



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO.343 OF 2015 A

JOSEPH GIKONYO T/A GARAM INVESTMENTS.....APPLICANT

VERSUS

STEPHEN K. KIBUNJA T/A KIBUNJA & ASSOCIATES.....RESPONDENT

RULING

1. By notice of motion dated 31st July 2015 the applicant seeks from this court orders that:

- 1) The application be allowed to file to appeal out of time against the ruling of Honourable I. Gichobi (Ms) delivered on 27th March 2015.
- 2) That the appeal herein be deemed to be duly lodged within the prescribed time.
- 3) That cost of this application is provided for.

2. The application is brought under the provisions of Order 50 Rule 6 and 7 of the Civil Procedure Rules. Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law.

3. The application is predicated on the grounds that;

- 1) The applicant's counsel was not made aware by the lower court of the date of the delivery of the ruling.
- 2) The delay in lodging this appeal is not attributable to the applicant or his advocates.
- 3) The court had discretion to enlarge time as the justice of the case demands.
- 4) No party will suffer prejudice if this application is allowed.

4. The application is further supported by the affidavit sworn by Joseph Gikonyo T/A Garam Investments. According to the applicant, the lower court did on 26th September 2014 indicate to the parties' advocates that it would deliver the ruling on notice and that the applicant's advocates were never served with any notice of delivery of the ruling and only learnt of the said ruling on 30th June 2015. That upon learning of the said ruling, his advocate wrote to court asking for copy of the ruling and proceedings and that it was not possible to lodge the appeal in good time. That the applicant's

advocates wrote letters to the lower court seeking to know the fate of the ruling and when it would be delivered. Further that the application had been lodged without undue delay.

5. The application was opposed by the respondent Stephen Kibunja & Associates who filed a replying affidavit sworn on 27th October 2015 deposing that the application is frivolous, bad in law and defective; that there is no evidence that the applicant and or his advocate attempted to peruse the court file and could not find the ruling; that if the applicant and or his advocate were interested in finding out the status of the file they should have perused the court file which was available after paying the requisite court fees instead of purporting to write letters to the Executive Officer. That the purported letter to court inquiring on the status of the ruling was never copied to the respondent and that there is no evidence that it was served on the Executive Officer at the Chief Magistrate's Court Milimani; that there is no evidence to show that the applicant's counsel was not served with ruling notice; that there was prolonged delay which has not been explained; that the respondent shall be prejudiced; no prejudice will be suffered by the applicant if the orders sought are not granted; the applicant had not shown that he has an arguable appeal; and that no draft Memorandum of Appeal has been annexed by way of an affidavit to this application to enable the court interrogate and exercise its discretion.

6. The parties agreed to dispose of the application by way of written submissions. The applicant's submissions were filed on 18th December 2015 whereas the respondent's submissions were filed on 1st February 2016. Both parties submissions relied on decided case law.

7. The applicant in his submissions maintained that had he been notified of the date of the ruling, he or his advocate would have attended court and the appeal herein would have been filed in time. The rest of the submissions reiterate the depositions in the affidavit, while maintaining that mistake of counsel should not be visited upon the client. He relied on **Murai Vs Wainaina (No. 4) [1982] KLR 38**.

8. On whether delay in filing this application was inordinate, it was submitted that the reasons for delay are provided and must be considered broadly and realistically, taking into account all the circumstances into account. Reliance was placed on **Wasike V Khisa [2004] I KLR 197**. It was submitted that 32 days delay from date of discovery of the lower court ruling is not unreasonable and that Order 50 Rule 6 of the Civil Procedure Rules confers upon this court unfettered discretion so that the applicant is given an opportunity to ventilate his appeal and to facilitate access to justice under Article 48 of the Constitution. That this court should invoke the overriding objectives of the law and do justice without undue regard to technicalities. Reliance was also placed on **Joseph Njau V Benson Mwau Nyeri CA 97/2012 [2013] e KLR** where the court allowed an application for extension of time in the interest of justice. On the exercise of the court's discretion the applicant relied on **African Airlines V PTA Bank [2003] I EA1** where the court held that discretion should be exercised judiciously. On what prejudice would be suffered if extension of time was granted, the applicant relied on **Njai V Highview Farm Ltd [2009] 2 EA 329**. It was further submitted that no prejudice would be suffered if extension is granted.

9. On the chances of success of the intended appeal it was submitted that failure to attach a draft Memorandum of Appeal to the supporting affidavit is not fatal since it is attached to the application and the court has an opportunity to view it.

10. On the part of the respondent it was submitted that there was delay in filing of the appeal which delay has not been explained. Further, that the intended appeal does not raise any triable issues and that the respondent would suffer prejudice. It is further submitted that no draft Memorandum of Appeal was annexed to the affidavit as evidence of an arguable appeal that is intended to be filed.

