



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISCELLANEOUS APPLICATION NO 55 OF 2020

JOHN ONDIEKI JOHN.....APPLICANT

VERSUS

GARDEN REAL ESTATE DEVELOPMENT LTD.....1ST RESPONDENT

BERNARD NJUGUNA NJERI.....2ND RESPONDENT

RULING

1. By Notice of Motion dated 31st August 2020 and filed on 1st September 2020, brought under sections 75 and 95 of the Civil Procedure Act and Order 50 Rule 5 of the Civil Procedure Rules, the applicant sought two prayers. First, leave to appeal out of time and, second, that the amended Memorandum of Appeal be deemed to have been duly filed and served on payment of court fees.
2. The motion was grounded on the fact that the judgment was delivered on 14th May 2020 and the applicant was desirous of filing an appeal but time for doing so had expired. The reasons the applicant advanced for not filing the appeal within time were that;
 - (a) Following the scaling down of activities after 15th March 2020, his advocates' offices were closed in line with recommendations that people work from home;
3. by the time his advocates resumed work, the time for lodging appeal had expired. The applicant stated that his appeal had high chances of success and that the respondent would not suffer any prejudice.
4. The motion was also supported by the applicant's affidavit sworn on 31st August 2020. He deposed that the impugned judgment was initially to be delivered on 19th March 2020 but due to the Covid-19 pandemic and the announcement by the Judiciary on 15th March 2020 that it was scaling down its operations, his advocates also closed down his offices following the directives by the Ministry of Health. He urged that his advocate's mistakes should not be visited on him.
5. The respondent filed a replying affidavit by Mercy Nelima Simiyu, sworn on 1st March 2021 and filed on 5th March 2021. She stated that the application had been filed in bad faith; was frivolous and had no legal basis. She again stated that it was becoming the applicant's habit to engage the respondent in long and unnecessary litigations even where it was clear that he had no legal cause against the respondent.
6. According to the deponent, prior to filing the case at Ngong, the applicant had filed **CMCC No. 5471 of 2018** at the Chief Magistrates Court, Milimani and while that case was going through motions in preparation for trial, the applicant filed the case at Ngong over the same cause of action and against the same party.
7. She stated that on becoming aware of the suit at Ngong, the respondent filed an application to dismiss the suit, but the applicant who denied being aware of the suit at Milimani, quickly withdrew that suit leaving the Ngong suit to proceed to hearing and eventually the judgment was delivered against it.
8. It was the respondent's case that the judgment was delivered on 14th May 2020 and sent to the applicant's advocate's email in the absence of its advocate, an indication that the Judiciary was working. The respondent argued that there were mechanisms in place through which proceedings were going on within the Judiciary to facilitate filing of pleadings and the necessary documents.
9. According to the respondent, courts then came up with ways of dealing with cases including technology, and courts had resumed operations by the time the judgment was delivered on 14th May 2020. It was the respondent's case that the applicant was dishonest and had failed to reveal material facts and should be denied leave.

10. When the motion came up for hearing, both counsel agreed to argue the application orally. Mr. Ngare moved the motion and relied on the supporting affidavit as well as the grounds on the face of the motion. He urged the court to allow the application.

11. Mr. Aguko for the respondent opposed the application also relying on the replying affidavit. He urged the court to dismiss the motion with costs.

12. I have considered the motion, the supporting affidavit, the response and arguments by counsel for the parties. The application primarily seeks leave to appeal out of time. It has been brought under sections 75G and 95 of the Civil Procedure Act.

13. The judgment sought to be appealed against was delivered on 14th May 2020, while the application for leave to appeal was dated 31st August 2020 and filed on 1st September, 2020.

14. The applicant has urged the court to exercise its discretion and grant him leave to appeal out of time. The respondent on its part has opposed the application, arguing that the applicant has not shown good reason why the application should be allowed and is guilty of non-disclosure of material facts.

15. There is no doubt that the law grants a person aggrieved with a judgment, the right of appeal. Section 65 of the Act allows appeals from subordinate courts to this court. At the same time, section 79G of the Civil Procedure Act sets the time within which an appeal to this court should be filed. The section provides:

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. (emphasis)

16. It is plain from the language of section 79G that the court has discretion to extend time within which to lodge an appeal if the applicant demonstrated that there was good reason or sufficient cause for not filing the appeal within the time provided. Decisions are also clear that the court's discretion to extend time for appeal may be exercised in favour of an applicant where the court is satisfied that it is just to do so. Just like the proviso to section 79G, the decisions emphasize the principle that an applicant must satisfy the court that he had good or sufficient cause for not filing his appeal on time. The court should always exercise its discretion judiciously.

17. The judgment to be appealed against was delivered on 14th May 2020. The applicant argued that judgment was delivered without notice to parties and at a time when the courts had scaled down operations and his advocates' offices had also closed due to the Covid19 pandemic. By the time his advocates' offices reopened, the time for filing appeal had lapsed. The respondent did not argue that the judgment was not delivered during the pandemic. It did not also argue that parties were notified that the judgment would be delivered on 14th May 2020.

18. The judgment was delivered on 14th May 2020 while the application was filed on 1st September 2020, a period of less than three months. There can be no argument that the period was not inordinate given the circumstances under which the judgment was delivered. I do not find the delay to be so inordinate as to warrant it to decline to exercise its wide discretion in favour of extending time for filing the appeal out of time.

19. In ***Kenya Power & Lighting Company Ltd v Rose Anyango & Another*** [2020] eKLR, judgment was delivered on 19th February 2020 and an application for leave to appeal was filed on 20th April 2020 during the pandemic. The court found the delay not to be inordinate.

20. I also note that the respondent has not stated what prejudice it will suffer if leave is granted to meet the ends of justice. For that reason, it is my view that the ends of justice would be better served if leave is granted to the applicant to lodge his appeal out of time.

21. Consequently, the application dated 31st August 2020 is allowed and I make the following orders.

a. Leave is hereby granted to the applicant to file an appeal out of time.

b. Memorandum of Appeal be filed within fourteen (14) days from the date of this order.

c. Costs of the application to abide by the result of the intended appeal.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 9TH DAY OF APRIL, 2021.

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JUDGE