



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

MISC. CIVIL APPLICATION NO. E007 OF 2021

JANE WACEKE KORI.....APPLICANT

VERSUS

JOHN GITHUI KORI.....RESPONDENT

RULING

Brief facts

1. This application dated 24th February 2021 seeks for leave to file appeal out of time against the decision in PMCC No. 31 of 2007.
2. The firm of Maina Karingithi & Company is on record for the respondent. They were served with this application as per the service but no response was filed by the said firm.
3. The applicant made oral submissions on the application on 23rd March 2021.

Applicant's Case

4. The applicant relied on Section 3A and 79G of the Civil Procedure Act and stated that this honourable court has discretion to grant leave to file the appeal out of time since the time for filing the appeal has lapsed.
5. It is the applicant's case that the matter was scheduled for ruling on 21st May 2020 and she never received a copy of the same via e-mail as the court had directed. Thereafter upon numerous inquiries from the Executive Officer, in October 2020, he was informed that the ruling was delivered sometime in May 2020. The applicant requested for a copy of the said ruling as well as typed proceedings on the same day, vide a letter and paid Kshs. 1,000/- deposit for proceedings.
6. On 4th December 2020, the applicant states that she received the copy of the proceedings and it was not until 24/2/2021, that she received the proceedings certified by the court for purposes of preparing a memorandum of appeal.
7. The applicant being aggrieved with the ruling is desirous of lodging an appeal but the time has since lapsed. Therefore the applicant prays that the application be allowed.

Issues for determination

8. The main issue for determination herein is whether the court should exercise its discretion to grant the applicant leave to file her appeal out of time.

The Law

Whether the court should exercise its discretion to grant the applicant leave to file her appeal out of time:

9. Section 79G of the Civil Procedure Act states:-

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 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. It is clear from the wording of section 79G of the Civil Procedure Act, that before the court considers extension of time, the applicant must satisfy the court that that she had good and sufficient cause for not filing the appeal out of time. This principle was enunciated in the case of **Diplack Kenya Limited vs William Muthama Kitonyi [2018]eKLR** 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.

11. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a) Extension of time is not a right of any 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 by case basis;**
- d) Whether there is a 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;**
- f) Whether the application has been brought without undue delay.**

12. Similarly in the case of **Paul Musili Wambua vs Attorney General & 2 Others [2015]eKLR**, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

13. The applicant stated that the ruling was delivered in the absence of both parties, particularly, via the counsel’s advocates’ emails pursuant to the Chief Justice’s directions issued under Gazette Notice No. 3137 of April 2020 the applicant further states that she followed up on the ruling until she received communication in October 2020 that the ruling had been delivered on 21st May, 2020. In the premises and upon considering the resulting circumstances in which the ruling was delivered and not communicated, I, find the explanation of the applicant to be reasonable. The ruling in this matter was delivered electronically on 21st May, 2020 in the absence of the applicant. The applicant came to be aware of the delivery five(5) months later after a struggle to obtain information from the court registry. It was not until certified proceedings and subsequently filed that the applicant filed the application. The duration of about ten(10) months delay was not the fault of the applicant.

I also rely on the case of **Samuel Mwaura Muthumbi vs Josephine**

Wanjiru Ngugi & Another [2018]eKLR where the court upon considering that no communication was given to the applicant regarding the judgement among other prevailing circumstances, granted an extension of time for the applicant to lodge an appeal

14. It is noted that this application was unopposed. Furthermore, it is my view that no prejudice will befall the respondent should leave be granted to the applicant to file an appeal out of time.

Conclusion

15. Consequently, I find that this application is merited and allow it on the following terms:-

- a) That the applicant files her appeal within fourteen(14) days in default of which these orders will lapse
- b) That there will be no order as to cost.

16. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 6TH DAY OF MAY, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 6th day of May 2021