would like to comment on the arguments raised by the 3<sup>rd</sup> Respondent about the Applicant not having met the requirement of filing a certificate of delay. The Court of Appeal decision in the case of **Kyuma vs Kyema, (1988) KLR 185 explained this requirement as follows:**

***“The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay? Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of Order 41 permits this latter document to be filed as soon “as possible and in any event within such a time as the court may order”. Therefore a certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant “a copy of the order” of the magistrate.”***

**Rule 1A of Order 41** which the court referred to in its judgment is now **rule 2 of Order 42** of the Civil

**Procedure Rules, 2010.** *It is thus evident that the certificate of delay is only crucial and is one of the documents needed when filing the substantive appeal out of time once leave has been granted, for there to be a proper appeal on record, and not at the stage of filing an application for leave to file an appeal as in the present application. Therefore, in the present application time starts to run for purposes of filing of the certificate of delay under section 79G of the Civil Procedure Act once leave to appeal is granted. In any event it has been found that the Applicant was not aware of the date of delivery of judgment, and the failure to get the certified decree and/or proceedings of the trial Court in time is therefore not material in the circumstances.*

I will consequently exercise my discretion in the Applicant's favour for the foregoing reasons. I accordingly allow the Applicant's Notice of Motion dated 24<sup>th</sup> July 2015 only to the extent that the Applicant is hereby granted leave to file an appeal out of time within 30 days from the date of this ruling.

The costs of this application shall follow the costs of the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 25<sup>th</sup> day of May 2016.

**P. NYAMWEYA**

**JUDGE**