



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 469 OF 2014

NATHANIEL NGURE KIHU APPLICANT

VERSUS

HOUSING FINANCE RESPONDENT

RULING

By a notice of motion dated 27th May, 2014, the applicant Nathaniel Ngure Kihui seeks from this court orders for leave to file an appeal out of time from the ruling delivered by the Hon. Kipkorir, Resident magistrate on 17th April 2014 in Nairobi CMCC No. 2691 of 2013. He also seeks costs of the application.

The application is premised on the grounds that the failure to file an appeal within the stipulated period was because his advocates on record were misinformed that the preliminary objection raised by the defendant to the suit on the ground that it was *Res judicata* Nairobi CMCC 9427/2005 had been dismissed; that it is only when his advocates invited the respondent's advocates to fix a hearing date for pre-trial directions when they learnt that the preliminary objection had been upheld; and that the applicant has moved with due dispatch to make the application.

The application is further supported by the affidavits sworn by the applicant on 27th May 2014 and another by Johnstone Kisengi, a legal clerk working for the applicant's advocate sworn on the same date.

The application was not opposed by the respondent Housing Finance.

When the same came up for hearing on 18th November, 2014, counsel for the respondent Mr Mbaluto informed the court that he was not opposed to the application for leave to appeal out of time being granted to the applicant as prayed.

Mrs Kuria advocate for the applicant submitted, reiterating the contents of the application and the supporting affidavits that her clerk informed her that the preliminary objection raised by the respondent had been dismissed only to learn that the same had been allowed thereby disposing of the applicant's suit with a dismissal order for being *Res judicata*. She urged the court to grant the applicant leave to appeal out of time as the intended appeal had chances of success as shown by the annexed draft memorandum of appeal and that she acted timeously upon discovering of the order dismissing the suit, to bring this application.

I have carefully considered the applicant's application, the grounds and supporting affidavits together

with the annexure thereto, coupled with the oral submissions by the advocate for the applicant, Mrs Kuria in support thereof. The application is brought under the provisions of Orders 50(6) and 51(1) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.

The law applicable to applications for leave to appeal out of time is Section 79G of the Civil Procedure Act which provides that:

“Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of 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.”

The proviso thereof provides that:

“An appeal may be admitted out of time if the applicant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

The Supreme Court on the other hand, being the apex court of the land has laid down seven principles that a court should consider in exercising discretion to extend time, in the case of **Nicholas Kiptoo Arap Korir Salat – Vs – IEBC & 7 Others DC App No. 16/2014.**

- a) 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;
- b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e) Whether there will be any prejudice suffered by the respondents if the extension is granted;
- f) Whether the application has been brought without undue delay; and
- g) Whether in certain cases like election petitions, public interest should be a consideration for extending time.

The question therefore, relevant to this application is whether the applicant has satisfied the above 7 conditions or principles as laid down by the highest court of the land to warrant grant of leave to appeal out of time.

The applicant has submitted that he has an arguable appeal as shown by the draft memorandum of appeal challenging the ruling dismissing his suit on account that it is *Res judicata* another matter which was determined. In paragraph 3 of the said draft memorandum, he contends that the alleged Nairobi CMCC 9427/2005 had no similarity with CMCC 2691/2013 as most of the matters complained of in the latter case were not in existence when the former suit was filed. It is further contended in paragraph 5 of the memorandum that the learned Magistrate erred in applying the wrong principles of law thereby arriving at a wrong decision.

Albeit, at this stage, it may not be necessary to determine the merits of the intended appeal, it is sufficient for the applicant to show that the intended appeal is not frivolous. The respondent has not opposed the application on that ground. Further, the respondent has not shown that any prejudice will be occasioned

to them if leave is granted.

The remedy being an equitable one, the record shows that it was filed timeously upon discovery of the dismissal of the suit. The main reason for the delay was an inadvertent mistake on the part of counsel who understood the outcome of the preliminary objection raised by the defendant/respondent to be in her client's favour as notified by her clerical staff only to learn that the suit had instead been dismissed. A delay of 1½ months is in this court's view, not inordinate.

The same has, furthermore, been explained and the court accepts that explanation as genuine and satisfactory.

In granting the applicant leave to appeal against the ruling delivered on 17th April 2014 by the Subordinate Court, this court employs the cardinal principle that its eternal mandate of responding appropriately to individual claims is as dictated by the compelling considerations of justice. The applicant has exercised due dispatch in seeking to ventilate his grievance on appeal from the decision of the court below and this court should therefore not be seen to be driving him or ousting him from the judgment seat.

Accordingly, I grant the applicant's application dated 27th May 2014 and order that the intended appeal be filed within 14 days from the date of this ruling failure to which this order or leave herein granted lapses. Costs of this application shall be in the intended appeal.

Dated, signed and delivered at Nairobi this 19th Day of November, 2014.

R.E. ABURILI

JUDGE