



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KILGORIS

ELC MISC APPLICATION NO. 2 OF 2021

CHARLES KINYANJUI KIMANI

(Suing as legal representative of

JASON KIMANI MWANGI (Deceased).....APPLICANT

-VERSUS-

THABITHA RINKA

JOHN RINKA

DORCAS RINKA

ANNAH RINKA

NAFTALIKESSES.....RESPONDENT

RULING

The Application before Court is a Notice of Motion dated 2nd November 2021 seeking mainly two prayers which are as follows;

- a) Spent
- b) That the Applicant/Appellant be granted leave to file his Appeal out of time.
- c) That in the meantime, the Honourable Court be pleased to grant stay of execution of the intended Appeal.

The Application is supported by the Affidavit of one Charles Kinyanjui Kimani sworn on the 2nd of November 2021.

The Grounds in the body of the Application as well as the Supporting Affidavit provide as follows;-

1. A judgement in the Sub-Ordinate Court Kilgoris Case Number KILGORIS ELC CASE NO.24 OF 2018 was delivered on the 23rd of September 2021 with a right of Appeal within 28 days from the date of pronouncing of the judgement.
2. Unfortunately, the Applicant had a patient in hospital and therefore failed to give proper instructions on time only being able to do so about 7 days after the period of the right to appeal had lapsed.
3. The Applicant states that he is desirous of challenging the judgment delivered on the 23rd of September 2021 by the Sub-Ordinate Court in KILGORIS ELC CASE No. 24 OF 2018 and that the delay was simply an accidental slip which should be excused by the Court.

The Supporting Affidavit has annexed a Draft Memorandum of Appeal dated 2nd November 2021 as well as the letter bespeaking an appeal dated 30th September 2021.

The Respondents on the other hand have opposed the Application through a Statement of Grounds of Opposition dated 16th November 2021.

The Statement of Grounds of Opposition contain about 8 grounds which can be summarized as follows:-

1. The Application is pre-mature, misconceived, incompetent and otherwise legally untenable.
2. The Applicant has not established nor laid out any sufficient cause and/or basis to warrant the Orders sought in view of the provisions of Section 79 G of the Civil Procedure Act, Cap 21.
3. The Application has been brought after unreasonable and inordinate delay hence the Applicant is guilty of laches.

Both parties proceeded to file their written submissions in accordance to the Court's directions issued on the 17th November 2021.

The Applicant's submissions were filed on the 2nd of December 2021 and basically gave a brief explanation of the reasons contained in the Supporting Affidavit as to why there was a delay to file the Memorandum of Appeal within the time given by the Court on the 23rd of September 2021.

In support of the Applicants written submissions, the Applicant has also relied on the case identified as **COURT OF APPEAL CIVIL APPL.NO.55 OF 2020 BETWEEN VISHVA STONE SUPPLIERS COMPANY LIMITED-VERSUS- RSR STONE (2006) LIMITED.**

The Respondents in support of their Grounds of Opposition filed their submissions on the 30th of November 2021.

The Respondents identified 5 issues in the submissions which this Court should apply in making a determination of this Application.

These issues were mainly as follows:-

- A) Whether the Applicant has satisfactorily laid a basis to warrant this court to extend time to file the Appeal.
- B) Whether there is a reasonable reason for the delay?
- C) Whether the Court should exercise its discretion to extend time?
- D) Whether the Applicant is bound and/or disposed to suffer prejudice if the Order of Stay is not granted?
- E) Whether the circumstances exist to warrant the Orders sought for?

On issue No. A & B, the Respondents submitted that the Applicant has not given any tangible and/or reasonable grounds to explain the delay in filing of the Memorandum of Appeal.

The Respondents stated that the first ground that the Applicant had a sick patient has not be fully proved and/or demonstrated by way of documentary evidence placed before this Court.

The second reason that the Memorandum of Appeal was not filed in time because the court had not provided for typed proceedings is not also valid.

