



**REPUBLIC OF KENYA**

**High Court at Meru**

**Miscellaneous Application 62 of 2012**

**ERASTUS MUTHOMI.....APPLICANT**

**VERSUS**

**KIENI MWANU.....RESPONDENT**

**RULING**

The applicant ERASTUS MUTHOMI through a Notice of Motion dated 12<sup>th</sup> July, 2012 pursuant to Section 95 of the Civil Procedure Act, Orders 50 Rule 6 and Order 51 Rule 1 of Civil Procedure Rules 2010 sought to be granted an enlargement or extension of time to file an appeal out of time against a judgment delivered on 17<sup>th</sup> November, 2011 in Meru CMCC 27 of 2011. The application is opposed. The respondent filed replying affidavit dated 21<sup>st</sup> September, 2012.

When the matter came up for hearing both counsel sought directions to the effect that the application be determined by way of written submissions. Consequently Mr. G. M. Wanjohi learned Advocate filed submission on behalf of the applicant on 5/12/2012 whereas Mr. M. Karuti learned Advocate filed submissions dated 19<sup>th</sup> December, 2012 on behalf of the defendant. The court has considered the submissions and supportive authorities. It has also considered the respective opposing positions of the parties. It also considered the pleadings and lower court proceedings.

The brief facts of the application are that judgment was entered against the applicant on 17<sup>th</sup> November, 2011 when the applicant was in the “*Linda Nchi Mission*” in the Republic of Somalia. That when the applicant came back he was informed of the court’s judgment. It is averred that he instructed his former Advocate to lodge an appeal and he proceeded back to discharge the “*Linda Nchi Mission*” in the Republic of Somalia until on 28/5/2012 when he returned back to Kenya. The applicant averred while they were in the aforesaid mission they were not allowed to use cell—phones or any other means to contact anybody, not even their relatives or advocates and no one could reach them as they were disallowed to have and retain cell phones. That when applicant returned he was shocked to find his former Counsel had only filed an application for stay of execution of the proceedings; instead of filing of an appeal as had earlier on been instructed. Consequently the applicant instructed the current Advocate to pursue this matter. The applicant further averred that on 21/4/2012 when his wife and his son were hospitalized the auctioneers invaded his home and carried away all applicant’s household goods and livestock. The applicant averred that he suffered great injustice as the seized properties were worthy Kshs.500,000/- while costs assessed in favour of the respondent was Kshs.43860. Applicant attached a draft Memorandum of Appeal to the affidavit as annexure “EM6”.

The respondent in his replying affidavit opposed the applicant’s application on grounds that the judgment was fully executed and costs recovered. The respondent averred that the applicant ought to have lodged his appeal within the stipulated time and most importantly before execution of the judgment. The

respondent further submitted that the applicant has not explained the inordinate delay of over 10 months before lodging the present application. The respondent further averred that prior to the execution of the judgment, the applicant's erstwhile advocates filed an application seeking stay of the proceedings pending appeal. The respondent further submitted there was nothing exhibited before court to show that the applicant was indeed in Somalia.

In the case of **WASIKE –V- SWALA(1984) KLR 591** Court of Appeal held:-

***“...A person applying for an extension of time within which to serve or institute an appeal had to account satisfactorily the delay in filing his appeal and if he succeeded in doing that, then he had to show that there was some merit in his appeal. The applicant did not have to show that his appeal had an overwhelming probability of success.***

***As Rule 4 now provides that the court may extend the time on such terms as it thinks just, such an applicant must now show, in descending scale of importance, the following factors:-***

***(a) That there is merit in his appeal;***

***(b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and***

***(c) That the delay has not been inordinate.”***

Further under Order 50 Rule 6 of the Civil Procedure Rules it is provided:-

***“6. 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 to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”***

The decision as to whether to grant leave to appeal is essentially discretionary and in doing so the court has to take into account the length of delay, the reasons for delay and whether there is merit in the appeal and the appellant does not have to show that his appeal has overwhelming probability of success.

Further our Constitution in Article 50(1) provides:-

***“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

Further Article 159(2) (d) of the Constitution of Kenya requires justice be administered without undue procedural technicalities. The Constitution is against depriving any party of his/her property or any interest in or right over property arbitrarily. Everyone has a right to have any dispute resolved by application of law in a fair trial as per Article 48 of the Constitution of Kenya.

In the instant application I am satisfied that the applicant's application was delayed for 7 months. The delay of 7 months was explained by the applicant. I have considered the explanation and I am satisfied the same is reasonable. I have also considered the draft Memorandum of Appeal and I have noted the same raises trial issues. The same has shown that there are some merits in the appeal.

The upshot of the matter is that the application is meritorious and the same is allowed. The applicant is granted extension of time to file appeal out of time against the judgment delivered on 12<sup>th</sup> November, 2011 in Meru CMCC No. 27 of 2011.

The appeal to be filed within 21 days from today. Costs be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2013.

**J. A. MAKAU**  
**JUDGE**

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Miss Waithaka h/b Mr. Wanjohi for the applicant
2. Miss Nelima h/b for M. M. Karuti for the respondent

**J. A. MAKAU**  
**JUDGE**