



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

MISCELLANEOUS CIVIL APPLICATION NO. 73 OF 2015.

KENYA POWER & LIGHTING CO.)

ANJELE CALEB) ::::::::::::::: APPELLANTS.

VERSUS

ASMAN ABDALLAH OKWARO ::::::::::::::: RESPONDENT.

R U L I N G.

1. The applicants by way of a notice of motion application dated 24th July, 2015 seek the following orders.
 1. ***THAT, this application be certified urgent and the same be heard ex-parte in the first instance in respect of prayer 2 below.***
 2. ***THAT, the Honourable court be pleased to grant stay of execution of the decree in Kakamega Chief Magistrate's Civil suit No. 254 of 2013 pending the hearing and determination of this application.***
 3. ***THAT the Honourable court be pleased to grant leave to the applicants to file an appeal out of time from the judgment and decree in Kakamega Chief Magistrate's Civil Suit No. 254 of 2013.***
 4. ***THAT, upon grant of prayer 3, there be a stay of execution of the decree in Kakamega Chief Magistrate's Civil Suit No. 254 of 2013 pending the determination of the intended appeal.***
 5. ***THAT the appeal filed hereinafter be admitted out of time.***
 6. ***THAT the costs of this application be provided for.***
 7. ***THAT a date for hearing inter-partes be given.***
2. The said application is premised on the following grounds.
 - a. ***THAT the judgment in this matter was to be delivered on 27th May, 2015.***
 - b. ***THAT on 27th May, 2015 the same was not ready and was rescheduled for delivery on 3rd June, 2015.***
 - c. ***THAT on the 3rd June, 2015 the same was not ready.***

- d. *THAT on the 9th June, 2015 the applicants learnt with shock that judgment had been delivered on 3rd June, 2015 in the afternoon.*
- e. *THAT no notice was given to the applicants as to whether the judgment was going to be delivered in the afternoon.*
- f. *THAT the applicants are aggrieved with the award and intend to appeal against the judgment.*
- g. *THAT the delay in filing the appeal is excusable.*
- h. *THAT it is only fair that the time for filing this appeal be extended and the applicants be granted leave to lodge an appeal out of time and the intended appeal be admitted out of time.*
- i. *THAT the applicants will be highly prejudiced unless this application is allowed.*
- j. *THAT the appeal intended to be lodged has high chances of success.*
- k. *THAT the delay occasioned in presenting this application is not inordinate.*

l. THAT it would be in the interests of justice for the orders prayed for to be granted.

- m. *THAT the applicants are willing to abide by any conditions that may be imposed by the Honourable Court including providing security.*

The applicants' submissions.

- 3. Ms. Ondego, learned counsel for the applicants, submitted that they were seeking leave to file an appeal out of time. The applicants relied on the supporting affidavit of their Advocate Mr. Mitchell Menezes to augment their application.
- 4. In paragraph 5 of the affidavit, the deponent deposed that on 9th June, 2015, he learnt with shock that judgment had been delivered on 3rd June, 2015. The deponent further deposed that he immediately called his instructing client, M/s. Jubilee Insurance Company Limited, who instructed him on 23rd July, 2015 to appeal against the judgment.
- 5. It was submitted that in paragraph 8 of the said affidavit, the deponent stated that the time for filing the appeal had already expired by the time he received the said instructions. In paragraphs 9, 10, 11 and 12, the deponent averred that the present application was filed without delay and that the delay between 3rd June, 2015 and 23rd July, 2015 is excusable. He further stated that the applicants are bound to suffer irreparably if the application is not granted and that the intended appeal has very good chances of appeal as per the memorandum of appeal annexed to the affidavit.
- 6. Mr. Ondego Advocate prayed that the appeal filed out of time to be deemed as properly filed and for stay of execution and decree in Kakamega Chief Magistrate's Civil Suit No. 254 of 2013. He further indicated to the court that the applicants had complied with an order issued on 30th July, 2015. He submitted that if their prayer is granted, they will deposit any security required.

