



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC MISC APPLICATION. NO. 6 OF 2020

HEBRON ORUCHO GISEBE.....1ST PROPOSED APPELLANT

NELSON MOCHAMA GISEBE.....2ND PROPOSED APPELLANT

COSMAS GEKONGE.....3RD PROPOSED APPELLANT

VERSUS

JOSEPH OMBUNA GISEBE.....1ST PROPOSED RESPONDENT

RENINSON GISEMBE.....2ND PROPOSED RESPONDENT

RULING

INTRODUCTION

1. The Applicant moved this Honourable Court vide a Notice of Motion dated 25th June 2020 seeking the following orders:

(i) That the Proposed Appellants be granted leave to appeal out of time against the whole Judgment of the Senior Resident Magistrate's Court at Kisii delivered on 28th February 2020.

(ii) That the Memorandum of Appeal annexed hereto be deemed as duly filed and served.

(iii) The costs of this Application be provided for.

2. The Application is grounded on the grounds set out in the body of the Application and on the Supporting Affidavit sworn on 25th June 2020 by the Applicant's advocate.

3. The main basis of the Application is that the Applicants initially lacked the wherewithal to file the Appeal and soon thereafter the COVID-19 global pandemic halted the regular operations of the courts thus resulting in the delay in filing the Appeal on time.

4. The Respondent filed Grounds of Opposition dated 22nd September 2020 to the Applicants' Notice of Motion on 25th June 2020.

5. When the matter came up for Inter-partes hearing on 22nd September 2020 the parties consented to canvass the Application by way of written submissions. The Applicant's submissions were filed on 12th October 2020 whereas the Respondent's written submissions were filed on 26th October 2020.

ISSUES FOR DETERMINATION

6. This is a straight forward Application that raises a single issue for determination namely:

Whether to extend time for filing the appeal out of time.

ANALYSIS AND DETERMINATION

Whether to extend time for filing the appeal out of time

7. Our case law has now provided guidelines on what should be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court Judgment or Ruling to file an Appeal out of time.

8. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an Appeal out of the statutory period is discretionary and must be granted on a case by case basis.

9. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised in their favour.

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 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.

10. The key take away from section 79G is that the Applicant seeking enlargement of time to file an Appeal out of time must show *good cause*.

Different circumstances determine whether the Applicant will have presented cause(s) to persuade the court to grant them leave to appeal out of time.

11. In the instant Application, the Applicants submit that the delay to file the application is not inordinate and further that the Applicants have a formidable and arguable appeal as disclosed in the attached Memorandum of Appeal.

12. Learned counsel for the Applicants submit that a party should be allowed to exhaust his right to justice by appealing to a higher court. They argue that the Appeal court exists for this purpose and that right of appeal cannot be wished away merely because the statutory timelines are not met.

13. In their submissions, counsel for the Applicants urged this Honourable Court to exercise its inherent and discretionary power to allow the Application with no orders as to costs.

14. In the opposing submissions, counsel for the Respondents urged this court to be guided by the conditions set out in **Karny Zahrya & another v Shalom Levi [2018] eKLR** where in summarizing the requisite conditions for such an application the court opined thus:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

15. The Respondents submitted that on 28th February 2020 (the day when the lower court delivered its Judgment) the Applicants were present in court and further that Counsel for the Applicants applied for certified copies of the proceedings. They submit that the letter applying for the certified copies of proceedings was presented at the Civil Registry for assessment of deposit costs on 2nd March 2020 and that the deposit was assessed at Ksh. 1075/-.

16. The Respondents submit that the Applicants paid the sum of ksh. 1075/- on 28th April 2020. It is their argument that this was only possible because there was no total close-down of the courts and therefore that reason for delay raised by the Applicants is not true and it is brought in bad faith.

17. Counsel for the Respondents submitted that the Applicants did not swear any Affidavit to support their claim of financial difficulties after stating that they weren’t able to immediately raise the sum of Ksh. 1075/=.

18. The Respondents referred this court to the case of **Daphene Parry vs Murray Alexander Carson (1963) EA 546** where the court opined that:

“though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.”

19. They were of the view that this argument put forth by the Applicants is not true since the Applicants had earlier testified (in the lower court) that they are businessmen in Keumbu Shopping Centre.

