



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MISCELLANEOUS APPLICATION NO. E026 OF 2021

IN THE MATTER OF CIVIL PROCEDURE ACT (CAP. 21)

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE AN INTENDED APPEAL OUT OF TIME

BETWEEN

1. JOSEPH NGINGO NDUATI (Suing as the legal representative of the Estate of

LAWRENCE NDUATI GACHOROHIO

2. DANSON MAINA NDIRANGU

3. STEPHEN THIONG'O KUNJURI.....APPLICANTS

VERSUS

THE COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

CHARLES ONYANGO DEYA.....2ND RESPONDENT

PETER MALA.....CHAIRMAN

MARTIN ODIRA OUKO.....SECRETARY

JOSEPH OBIERO.....TREASURER

SIMON OUKO(Trustee Sued as Officials of

SHALOM WELFARE ASSOCIATION).....3RD RESPONDENT

THE RULING

1. The application for consideration is the Applicant's chamber summons dated 19/02/2021 brought under Order-50 Rule 7 of Civil Procedure Rules and Section 79G-1A,1B & 3A of Civil Procedure Act. The Applicant is seeking for the following;

a. Time within which to file the intended appeal against the decision made on 28/8/2020 be enlarged.

b. Costs be provided for.

A. THE APPLICANT'S CASE

2. The grounds of the Application are stated in the supporting affidavit sworn by Stephen Thiong'o Kiunjuri on 19/02/2021 as follows;-.

- a. The impugned judgment was delivered on 28/8/2020 without our knowledge and without notification at all even though we were available.
- b. We kept trail of the progress of the matter and the court had indicated it would deliver the judgment on 10/7/2020, then 31/7/2020 but the matter was not listed after which despite several requests to the court through emails there was no response and we only learnt judgment was delivered much later by sheer chance.
- c. We also applied for copy of the judgment and proceedings on 21/1/2021 but again no response is forthcoming
- d. The applicant is aggrieved by the said decision and wishes to appeal against the same.
- e. We urge that the application be granted in the interest of substantial justice as the fault was not our part of the court.

B. THE RESPONDENTS CASE

3. This application is not opposed.

C. SUBMISSIONS

Applicant's submissions

4. The application was canvassed by way of written submissions. The applicant through their counsel filed their submissions on the 28th of September 2021. In it, counsel submits that the applicant's grievance is that the impugned judgment was delivered in their absence as no notice was issued or served upon them or their advocates.
5. Counsel submits that the applicants are alive to the fact that the remedy sought is pegged on the court's discretion and urge the court to take note of the circumstance attendant to the matter having regard to the fact that this was at a time when the nation was in turmoil and confusion due to COVID 19 Pandemic.
6. Counsel relied on and cited the case of **Petition No. 528 of 2017: National Super Alliance (NASA) vs IEBC** and **Civil Appeal No. 27 of 2019: Kridha Limited vs Peter Sala Kituri** whereby the court defined judicial discretion.
7. It is the applicant's contention that the court should rely on Section 79G of Civil Procedure Act to allow the applicant to file the appeal out of time as was set out in the case of **Misc. Civil Application No. 85 of 2020: MFI Document Solutions Limited vs Paretto Printing Works Limited**.
8. Finally, counsel submits that the applicant is seeking enlargement of time to file an intended appeal out of time under the circumstances explained in the applicant's affidavit and urges the court to allow the application.

D. ISSUES FOR DETERMINATION

9.c Having considered the Application, the Supporting Affidavit and applicant's submissions together with the cited authorities, the following arise as the issues for determination before this court.

- a. whether the applicant ought to be allowed to file the appeal out of time,
- b. whether the applicant has established sufficient cause for the delay,

E. ANALYSIS

a. Whether the applicant ought to be allowed to file the appeal out of time.

10. It is not in dispute that the matter before the lower court was slated for judgement for delivery on 10/7/2020, then 31/7/2020. It is also not disputed that judgement was eventually delivered on 28/8/2020 in the absence of the applicant's counsel. The explanation by the applicant is that the matter was not listed after which despite several requests to the court through emails there was no response. It is the applicant's contention that the judgment was eventually delivered without notice to the applicant.

11. 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 (30) 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.”

12. The applicant's application for leave to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal during the specified time.

13. The court notes that the present application was filed on 19th February, 2021 and the applicant has explained that the delay was caused by the delivery of the judgment without notice even though they had followed up severally since 31/7/2021 when the court had intimated the same would be delivered.

14. In the case of **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR**, Odunga J found that:

“an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in Daphne Parry vs. Murray Alexander Carson [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, 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.”

15. As to the principles to be considered in exercising the discretion whether to enlarge time, 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:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.

In **Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others [2014] eKLR**, the court stated that;

“Judicial discretion is always exercised judiciously and for reasons which are stated. The aims that should be encapsulated in the reasons given for the refusal to exercise discretion are meant to further the cause of justice, and to prevent the abuse of the court process.

Judicial discretion is never exercised capriciously or whimsically”

16. The Court in **Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013** stated that:

“... But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at.”