The Respondent's submissions

- 7. On the other hand, Ms. Muleshe, learned counsel for the respondent opposed the application. She relied on the replying affidavit of the respondent, Asman Abdallah Okwaro.
- 8. Ms. Muleshe submitted that the application by the applicants has no merit, is an afterthought and

an abuse of the court process. She referred the court to the affidavit of the applicants in paragraph 5 where it states that the deponent became aware on 9th June, 2015, that judgment was delivered on 3rd June, 2015. Ms. Muleshe submitted that the application was however filed on 27th July, 2015 which was one and a half months later. She submitted that the applicants had more than sufficient time to file the appeal. She submitted that with regard to paragraph 6, the deponent states that he advised his client of the judgment and in paragraph 7, that he was instructed on 27th July, 2015. She submitted that was indolence on the part of the applicants.

9. It was submitted that in Paragraph 9 of the affidavit of the applicants, it is deposed that parties agreed on party to party costs on 22nd June, 2015. Both counsel filed a consent letter on costs on 3rd June, 2015. There was no valid reason given for delay in filing the appeal. Ms. Muleshe submitted that even if the court has powers to grant the prayers sought, the applicants must show they have a good reason for the delay, the length of the delay matters and the applicants must show that they have chances of succeeding on appeal if granted the orders sought.
10. Ms. Muleshe relied on the decision of the **Court of Appeal at Nyeri in Civil application No. 22 of 2014**, where **Justice Kiage declined to exercise his discretion to allow an appeal to be filed out of time as the applicant failed to approach the court with utmost candour so as to have access to the well of equity.**
11. She also cited a decision by Justice C. Githua in **Misc. Civil Appeal No. 18 of 2014 in the High Court at Eldoret found that a delay of 20 days was not satisfactorily explained and was inordinate and inexcusable.**

Determination of the application

12. The time within which an appeal from an order or a decree from a subordinate court can be made is set out in section 79G of the Civil Procedure Act. The section 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.”

13. In determining this application, this court relies on the case of **Nicholas Kiptoo arap Korir Salat Vs. IEBC & 7 Others, Supreme Court Application No. 16 of 2014**, which laid down the following guiding principles for courts to consider in a matter such as the one before this court:-
 - i. ***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;***
 - ii. ***A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
 - iii. ***Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
 - iv. ***Whether there is a reasonable cause for delay. The delay should be explained to the satisfaction of the court;***
 - v. ***Whether there will be any prejudice suffered by the respondents if the extension is granted;***
 - vi. ***Whether the application has been brought without undue delay; and***
 - vii. ***Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

14. In the instant case, I find the applicant's affidavit self-defeating in paragraph 4 where the deponent deposed that they were aware that judgment was to be delivered on 3rd June, 2015 at 3.30 p.m. The onus was on the deponent to attend court at the appointed date and time for delivery of the judgment. It therefore beats logic why the deponent on 9th June, 2015, learnt with shock that judgment had been delivered on 3rd June, 2015.
15. The applicants have not demonstrated why there was delay in filing the application from the time the deponent informed the applicants about the judgment to the time when their instructing client M/s Jubilee Insurance Company Limited instructed the deponent to appeal out of time.
16. Although a memorandum of appeal has been annexed to the applicants' affidavit, this court cannot form an opinion on the merits or demerits of the intended appeal in the absence of copies of the proceedings and judgment of the lower court.
17. Taking into account that judgment was delivered on 3rd June, 2015, the applicants had up to 15th July, 2015 to file their intended appeal. The memorandum of appeal was filed on 27th July, 2015. There was thus a delay of twelve (12) days in filing the memorandum of appeal.
18. The applicants in this matter are silent on the issue of the delay in filing their appeal. The only inference that can be drawn from their silence is that there was no justifiable cause for the delay. If there was, it would have been brought out in the affidavit of Mr. Mitchell Menezes Advocate. This court is therefore persuaded by the High Court decision cited by Ms. Muleshe. This court is bound by the decision I have cited from the Supreme Court and that cited by Ms. Muleshe from the Court of Appeal.

The applicants in this matter have not candidly and to the satisfaction of the court explained the delay in the filing their appeal.

19. I hereby dismiss the application dated 24th July, 2015 for lack of merit. Costs to the respondent. It is so ordered.

DELIVERED, DATED and SIGNED at KAKAMEGA on this .7TH day of DECEMBER, 2015

NJOKI MWANGI.

JUDGE.

In the presence of:-

.....**No appearance..... for the Appellants.**

.....**Ms. Muleshe for the Respondent.**

.....**Mr. Anunda Court Assistant.**