20. The Respondents submitted that it was the Applicants' advocate Mr. Samwel Nyariki Ondieki who signed the Affidavit in support of the Application dated 25th June 2020. They argued that an advocate is not allowed in law to swear an Affidavit in support of this kind of Application and that the same ought to have been done by the Applicants giving sufficient reason for their delay.

21. Counsel for the Respondents asked the court to expunge the affidavit sworn by the advocate in support of the application dated 25th June 2020.

They submitted that 4 months without sufficient explanation by the Applicants constitutes inordinate delay.

22. They argued that although the Applicants moved this court under the O2 principle instead of Section 75G, they must nonetheless fulfill the conditions set out in Section 75G of the Civil Procedure Act in order for leave to be granted to file out of time.

23. In support of this argument the Respondents referred this court to the case of **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR** where the court reiterated the findings in the case of **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** where the court held *inter alia* that:

“...the Applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.”

24. They submitted that the Applicants cannot be allowed to invoke the O2 Principle when they have not complied with the conditions set out in Section 75G of the Civil Procedure Act.

25. They argued that the conduct of the Applicants in this matter portrays them as people whose only intention is to delay the implementation of the lower court’s judgment so that they can go on to unjustly enrich themselves from the suit plot.

26. They submit that the Applicants were negligent and/or inactive in taking the necessary steps to lodge their appeal in time. Furthermore they argue that the Applicants have failed to file the record of appeal which demonstrates that they are not serious about pursuing their appeal and thus the Applicants do not deserve the discretion of this court.

27. Counsel for the Respondents submit that in balancing the Applicants interests and that of the Respondents, they urge this Honourable Court to find that the interest of the Respondents must prevail given the Applicants’ conduct.

28. The Respondents submit that the Applicants have not laid any sufficient cause to warrant the court to exercise its discretionary powers under the law in their favour and that this Application be dismissed with costs.

29. As aforementioned, our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**. They include the following:

- i. The period of delay;
- ii. The reason for the delay;
- iii. The arguability of the appeal;
- iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- v. The importance of compliance with time limits to the particular litigation or issue; and
- vi. The effect if any on the administration of justice or public interest if any is involved.

30. I will therefore proceed to consider all these factors contemporaneously so as to establish whether this is a case where extension of time to allow the Applicants to file their appeal out of time is merited.

31. It is common knowledge that on March 15, 2020 there was a scale down of all the Judiciary public-facing operations in compliance with the recommendations of the National Emergency Response Committee on Corona virus.

32. The Applicants statutory period expired 30 days after the Judgment was delivered. This time frame fell at the epoch where the pandemic was all the craze in the country and the globe at large. The Judiciary thereafter scaled up its operations on 15th June 2020 allowing more court processes to resume.

33. This Application was filed on 25th June 2020 which all things considered, was so soon after some form of normalcy had resumed in the

courts that one would not reasonably deduce to be inordinate delay.

34. The Applicants have given the disruption caused by the COVID-19 global pandemic as one of the reasons why they failed to lodge their Appeal within the statutory time frame.

35. It has to be acknowledged that the COVID-19 global pandemic is unprecedented and it disrupted the society at large and court operations in particular. The time when the Applicants filed their Application was soon after the courts scaled up their operations, which is a clear indicator that they were keen on pushing forward with their appeal as soon as they could.

36. However, it is also a valid argument that the Applicants failed to file their Memorandum of Appeal thus depriving the court the opportunity to analyze the arguability of the case. This notwithstanding, I see no sufficient reason why the Application should not be granted.

37. I however direct the Applicants to file all the requisite documents without any delay whatsoever.

38. In my view, no adverse effects will be occasioned to the Respondents by granting this order in favour of the Applicants; It would be prudent to permit the Applicants to exercise a preciously cherished right of Appeal.

39. While the statutory timeline is certainly important and vital in any litigation matter, it cannot be said to be the '*be all, end all*' in determining whether one is granted the opportunity to file an Appeal in the pursuit of justice.

40. In view of the foregoing, I grant prayer (a) of the Application by granting the Applicants leave to Appeal out of time on the condition that the Memorandum of Appeal is filed by the Applicants within 14 day after delivery of this Ruling. The Applicants shall bear the costs of this Application.

It is so ordered.

Dated, Signed and Delivered, at Kisii this 10th Day of February, 2021.

J. M. ONYANGO

JUDGE