Therefore it is trite that discretion must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment

b. Whether the applicant has established sufficient cause for the delay.

17. The applicant was expected to file his appeal within thirty (30) days of the judgment, he did not do so. However he gave an explanation why there was the delay.

18. The applicant also provided that he applied for copy of the judgment and proceedings through a letter dated 21/1/2021 addressed to the Chief Magistrate Milimani Commercial Courts but has not received a response.

19. In the case of **Daniel Kakuta Kavoi v Tri-Clover Industries (9K) Limited [2021] eKLR**, Matheka J in answering the question as to whether there was inordinate delay relied on the Court of Appeal case of **Cecilia Wanja Wamwira Kerugoya Civil Appeal No.211 of 2013 (2018) eKLR** whereby court held;

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed..... we have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or

delay in filing the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice.”

20. The court in **Daniel Kakuta Kavoi (supra)** found that an appellant’s explanation therein that the delay to file an appeal was due to the COVID 19 pandemic was sufficient in the circumstances of the case. It held that:

“This is not a case seeking the court’s sympathy. It is a case where there is a believable explanation for the delay. Is this explanation sufficient in the circumstances of the case? This must be established to warrant the flow of the court’s discretion in favour of the applicant. The question is whether this explanation amounts to sufficient cause. In DAAPHNE PARRY VS. MURRAY ALEXANDER CARSON (1963) EA 546 court stated 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.”

21. In the case of **Boniface Njoroge v Nancy Njoki Nyaga [2021] eKLR**, the court in allowing an application to appeal out of time and held that:

“This court is persuaded the delay may have been caused by the scaling down of court operations due to the outbreak of Covid 19 pandemic leading to closure of court premises for a while. I am convinced that the applicant should benefit from the court’s discretion.”

22. Further, in allowing an application to extend time to file an appeal in the case of **In re Estate of Nzolove Kisuke (Deceased) [2020] eKLR**, Odunga J held that:

“In my view considering the circumstances of this case and as there is a plausible reason for the delay in filing the appeal, it is in the interest of justice that the applicant be granted a chance to argue his appeal on merits. The fact that he did not file his appeal within the prescribed time should not be impediment to his doing so. Prejudice if any occasioned to the Respondent can, no doubt be compensated in costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See Waljee’s (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.”

23. From the above, the factors I am enjoined to take into consideration in the determination of an application of this nature are first, the length of the delay. Second, reason for the delay. Third, possible arguability of the intended appeal and fourth, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.

24. Starting with the delay, it is not in dispute that the intended impugned judgment was delivered on 28/08/2020, while the application under consideration is dated 19/02/2020 a period of five months and about three (3) weeks.

25. In **George Mwendu Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014 (UR)**, extension of time was declined on account of the applicant’s failure to explain a delay of twenty (20) months, while in **Aviation Cargo Support Limited vs. St. Marks Freight Services Limited [2014]eKLR**, the relief for extension of time was declined for the applicant’s failure to explain why the appeal was not filed within sixty days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.

26. Applying the above threshold to the uncontroverted position herein, it is my finding that the length of delay under interrogation herein is not so long as that which was the subject in the **Mama Day Nursery School** case [supra] that led to the Court declining relief therein. It is however longer than the length involved in **the Aviation Cargo** case (supra) which also resulted in the Court declining to exercise its discretion in favour of the applicant therein. The above being the position, issue as to whether the applicant’s request is sustainable or not will depend on my take on the reasons given for the delay.

27. From the evidence presented, the Applicant has annexed documentary proof in support of the effort made to find out from the court when the judgement was to be delivered. Although the Respondent/Defendant was present when the judgement was delivered the Applicant/Plaintiff was not there. The Applicant wrote a letter dated 10/07/2020 requesting to know when the judgement would be delivered. A letter dated 16/09/2020 was written requesting for the judgement and another letter dated 12/10/2020 asking for the judgment. The final letter requesting for the judgment was written on 21/01/2021 and this application was filed on 19/02/2021 two weeks and five days after the last request for judgement. There is no reason for me to doubt the reasons advanced by the Applicant and I am therefore satisfied that they are genuine. The reason for the delay is plausible, and, therefore, excusable.

28. On whether the applicant has an arguable case I am unable to say that the intended appeal is arguable. The arguability or otherwise of the intended appeal is merely a possible consideration. It is not a mandatory requirement. There is therefore no need for me to determine at this juncture as to whether the appeal is arguable or not.

29. On prejudice, the respondent has not opposed the application. There is therefore no prejudice that is likely to be suffered by the respondent should the relief sought be granted.

F. DETERMINATION

30. In the result and on the basis of the above assessment and reasoning, I find merit in the applicant's application and proceed to make orders as follows:

a. The applicant has 7 days from the date of the reading of this ruling to file and serve Memorandum of Appeal

b. Since the application is undefended there will be no order as to costs.

31. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2021

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JACQUELINE MOGENI

JUDGE

Delivered in the presence of

CA Vincent Owuor