Determination:

11. I have carefully considered the application for leave to file an appeal from the ruling of the trial court in CMCC 2453/2014 on 27th March 2015 out of time. I have also considered the opposition by the respondent and the parties' rival submissions. The only issue for determination is whether the applicant has satisfied this court that he warrants the exercise of this court's discretion to extend the

time within which the appeal as intended from the ruling on 27th March 2015 should be filed.

12. I must however, resolve the issue of whether such an application for extension of time to file an appeal out of time can be brought under Order 50 Rule 6 of the Civil Procedure Rules. Order 50 Rule 6 of the Civil Procedure Rules provides that :

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms if any, as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: provided that the costs of any application be extended such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

13. From the above provisions which have their basis in Section 95 of the Civil procedure Act the extension of time referred to herein is not where such time that has expired is fixed by statute, but fixed or granted by the court. Accordingly, a court of law cannot purport to enlarge time for filing an appeal out of time by application of Order 50 Rule 6 of the Civil Procedure Rules or even under Section 95 of the Civil Procedure Act.

14. I shall however excuse the applicant’s serious ignorance of the applicable provisions of the law and apply the correct provisions of the law being Section 79G of the Civil Procedure Act as read with Section 59 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya.

15. Under Section 59 of the Interpretation and General Provisions Act,

“Where in a written law, a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then unless a contrary intention appears the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.”

16. On the other hand, Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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.”

17. It is from the above provisions of the law that the jurisdiction of this court to extend the time for filing of an appeal out of time is derived, while applying the inherent jurisdiction of this court as reserved under Section 3A of the Civil Procedure Act and invoking the overriding objectives of the law under Sections 1A and 1B of the Civil Procedure Act.

18. The discretion to extend time for filing an appeal out of time is unfettered and should be exercised flexibly with regard to a particular case; and secondly, on relevant factors pertaining to each particular case which should be taken into consideration. See **Africa Airline International Ltd Vs Eastern and Southern African Trade and Development (PTA) Bank [2003] KLR 140**. In **Githaka V Nduiriri [2004] 2 KLR 67** the Court of Appeal was clear that the court, under Rule 4 of the Court of Appeal Rules is vested with an unfettered discretion to extend time with the only fetter being that it be exercised judiciously, that it to say, on sound reason, free from whim, caprice of sympathy and in the interest of justice on the case.

19. In **Samiyan Kanr Devinder Singh V Speedway Investment Ltd and Another [2014] e KLR** the Court of Appeal stated that the factors to be considered in extension of time to file an appeal out of

time are:

- 1) Period of delay.
- 2) Reason for the delay.
- 3) Possibly, the chances of the appeal succeeding if the application is granted.
- 4) The degree of prejudice to the respondent if the application is granted.
- 5) The effect of the delay on public administration of justice;
- 6) The importance of compliance with time limits in litigation.
- 7) The resources of the parties;
- 8) Whether the matter raises issues of public importance.

20. The above decision relied on **Delphis Bank Ltd V Recco Builders Ltd and Another [2005] 346** for the propositions that a defaulting party is not precluded from seeking leave to regularize the notice of appeal and where there is demonstration that despite the delay, the applicant had been diligent; that the intended appeal has merit and the extension of time sought would not prejudice the respondent, the court can still exercise its discretion in favour of such an applicant.”

21. Applying the above guiding principles to the rival positions argued in this application, it is not disputed that there was delay in filing the intended appeal from the ruling of 27th March 2015 made by the trial court hence this application. The applicant’s explanation for the delay is as borne out in the contents of his supporting affidavit and documents exhibited. In the proceedings of the lower court, it is clear that indeed on 26th September 2014, the Honourable Teresia Ngugi Senior Resident Magistrate reserved the delivery of the ruling on notice after parties had submitted on the same date by way of written submissions as ordered on 19h August 2014.

22. Then in 27th March 2015, the record shows as follows :

27th March 2015

Before Honourable I. Gichobi (Ms) RM

Court Assistant - Nanzushi

Matter coming for ruling.

Court- Ruling delivered as per typed copy.

Honourable I. Gichobi (Ms)

Resident Magistrate

27th March 2015.

23. From the above record, it cannot be denied that there is no evidence of service of a notice of ruling upon any of the parties to the dispute. The trial magistrate was all alone with her court assistant when she delivered the ruling and never even mentioned that parties were absent or that they were served with notice as expected by the proceedings of 26th September 2014. Neither is there any correspondence notifying the parties of the delivered ruling after such delivery.

24. The applicant's counsel on the other hand has exhibited letters dated 4th February 2015 addressed to the Executive Officer of the court inquiring as to when the ruling would be delivered to enable them attend court but there was no response, albeit the said letter was also copied to Honourable Nchoe, Magistrate.

25. The applicant's counsel wrote on 18th April 2015 to the Chief Magistrate copied to the Honourable Nchoe and Executive Officer, Milimani Commercial Courts asking why there was stoney silence to the inquiry on the date of ruling but again, there was no response, although the said letters were received by the court.

