



REPUBLIC OF KENYA

IN ENVIRONMENT & LAND COURT

AT KISII

MISC. APPLICATION NO. 5 OF 2020

NELSON NYAUMA NDUBI.....APPLICANT

-VERSUS-

GEKARA OGETO.....RESPONDENT

RULING

INTRODUCTION

1. On 5th June 2020, the Applicant filed a Notice of Motion Application dated 5th June, 2020 seeking leave to enable him file his appeal out of time.
2. In support of his application, the Applicant averred that the Judgement of the lower court was delivered in favour of the Respondent on 10th February, 2020 and since he was acting in person he received a copy of the Judgment after the time of the Appeal had lapsed. It was his contention that the COVID 19 pandemic worsened the situation as the courts scaled down their operations.
3. He further prayed that this court be pleased to grant stay of the orders of the lower court pending the hearing and determination of the Appeal, since he was apprehensive that the Respondent might execute the Judgement and thus make him unable to recover should the Appeal succeed. He averred that his inadvertent failure to file his appeal in time is excusable and the application has been filed without inordinate delay. It was also his contention that the Respondents are not likely to be prejudiced in any way if the orders sought in the application were granted, since the execution of the Judgement of the lower court would still be possible if the Appeal was found to be unmeritorious.
4. The Applicant's application is opposed by the Plaintiff/Respondent vide Grounds of Opposition dated 10th June, 2020 and filed in this court on 15th June, 2020 wherein the Respondent stated that the application is incompetent, fatally defective, bad in law, lacks merit and is an abuse of the court process.
5. The court with the consent of the parties directed that the application be canvassed by way written submissions. The Applicant filed his written submissions on 11th January, 2020 while the Respondent not filed his submissions on 2nd June, 2021.

ISSUES FOR DETERMINATION

6. From my analysis of the Application, the response by the Respondent and the rival submissions, I deduce that the main issue for determination is whether the Applicant's application meets the threshold for grant of leave to file an Appeal out of time.

ANALYSIS AND DETERMINATION

7. It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time, in the case of **Nicholas Kiptoo Arap Korir Salat VS. The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**. The Court stated as follows:

“the under-lying principles that a Court should consider in exercise of such discretion are:

- 1. 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;**

2. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
3. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
4. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

8. It is trite law that under section 79 G of the Civil Procedure Rules, an Appeal from the subordinate court to the Superior Court shall be filed within 30 days from the date of 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.*”

9. In this instant application the Applicant raises two reasons as to why he seeks extension of time to file his Appeal. He avers that he got a copy of the judgment late after the time for filing his Appeal had lapsed and that the Covid-19 Pandemic made the situation worse for him as he was unable to access the court for purposes of filing the same.

10. However, with all due respect to the learned counsel for the Applicant, he has in his submissions ignored the averments of the Applicant in his Supporting Affidavit and set out totally new grounds and reasons why the Applicant failed to file this Appeal in time in what he captioned as the brief background.

11. Counsel argues that Applicant had on 26th February, 2020 through the firm of Moerwa Omwoyo and Co. Advocates filed a Memorandum of Appeal being **CIVIL APPEAL NO. 7 of 2020** in Nyamira High court. The Learned Counsel went on to state that the High court on 16th June, 2020 declined to entertain the same on reasons that it lacked jurisdiction hear and determine the claim therein since the same falls under the jurisdiction of the Environment and Land Court. It was also the learned Counsel’s submissions that it was upon the Applicant’s discovery that the High Court had no jurisdiction that he filed the instant application seeking leave to be granted upon him to file his Appeal in this court out of time.

12. Counsel contended that the Applicant’s decision to file this application was informed by the fact that at the time he learned that his Appeal at the High Court had been declined to he realized that his time within which he could file a Memorandum of Appeal in this court had lapsed hence he could not file the same without first seeking leave to do so.

Before even delving into sufficiency of the new reasons for the delay introduced in the Applicant’s written submission, it would be proper to first of all determine whether it is legally sound to introduce new facts of a suit in written submissions like the learned counsel has done. On this issue am guided by the court in the case of **Re Estate of Ndungu Mwaniki (Deceased) [2014] eKLR** where the court started as follows:

Written submissions should not be used to introduce new facts. Indeed, written submissions ought to dwell only on points of law. The applicant’s written submissions have not dwelt on the law at all, instead they seek to analyze facts which are not deponed to in the affidavits supporting the application.

..... Written submissions are not the same as affidavits. They are not sworn statements. They are not even meant to deal with facts but the law....

13. From this aforementioned case, it goes without saying the fact that the new reasons being advanced as reasons for the delay in filing the Appeal in time cannot be introduced through the written submission. This kind of practice amounts to allowing the Applicant to reframe or amend his pleadings or introducing new evidence through the backdoor without following the required procedure.

14. I also note a very disturbing disclosure in the Applicant’s written submissions wherein counsel submitted that the finding of the High Court that it lacked jurisdiction to hear and determine the Appeal was made on 16th June, 2020 by which date this application had already been filed in this court that is on 6th June, 2020. Even if I was to allow the application based the new reasons for the delay introduced in the written submissions, it would not be proper because from the Applicant’s own admission in his written submissions, the application was filed in this court on 6th June, 2020 when there was already an Appeal pending hearing and determination in the High Court. This is an abuse of the court process and an attempt by the Applicant to forum shop for a favourable order to the detriment of the Respondent who has a judgment in his favor.

15. Having established that the new reasons for the delay introduced in the submissions are inadmissible, it would be prudent to also make a determination as to whether the reasons advanced in the Applicant’s Supporting Affidavit are sufficient. It is without doubt that the application seeking leave to file the Memorandum of Appeal was filed in this court almost 4 months after delivery of the Judgment of the lower court on 10th February, 2020.

16. Section 79G of the Civil Procedure Act provides that every appeal from a subordinate court to the High Court must 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 necessary 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. It is

c;lear that the time for filing this Appeal had lapsed calling upon this court to determine whether the reasons provided in the Application are sufficient.

17. In as much it would appear convenient to use Covid-19 Pandemic as an excuse for the delay, the Applicant has not explained satisfactorily the efforts he made in trying to file the Appeal in time given that the public court had some limited access. It is also clear that from the reasons I have hereinabove determined to be inadmissible for having been introduced in the submissions that most of Applicant's time was wasted at the High Court in Nyamira and not on reasons advanced on the face of the application and his Supporting Affidavit.

18. As submitted by Counsel for the Respondent the burden was on the Applicant to satisfy the court that he was deserving of the exercise of the court's discretion. I am constrained to agree with counsel for the Respondent that the Applicant has not met requirements set out in the **Salat** case I have highlighted herein above. In particular, he has not he has not explained to my satisfaction why it took him 4 months to file this application seeking leave to file his Appeal out of time.

CONCLUSION

19. In the light of the foregoing, I dismiss this application with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF JULY, 2021.

J.M ONYANGO

JUDGE