



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

MISCELLANEOUS CIVIL APPLICATION 194 OF 2008

ROBERT KINYUA MIGWIAPPLICANT

VERSUS

MANYA BETTARELLO1ST RESPONDENT

VITTORIO BETTARELLO.....2ND RESPONDENT

R U L I N G

Mr. Robert Kinyua Migwi, hereinafter referred to as “*the applicant*” on 14th August, 2008 filed an application by way of Notice of Motion seeking one main prayer, to wit;

“1.That the applicant herein be granted leave to file an appeal out to (sic) time against the judgment and decree in Nyeri CMCC No.393 of 2005 (sic) of the same parties.”

The application was expressed to be brought pursuant to the provisions of *orders XLIX rule 5 and L rule 1* of the Civil Procedure Rules and all other enabling provisions of the law.

The grounds upon which the application was made that:

“a) Time within which the appeal could have been filed has since lapsed.

b) The respondents have filed an appeal against the same judgment and decree being Nyeri HC. Civil Appeal No.30 ‘B’ of 2008.

c) That the applicant was keen to file an appeal against the judgment of the lower court in Nyeri CMCC No.393 of 2005, but was inadvertently unable to do so within time and its expedient and fair to allow him to file an appeal that (sic) all the issues may be canvassed in a cross appeal.

d) The applicant intended appeal is an arguable appeal which has a high chance of success.

e) The delay in filing the appeal is not inordinate and therefore is excusable.

f) The same applicant has a good explanation for the delay in filing the appeal in time.

g) No prejudice will be occasioned to the respondents if the orders sought are granted.”

The application was further supported by an affidavit sworn by the applicant. In pertinent paragraphs he deponed as follows:

“1

2. That I was the plaintiff in the Nyeri Chief Magistrate’s Civil Case No.393 of 2005 between the parties herein. The case was concluded on the 21st May, 2008, where judgment of Ksh.292,654.30 was entered in my favour. Annexed hereto is a copy of the handwritten judgment, decree, plaint and notice to produce and marked RKM 1a, b & c.

3. That after the delivery of judgment I immediately had to return back to Malindi where I had been posted in (sic) the beginning of the month of May, 2008 by my employer.

4. That due to a heavy workload at the office I could not manage to travel back to Nyeri in good time to discuss the content of the said judgment with my advocates and fathom the way forward.

5. That while at Malindi my cell-phone got lost and in the process, I lost the telephone contacts of my advocate which compounded my problems to reach him.

6. That it was not until 15th July, 2008, when my advocate Mr. Mahinda met my friend one Frank Kimondo whom he requested to come to my home at Timau, confirm my whereabouts and if available I contact the said advocate.

7. That the said Frank Kimondo came to our home, informed my wife of the communication transmitted by the advocate. My wife contacted me through the hotel address and furnished to me the telephone contact of my advocate.

8. That I finally managed to contact my advocate on 22nd July, 2008.

9. That when I communicated to my advocate he informed me that he had been served by the counsel for the defendant/respondent with a memorandum of appeal and an application seeking stay of execution and therefore I was required to instruct him appropriately and respond to the same. Annexed hereto is a copy of the respondent’s Memorandum of Appeal in Nyeri HC. Appeal No.30’B’ of 2008, application for stay and marked RKM 2.

10. That I travelled to Nyeri on 24th July, 2008, where I met my advocate and thereby I instructed him to make an appropriate response on the application and requested him to file an appeal against the judgment also.

11. That the respondent (sic) having filed an appeal against the same judgment, no prejudice will be occasioned to them if the said orders are granted.

12.

13. That I have been advised by my advocate that, the intended appeal is arguable and has high chances of success.

14. That I felt aggrieved by a part of the judgment and had resolved to appeal against the same but due to the aforesaid reason, I was unable to file my appeal within time stipulated by law.”

Upon being served, the application was met with grounds of opposition as well as the replying affidavit filed by **Manya Battarello** and **Vittorio Bettarello** hereinafter referred to as “*the respondents*”. The grounds of opposition were to the effect that:

“1. The reasons advanced for the delay are unconvincing and untruthful.

2. The circumstances point out that the intention to appeal is a clear afterthought.

3. The intended appeal is a sham and stands absolutely no chance of success.”

The replying affidavit was however sworn by **Mwangi Kariuki**, learned advocate for the respondents. In pertinent paragraphs he deponed as follows:

“2. That there is nothing in the applicant’s application to show that the handwritten proceedings marked as Exhibit RKM 1(a) has any relationship with Nyeri Chief Magistrate’s civil Case Number 393 of 2005 whose judgment the applicant seeks to appeal against.

3. That and without prejudice to the foregoing the record shows that the applicant and his counsel were present at the reading of the judgment on 27th May, 2008 thereby giving the applicant ample opportunity to express to his counsel his dissatisfaction (if any) with the judgment and accordingly give instructions to appeal.