26. Albeit the above communication was not copied to the respondent herein, failure to do so would in no way prejudice the respondent who has not stated in his affidavit that he himself received notice of ruling or that he was notified that the ruling had been delivered after its delivery. In other words, the fact of non communication as to the delivery of the ruling both before and after such delivery have not been controverted by the respondent and or the trial court's executive officer.

27. It therefore follows that albeit there was delay in filing an appeal against the ruling of 27th March 2015, that delay has been satisfactorily explained by the applicant as having been occasioned by the trial court's failure to notify the parties of the date of delivery of the ruling, and therefore the issue of inordinate delay in filing of this application does not arise. That delay, in my view cannot disentitle the applicant to a relief of extension of time, as that would be frustrating the course of justice in one way or another by withholding exercise of the court's discretion in favour of an innocent litigant.

28. The respondent argued that the intended appeal has no chances of success and that there is no draft memorandum of appeal annexed to the applicant's supporting affidavit. I examined the application by the applicant which is in a bundle. Albeit his affidavit does not annex a Memorandum of Appeal draft, nonetheless, the last document after annexure JG2 is a memorandum of appeal which sets out six(6) grounds of appeal. This court cannot ignore that document which was filed together with this application and which is on record.

29. With regard to arguability of the intended appeal, this is not a mandatory requirement but just a possibility that the court should not lock out an arguable appeal where the applicant is exercising his right of appeal. The general principle is that, an arguable point need not be one which must succeed. It should simply be one which warrants full argument and or interrogation by a court of law. See **Stanley Kangethe Kinyanjui V Johny Keter and Five Others CA 31/2012** (unreported) where it was held that it is now trite that only one arguable point suffices. Ground 2 of the intended memorandum of appeal dated 31st July 2015 faults the trial magistrate for failing to take notice of the fact that the appellant's claim is grounded on a duly filed and taxed Auctioneers Bill of Costs whose certificate of costs has never been challenged by the respondent.

30. In my view, that ground alone raises an arguable point as to whether there can be any defence to a taxed bill of costs whose certificate of taxation has not been challenged.

31. On the degree of prejudice likely to be occasioned to the respondent advocate if leave to appeal out of time is granted, the respondent's argument is that "if the applicant had instead of filing this application set down the suit in the lower court for hearing. It would have been concluded by now but that instead, he has engaged in unwarranted applications and counter applications at a great expense and irreparable prejudice."

32. In my view, that statement does not disclose or demonstrate any prejudice likely to be occasioned to the respondent if leave to appeal out of time is granted to the applicant who is exercising his unfettered right of appeal. I therefore find that any prejudice, if at all there would be any, likely to be suffered by the respondent can be sufficiently compensated for by an award of costs.

33. On the effect of delay of disposal of the suit in the lower court on the administration of justice,

whereas this court agrees that dispensation of justice should be expeditious, however, where the applicant is aggrieved by the decision of the lower court and wishes to ventilate his grievance by way of an appeal, which appeal, if successful, is likely to dispose of the matter in the lower court, he should not be blocked from accessing justice since the wheels of justice will not have been stalled. It would be extremely unfair to punish the applicant by shutting him out of the judicial process which by itself contributes substantially to that delay. This court exists to do justice to the parties and it shall therefore, not send the applicant from the seat of justice empty handed in view of the circumstances of this case.

34. Although the applicant did not seek for stay of proceedings in the lower court, in view of my findings above that the applicant deserves extension of time to file an appeal out of time, I find that where there is clear demonstration as is in this case, that the applicant's proprietary rights which are at stake crystallized before the lower court made a decision refusing to strike out the defence thereby threatening the intended divestation, it is only proper that the suit be preserved in the first instance and the proper adjudication be done after a decision of the appellate court one way or the other.

35. For the above reasons, I am persuaded that the applicant has brought himself within the propositions in the case of **Delphis Bank Limited V Recco Builders Limited and Another [2005] e KLR** that even where there has been delay but there is demonstration like in the instant case, that the applicant has been diligent and that the intended appeal is not frivolous, and also considering that the extension of time sought would not prejudice the respondent. It is only proper that I do exercise my discretion in favour of the applicant to extend the time within which to lodge his appeal out of time, since sufficient cause has been shown to warrant the exercise of my discretion in his favour.

36. In the end, I allow the applicant's application/Notice of Motion dated 31st July 2015 and filed on 3rd August 2015 as follows:

1. The applicant is granted Fourteen (14) days from the date of this ruling to file and serve the Memorandum of Appeal upon the respondent.
2. As the proceedings herein are not in an appeal, the applicant to lodge a separate appeal.
3. The proceedings in the lower court shall be stayed until determination of the intended appeal.
4. The costs of this application shall abide the outcome of the appeal as intended.

Dated, signed and delivered in open court at Nairobi this 19th day of September, 2016.

R.E. ABURILI

JUDGE