



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO.24 OF 2016**

**J N M**

**Suing as next friend and mother of**

**K N (MINOR)..... APPLICANT**

**VERSUS**

**AGROLINE HAULERS LIMITED.....RESPONDENT**

**RULING**

1. By a Notice of motion dated 6<sup>th</sup> May, 2016, brought under **sections 1A, 79G and 95** of the Civil Procedure Act, (Cap 21 Laws of Kenya), and **Orders 50, rule 6 and 51 rule 1** of the Civil Procedure Rules, 2010, **J N**, the applicant, moved the court for enlargement of time for lodging an appeal against a judgment delivered on 3<sup>rd</sup> December, 2015.

2. The applicant had filed a suit before the Senior Principal Magistrate's court at Butere being **Civil Suit Number 217 of 2014** which was determined on 3<sup>rd</sup> December, 2015, whereby the applicant was successful and an award of general damages was made in the sum of Kshs.150,000/- which the applicant feels is inordinately low and wishes to appeal to this court.

3. The motion is supported by an affidavit by the applicant in which she states that by the time the judgment was delivered, she was working in Mombasa and had lost contact with her advocate thus she did not know the result of her case. According to the affidavit, the applicant got information from her sister in law who had been contacted by the Area Chief with a message that her advocate wanted to talk to her. The applicant says visited her advocate and that is when she learnt of the judgment, but she felt award was low, thus instructed her advocate to appeal. She then learnt that time for lodging an appeal had lapsed. She has therefore filed this application seeking leave of the court to lodge an appeal out of time.

4. The application is opposed. **Agroline Haylers Limited** the respondent, has filed grounds of opposition. The respondent has argued that the application has been brought with unreasonable delay, that litigation must come to an end, that the application is incompetent, misplaced lacks in bona fides and that it is an afterthought, frivolous, vexatious and an abuse of the process of the court.

5. When the application came for hearing on 25<sup>th</sup> May, 2016, **Mr Mukisu** appeared for the applicant while Mr Mushindi was for the respondent. Learned counsel moved the motion and urged the court to grant the application submitting, as he did, that the applicant was not aware of the judgment and that the delay was not inordinate. Learned counsel implored the court to grant leave arguing that the respondent

will not suffer prejudice since it will have a chance to fight the appeal.

6. Mr Mshindi, learned counsel for the respondent on the other hand, opposed the application, submitting that **section 79(G)** is mandatory as to the time for lodging appeals from the subordinate courts, and the proviso to that section requires that an applicant for leave should show sufficient cause. Counsel submitted that, in his view, the supporting affidavit does not substantiate the delay and there is no evidence that the applicant was and is indeed working in Mombasa. According to counsel, judgment was delivered on 3<sup>rd</sup> December, 2015 approximately six (6) months now, which makes the delay inordinate. He therefore urged the court to dismiss the motion.

7. I have considered the application supporting affidavit, grounds of opposition and rival submissions by counsel on both sides. A litigant has a statutory right of appeal from a judgment and decree of a subordinate to this court. **Section 65** of the Civil Procedure Act provides:-

**“Except where otherwise expressly provided by this Act, and subject to such provisions as to the furnishing of security for costs as may be prescribed, an appeal shall lie to the High Court**

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**a) from any original decree or part of a decree of a subordinate court, other than a magistrate’s court of the third class, on a question of law or fact.**

**b) .....**”

8. However in exercising his/her right of appeal, the intended appellant must file the appeal within a period of thirty (30) days from the date of the impugned decision. There is room for a litigant to seek leave of court to lodge an appeal out of time. **Section 79(G)** which is relevant in this respect, provides:-

**S.79G “ 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 anytime which the lower court may certify as having been requisite for the preparation and delivery to the appellant 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)**

9. **Section 79(G)** is clear that an appeal should be filed within thirty days from the date of the decree, but gives this court discretion to enlarge time for lodging the appeal upon the appellant satisfying the court that he had good reason for not filing his appeal on time. The section therefore, places the burden on the appellant to show that he was prevented by good and sufficient cause from filing the appeal. It is upon satisfying the court that there was good reason, that the court may exercise its discretion in favour of the applicant.

