



DOMINIC PAUL WATENE KYENZE APPLICANT

VERSUS

BENJAMIN MUINDI NTHUKARESPONDENT

RULING

1. By a **Notice of Motion** dated **06/09/2010** (“Application”), the Applicant seeks an order enlarging time to file a memorandum of appeal against orders of the Kilungu Resident Magistrate’s Court in Civil Suit No. 37 of 2009. The Applicant herein, who was the Plaintiff in that case, is aggrieved by the decision of the Learned Magistrate dismissing his suit with costs.
2. The law, in **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 **thirty days** from the date of the decree. The decree in this case was issued on **28/07/2010**. The statutory period for filing a memorandum of appeal expired on **28/08/2010**. By that time, the Applicant had not filed his Memorandum of Appeal. He now seeks leave to file the memorandum of Appeal out of time.
3. The Application is supported by the affidavit of the Applicant. He asserts under oath that he instructed his advocates to prepare an Appeal immediately after the decree was issued. The advocates, **Kioko, Muthithya, Ngugi & Co. Advocates** wrote to the lower Court on **17/08/2010** asking for certified copies of the proceedings. Apparently, the proceedings were ready to be collected on **20/08/2010**. If the proceedings had been collected then, the Applicant would have been in a position to file his Memorandum of Appeal within time. However, no follow up was made with the **Kilungu Court** until **01/09/2010** when the Applicant visited the court a day after checking with his advocates on the progress of the appeal and being informed that they were waiting for certified copies of the proceedings.
4. The Applicant avers in his affidavit that upon learning that the certified copies of the proceedings had been ready since **20/08/2010**, he immediately applied for a copy and forwarded them to his current advocates with instructions to file an appeal on his behalf.
5. On behalf of the Applicant, it was urged that the delay was caused by his former advocates and that the mistakes of those advocates should not be visited on the Applicant. Further, the Applicant argues that they moved to file an application for leave to file an appeal out of time promptly, and that granting leave will not prejudice the applicants. Lastly, the Applicant asserts that the intended appeal has high chances of success.
6. On behalf of the Respondent, I am urged to dismiss the Application with costs on two main grounds:
 - a. First, the Respondent contends that the issues canvassed in the intended appeal are already subject of another legal proceeding namely before the **Kyamuoso Adjudication Section Committee**. Indeed, that was the reason the Applicant’s suit in the lower court was dismissed. The Respondent urges the court to order the Applicant to await the completion of those proceedings rather than file the intended appeal.

b. Second, and relatedly, the Respondent argues that the appeal is, in any event, not arguable.

7. The singular issue here is whether the Applicant has satisfied the Court that he had good and sufficient cause for not filing the appeal on time, and whether the court should exercise its unfettered discretion in favor of the Applicant. In deciding whether to exercise the Court's discretion, the court is guided by two competing interests. On the one hand, there is the obligation of a court of law to do justice by the parties and not to use technical legal rules to defeat substantive justice. This comes into sharp relief where, as here, a party claims the failure to abide by procedural rules was caused by its counsel. The legal principle implicated by this judicial objective is now enshrined in the now popularly known Oxygen Principles encapsulated in **sections 1A and 1B of the Civil Procedure Act**.

8. On the other hand, however, we must never lose sight of the fact that though procedure is the handmaiden of justice; and that rules of procedure serve an important function of preserving the orderly conduct of legal proceedings. In addition, courts must recall the need to bring proceedings to an end.

9. The judicial test which has developed to balance these competing interests is stated succinctly in the case of *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* (Civil Application No. NAI 251 of 1997). There the court stated the test in these terms:

It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matter which this Court takes into account in deciding whether to grant an extension of time are first the length of delay. Secondly the reason for the delay, thirdly (possibly) the chances of appeal succeeding if the application is granted and fourthly the degree of prejudice to the Respondent if the application is granted.

This case was cited with approval by the Court of Appeal in *Grindlays Bank International (K) Ltd v. George Barboor* (Civil Application No. 257 of 1995)

10. I have carefully considered the application, affidavits filed, and submissions of counsel. I am inclined to grant the application for leave because I am persuaded that the Applicant satisfies three of the four prongs of this *Mutiso* test with "flying colours" and I tip the balance of probabilities on his behalf on the fourth. First, the length of the delay is hardly material. The Applicant was only late to file the Memorandum of Appeal by six days. Second, the Applicant has explained the reasons for the delay, and I am persuaded that it is not merely for purposes of vexing the Respondent that he was tardy in filing the Memorandum of Appeal. Third, it is not readily obvious what prejudice the Respondent would suffer if this application is granted. The Respondent argues that this will, in essence, force them to litigate twice on the same issue since there are proceedings pending before the **Kyamuoso Adjudication Section Committee**. However, I believe this argument should properly be evaluated under the fourth prong, to wit, the likelihood of success of the appeal. Here, the less I say at this point the better. It does seem, however, that the Applicant has an arguable appeal. At the very least, the parties should get an opportunity to fully ventilate the issues surrounding the dismissal of the case in the lower court. The Respondent will get an opportunity press his argument that the dismissal was proper at that stage. As I have said, I hesitate to say more here at this stage.

11. When all is said and done, I have exercised my discretion to grant leave to file the Applicant's Memorandum of Appeal out of time against the orders of the Kilungu Resident Magistrate's Court Civil Suit No. 37 of 2009 issued on **28/07/2010**. I further direct that the Memorandum of Appeal annexed to the Applicant's draft Memorandum of Appeal be deemed as duly filed upon the payment by the Applicant of requisite court fees, which should be paid within three days hereof.

12. Finally, I order that the Applicant pays the costs of this Application.

DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.

J.M. NGUGI
JUDGE