4. That it is not true that the applicant as he alleges is or was working at Malindi as he alleges and it is instructive that he does not state from where he was working prior to his posting at Malindi or indeed where he exactly works in Malindi.. Indeed the applicant did not travel back to Malindi immediately after delivery of the judgment and I am informed by my secretary Bridget Gakii Ngera which information I verily believe to be true that he came to my chambers in Nanyuki trying to seek me out and failing to find me asked my secretary to convey to me his request that I do not appeal against the judgment and to ensure that the decretal amount was paid to him the soonest possible. It is infact from that visit that I myself leant of the judgment whose date after several postponements had not been communicated tome.

5. That a litigant as enthusiastic as the applicant seeks to convince the court could have tried to contact his counsel in some other way even after losing his phone as he alleges, say by asking his wife to make contact with the counsel not to mention that the applicant must have been in possession of his counsel’s letterheads on which he could have obtained the latter’s telephone contact.

6.

7. That it is inconceivable that a litigant enthusiastic to appeal should be unable to contact his counsel for a period of approximately two months.

8.

9.

10.

11. That the intended appeal looked at in the context of the judgment is incomprehensible and stand (sic) no chance of success its sole intention being a hope to intimidate the respondents into withdrawing their own appeal filed as this court’s Civil Appeal Number 30 of 2008.

12. That the delay in seeking to institute an appeal on the part of the applicant is inexcusable and the decision is a clear afterthought in the light of all the circumstances.

The interpartes hearing of the application commenced before **Kasango J.** on 15th December, 2008. Midway through his submissions in opposition to the application, **Mr. Kariuki** realized that he needed to have filed a replying affidavit. Apparently, at this stage he was contend with relying on the grounds of opposition that he had filed earlier. Therefore he sought leave of court to file a replying affidavit portions

of which I have already reproduced elsewhere in this ruling. Though the application was resisted it was nonetheless allowed. The matter was then adjourned to 6th February, 2009 for further hearing. On that day it was the turn of the applicant to seek leave so as to file a supplementary affidavit to respond to what had been deposed to in the replying affidavit by the respondent. The application was allowed. When the matter next came up for hearing, **Kasango J.** had been transferred to the High Court of Kenya at Meru. Accordingly parties by consent agreed to have the application determined by me on the basis of the affidavits on record.

The essence of this application is that the applicant is seeking leave of court to file a cross-appeal out of time against the judgment and decree in Nyeri CMCC No.393 of 2005 passed on 27th May, 2008. The respondents having been dissatisfied by the said judgment and decree had lodged an appeal to this court vide Civil Appeal Number 30'B' of 2008. It would appear that the applicant was also aggrieved by a portion of the judgment and had resolved to appeal against the same. However he was unable to do so in time due to the reasons set out in the supporting as well as the supplementary affidavits filed herein.

The law as regards the principles to be applied when dealing with applications of these nature is now well settled. The starting point is that the court has unfettered discretion in dealing with such an application. However, like all judicial discretions, the court has to exercise its discretion upon reasons and not upon its whims. To guide the court on what to consider when exercising this discretion, the case law has established certain matters that must be taken into account. These are first, the period of delay must be considered. Second, the court has to consider carefully the reasons given for such a delay. Thirdly, the court would consider whether the appeal or the intended appeal (as it is the case here) for which extension is sought is arguable, that it is not a frivolous appeal – and it must be pointed out that an arguable appeal does not mean an appeal that will be successful. Fourthly, the court is required to consider if the respondent (or respondents as is the case here) will be prejudiced if the application is granted. Those are the main principles to be considered but the list is not meant to be exhaustive and can never be exhaustive, as the exercise of discretion by itself demands that the court should not be restricted in this options. Other matters such as problems relating to finances for mounting the appeal, ages of the parties, conduct of advocates, delay by courts, e.t.c may in certain circumstances be relevant.

In the case of **Leo Sila Mutiso V Rose Hellen Wangere Mwangi – Civil Application No.NAI.251 of 1997 (UR)** the court of appeal however stated:-

“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 matters 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 the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

In the instant application, the applicant explains in his affidavits the efforts he made in pursuing the intended cross-appeal. The main reason advanced was his unforeseen and unexpected transfer to Malindi as his new working station. Whilst in Malindi, he also lost his cell phone and in the process lost telephone contacts of his advocates. These are all plausible reasons. The judgment sought to be appealed was delivered on 27th May, 2008. The instant application was lodged on 19th August. The delay therefore is about 2 ½ months. That delay cannot be said to be inordinate. I have glanced through the memorandum of intended cross appeal and on the face of it, I cannot say that the intended appeal is frivolous. In my view it is an arguable appeal. I do not see any prejudice that will be occasioned to the respondents if the application is allowed. After all they too have lodged an appeal against the very same judgment.

In view of the foregoing, I allow the application and leave is hereby granted to the applicant to lodge a cross-appeal out of time. The intended cross-appeal is to be lodged within the next fourteen (14) days from the date hereof. Costs of this application to abide the outcome of the intended cross-appeal.

Dated and delivered at Nyeri this 18th day of June, 2009.

M.S.A. MAKHANDIA

JUDGE