10. The judgment against which the applicant intends to appeal against was delivered on 3<sup>rd</sup> December, 2015. It has not been disclosed whether counsel for the applicant was present or not. However, no steps were taken to file an appeal, but the applicant has deponed that she was away in Mombasa. She says that she only got to know about the judgment in April, 2016, she went to her advocate’s office who informed her of the result of her suit in the lower court. The applicant has not disclosed the date when she got the information that her advocate wanted to see her or when she met the advocate. She has not even shown that her advocate applied for proceedings from the subordinate court to demonstrate that indeed she was willing to pursue an appeal.

11. My reading of **section 79(G)** is that an appellant has thirty days for filing an appeal excluding the period taken by the subordinate court in preparing and supplying copies of proceedings. That would mean time starts running after receiving proceedings if the appellant applied for proceedings in time. The wisdom of the legislature in giving that window, must have been informed by the fact that it would normally take time for proceedings to be typed and availed to the applicant, which could possibly not be

achieved within thirty days. The applicant has not therefore shown that necessary steps were taken to seek proceedings and even as counsel waited to notify his client, the request for proceedings, would have assisted them as contemplated by **section 79(G)**.

12. Counsel for the applicant has cited **section 95** and order **50 rule (6)** in advancing his arguments for grant of leave. **Section 95** provides:-

**S.95 “Where any period is fixed or granted by the court for doing any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”**

The section gives the court discretion to enlarge time, and in my view, the court would still have to consider the reasons for delay and as provided for under **section 79(G)**. The court would have to be satisfied that there was **good and sufficient cause**. **Order 50 rule 6**, on the other hand, cannot apply in this case because it relates to extension of time under the rules and not under the Act.

14. Counsel for the respondent has opposed the application, arguing that the delay is inordinate. From the date of judgment to the time of filing this application, it is a period over five months. For the five months, the applicant’s counsel never took any steps to intimate the intention that they would appeal against the decision of the lower court. Courts are required to consider overriding objective under **sections 1A** and **1B** of the Act, and act in such a way that will facilitate a just, expeditious, proportionate and affordable resolution of disputes. And whenever the court is called upon to interpret the Act and rules, it must bear in mind the above overriding objectives: The overriding objective in my view frowns upon delay in undertaking civil proceedings, and cannot be used to aid an indolent litigant. A delay of five months must be satisfactorily explained before the court exercises its discretion in favour of the applicant. However, the applicant has not done so in this case.

15. The applicant has sought exercise of the court’s discretion and must show that she deserves that discretion by explaining the delay. In the case of **Aviation Cargo Support Limited v St. Mark Freight Services Limited** [2014] eKLR, the appellant had collected proceedings on 19<sup>th</sup> December, 2012, but only filed the application for extension of time to file record of appeal on 13<sup>th</sup> May 2013. G.B.M. Kariuki, JA dismissed the application finding that **the delay of five months was inordinate and had not been satisfactorily explained.**

17. The respondent has also urged that litigation has to come to an end since the matter has already been settled. Infact during the hearing of the motion, Mr Mushindi stated from the bar, that the decree had been settled, a fact that was not denied by Mr Mukisu. That fact is also stated in the grounds of opposition. If that statement be true, and as contained in the grounds of opposition, then it is obvious that the respondent will be dragged into a litigation that according to it, has been concluded and the decree satisfied. That is to say, the respondent will be prejudiced with the order granting leave to appeal.

18. For the above reasons, I find that the delay of five months is inordinate and has not been explained to the satisfaction of this court. That is to say, the applicant has not shown to the satisfaction of the court that she had good and sufficient reason for not filing her appeal on time.

Consequently the application is dismissed with costs.

**Dated and delivered at Kakamega this 20<sup>th</sup> July, 2016.**

**E.C. MWITA**

**JUDGE**