The law does not require a party appealing to have typed proceedings before filing a memorandum of appeal.

In support of the submissions by the Respondents on the above two issues, the Respondents relied on the authority of **NICHOLAS KIPTOO KORIR -VS- IEBC & 7 OTHERS , APPLICATION NO.16 OF 2014 eKLR.**

The gist of the above Ruling was as follows ***"a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court"***

On Issue No. C, the Respondents submitted that indeed, the prayers sought are equitable remedies which the Court has discretionary powers to make the appropriate Orders.

Consequently therefore, the Respondents submitted that in view of the Applicants inability to give tangible and satisfactory reasons for not filling the Memorandum of Appeal on time, then the Court should not exercise this discretion in favour of the Applicant.

On issue No. D regarding the issuance of stay Orders pending the hearing and determination of the Appeal, the Respondents submitted that the Order given by the Sub-Ordinate Court was a dismissal of the suit.

In essence, the judgement in the Sub-Ordinate Court namely KILGORIS ELC CASE NO.24 OF 2018 was a negative Order which cannot be executed and is incapable of being stayed save for issues of Costs.

Similarly, on the issue of costs, the Respondents had not taxed any Bill of Cost against the Plaintiff and therefore any stay orders would be made in a vacuum.

The Respondents in support of the above submissions relied on the case of **PHILIP KIPROTICH TUITOEK -VERSUS- EDNA JEBIWOTT KIPLAGAT & 2 OTHERS (2021) eKLR.**

ANALYSIS & DETERMINATION OF THE ISSUES IN THE APPLICATION.

According to the Pleadings and submissions filed herein, the only issue for determination is one, namely;-

1. Whether or not this Court should exercise its discretionary powers and grant an extension of the period in which the Applicant should file its Memorandum of Appeal and/or Record of Appeal.

The Application before Court for consideration has been anchored under Section 1A, 1B,3A and 79 C together with Section 95 of the Civil Procedure Act, Cap 21.

Section 79 C reads as follows;-

“Appeals from sub-ordinate Courts shall be heard by one judge of the High Court except when in any particular case the Chief Justice shall direct that the appeal be heard by two or more judges of the High Court; and such directions may be given before the hearing of the appeal or at any time before the judgment is delivered.”

Section 95 reads as follows;-

“Where any period is fixed or granted by the Court for the doing of any acts prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”

It is clear from the provision of Section 95 of the Civil Procedure Act, Cap 21 that the extension of time for a party to do certain acts is a matter of discretion by the presiding Court.

In the Supreme Court Case of **NICHOLAS KIPTOO ARAP KORIR SALAT -VERSUS- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 7 OTHERS,** the

Supreme Court Justices stated as follows;-

- “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 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 Respondent if the extension is granted.”***

According to the Applicants pleadings, the Sub-Ordinate Court delivered a judgment on the 23rd of September 2021 in the proceedings known as KILGORIS SPMC CASE NO.24 OF 2018.

It is not in dispute that the Court granted a window of 28 days to file an Appeal against the judgment if the Applicant was aggrieved by the same.

The Applicant’s supporting affidavit annexure 1 places before the Court a letter bespeaking an Appeal dated 30th September 2021 and received in Court on the 1st November 2021.

However, after the letter bespeaking the appeal dated 30th September 2021, the next document the Applicant filed was this Application on the 2nd of November 2021.

The 28 days period granted by the Court for the Applicant to file his Memorandum of Appeal was lapsing on the 20th of October 2021.

On the 2nd of November 2021 when the Applicant approached this Court for extension of time, the delay was for a period of 13 Days.

The Applicant’s reason for failing to comply with the 28 days period granted by the Court was that he had a sick patient in court and accidentally forgot to give instructions for the Memorandum of Appeal to be filed.

Although the Applicant has failed to provide any documentary evidence from the hospital, illness is something that one does not wish on any human being.

Health is a serious and critical issue to any human being and it is normal to prioritize treatment of either oneself or a relative when faced with it.

Even though no documentary evidence is placed before the Court by the Applicant, the Court is inclined to accept the Applicant's explanation on humanitarian basis.

In the cited Case of **VISHVA STONE SUPPLIERS COMPANY LIMITED -VERSUS- STONE (2006) LIMITED, COURT OF APPEAL CIVIL APPLICATION NO.55 OF 2020**, the Learned Judge made the following observation;-

“The Law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactorily explanation for the delay is the key that unlocks the Court's flow of discretionary power with the only caveat being that there has to be a valid and clear reason upon which the discretion can be favorably exercised.”

In any event, the period between when the time for the Right of Appeal lapsed and the filing of the Application is a mere 13 days.

In the Court's considered view, this Application was not filed after an inordinate delay or unreasonable delay.

The Applicant is still vigilant to follow up this litigation for the purposes of proceeding with any appeal available in law.

In the Cases of **JALDESA TUKE DABELO -VERSUS- IEBC & ANOTHER (2015) eKLR** and a second one of **RAILA ODINGA & 5 OTHERS -VERSUS- IEBC & 3 OTHERS (2013) eKLR**, the Courts held as follows;-

“ i) Rules of procedure are handmaidens of justice;

ii) A Court of law should not allow the prescriptions and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case.”

The other issue for consideration is whether or not the Respondents would suffer any prejudice if the Applicant is granted leave to file the Appeal out of time.

The right of an Appeal is not only a constitutional right but also a corner stone of any Rule of Law.

It cannot be taken and should not be taken away from a litigant simply because of procedural technicalities.

The Respondents herein will definitely participate in the Appeal process and have an opportunity to heard on merit.

In the event the Appeal is concluded in the Respondents' favour, they will retain their judgment as well as be compensated with additional costs for conducting the Appeal.

In the Court's opinion, the Respondents lose nothing in participating in the Applicant's Appeal.

In a nutshell, this Court is satisfied that the Applicant should be given an opportunity to enjoy the constitutional right of appeal enshrined in our Constitution of Kenya and statutes thereof despite the delay.

Having made the above determination, it is not lost to the Court that there is a second prayer in the Application which reads as follows;-

“c. That in the meantime, the Honourable Court be pleased to grant stay of execution of the intended Appeal”.

A plain reading of this prayer in the Court's view is actually self-defeating.

The Applicant in Prayer number B is seeking for leave to file the Appeal out of Time.

However, the Prayer Number C is again seeking to stay execution of the Intended Appeal.

Clearly, Counsel for the Applicant was not careful in the drafting of this particular prayer to enable the Court adjudicate on it.

The object and purpose of pleadings is to ensure that litigants come to court with all the issues clearly defined.

In the Case of **ISSA AHMED & 16 OTHERS-VERSUS-MOHAMED AL-SAWAE (2021) eKLR**, the Learned Judge had this to say;-

“A Court cannot assume or infer a case by referring to a stray sentence here and a stray sentence there in the pleading. A Court cannot exercise its judicial position to grant a relief which is not even sought by parties in their pleadings as granting the same would lead to a miscarriage of justice”

In a nutshell, Prayer No. C is incapable of being granted and is hereby dismissed.

In conclusion therefore, the Court do hereby make the following Orders in determining the Application before Court;-

1. The Applicant is hereby granted Leave of Fourteen (14) Days from the delivery of this Ruling to file the appropriate Memorandum of Appeal.
2. The Applicant shall be required to file the Record of Appeal within Forty-Five (45) Days from the date of filing of the Memorandum of Appeal.
3. Costs of this Application are awarded to the Respondents herein.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 3RD DAY OF FEBRUARY 2022.

EMMANUEL.M.WASHE

JUDGE

In the Presence of:

Court Assistant: Matiko

Counsel for the Plaintiff: No appearance

Counsel for the Defendant: No appearance