



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 120 OF 2020

PAUL KIRIGA MWANGANYI.....APPELLANT/APPLICANT

VERSUS

1. KENYA WILDLIFE SERVICE)

2. ISAAC ALIO HAPPI).....RESPONDENTS

RULING

1. Before me is a **Notice of Motion** application dated **30th September, 2020** brought pursuant to **Section 79G** of the **Civil Procedure Act Cap 21** and **Order 51 Rule 1** of the **Civil Procedure Rules Laws of Kenya** and all other enabling provisions of the Law. In the Application, the Applicant prays for the following orders: -

1) *THAT the Appeal herein be admitted out of time and the Memorandum of Appeal filed on 27th August, 2020 be deemed to be properly on record.*

2) *THAT costs be in the cause.*

2. The grounds upon which the application is premised are on the face of the application and further expounded in the **Supporting Affidavit** sworn by **Kioko Maundu**, the Appellant/Applicant's Counsel, on the **30th September, 2020**. He deponed that the **Judgment in CMCC Civil Case No.1899 of 1998** was to be delivered on **26th March, 2020** but due to the Covid-19 Pandemic, physical courts had been shut down on **16th March, 2020**. He stated that he wrote to the trial court and parties agreed that the Judgment be delivered via email.

3. The Appellant/Applicant's Counsel further deponed that they never received the Judgment as agreed, but instead discovered the same was delivered upon receiving payment from the Respondents on **17th August, 2020**. It was stated that when Counsel obtained a copy of Judgment from the registry, he noted that the award was inordinately low. Further, Counsel deponed that when he later checked his email and he found the Judgment had been sent by the court.

4. The 1st Respondents opposed the application dated **30th September, 2020** by filing a **Replying Affidavit** sworn by **Counsel Priscah Obura** on **3rd November, 2020**. She agrees that indeed **Judgment in CMCC Civil Case No.1899 of 1998** was to be delivered on **26th November, 2020** but the same was not delivered as courts were closed due to the Covid-19 pandemic.

5. The 1st Respondent's Counsel deponed that sometime in early **May, 2020** a **notice** was sent to Counsels of both parties notifying them that the **Judgment in CMCC Civil Case No.1899 of 1998** would be delivered on **13th May, 2020**.

6. That the Applicant's Counsel (**Mr. Kioko Maundu**), sent an email to the trial Court on **11th May, 2020** indicating that they were agreeable to a 30 days stay of execution being granted to the 1st Respondent if the Judgment was in their favour.

7. The 1st Respondent on **12th May, 2020** also sent an email to the trial court confirming the Applicant's position, that if the Judgment was to be in the Applicant's favour, the 1st Respondent be granted a 30 days stay of execution.

8. It was the 1st Respondent's averment that on **13th May, 2020** via email/address for both parties herein, the trial court sent the Judgment awarding the Applicants **Kshs.51,600/=**.

9. On 17th August, 2020, the 1st Respondent forwarded the decretal amount **Kshs.51,600/=** via cheque to the Applicant's Counsel as full and final settlement as was ordered by court.

10. The 1st Respondent deponed that the application herein has not been made timeously and no sufficient reason has been given by the Applicant for failure to file their Appeal on time.

11. Parties were directed to dispose of the Application dated 30th September, 2020 by way of written submissions and the record reflects that both parties have complied. All parties indicated that they would rely on the said written submissions. The Appellant/Applicant filed submission on 18th March, 2021 while the Appellant filed submissions on the 14th January, 2021.

12. I have had the benefit of reading the written submissions. They replicate much on the grounds in support and opposition of the application as captured above that I need not to duplicate the same herein.

ANALYSIS AND DETERMINATION

13. I have considered the **Notice of Motion** application dated 30th September, 2020, the affidavits in support and objection thereof, the written submissions, the law and judicial authorities cited therein. This court finds that the only issue that arises for determination, is whether the Appeal herein can be admitted out of time and the **Memorandum of Appeal** filed 27th August, 2020 be deemed to be properly on record.

14. **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 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.”

15. For an applicant seeking enlargement of time to file an Appeal and admission of a **Memorandum of Appeal**, they must show that they have a ‘good cause’ or ‘sufficient reason’ for doing so.

16. The principles to consider on whether or not to enlarge time to file an Appeal out of time are enunciated in the case of **Dilpack Kenya Limited –vs- William Muthama Kitonyi [2018] eKLR** citing with authority the case of **First American Bank of Kenya Ltd –vs- Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO.2255 of 2000 [2002] 1 EA 65**, the court stated: -

“...to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant...”

17. It is worth-noting that the Application herein has been filed after almost 3 months of the delivery of **Judgment** on 13th May, 2020. The Application together with the **Memorandum of Appeal** were filed on 17th August, 2020. This court finds that the application and **Memorandum of Appeal** have not been filed in a timely manner.

18. The Applicant's Counsel stated that the delay in filing of the Appeal was because they did not know nor receive Judgment from the trial court and they only got to know that the Judgment had been delivered when they were paid the award by the 1st Respondent on 17th August, 2020.

19. It has definitely been established through the 1st Respondent's Counsel and evidence of emails the Applicant's counsel sent to court and the 1st Respondent, that both parties were aware of the date the **Judgment** was to be delivered and on 11th May, 2020, the Applicant informed the trial court of their agreeability to the 1st Respondent being granted a 30 days stay.

20. It is evident that the Applicant was aware of when the Judgment was to be delivered and inadvertently failed to act on it and is before court in the guise that they were not aware of the delivery of the said Judgment.

21. Be that as it may, while I find that the Applicant has not given to this court any sufficient reason for not filing the Appeal on time, the interests of justice would be served to the parties by enlarging time and admitting the already filed **Memorandum of Appeal** as duly filed so that the issues which have been raised herein are ventilated at an appropriate hearing and determined on merit.

22. The Applicant's Appeal is against the award as it is alleges to be inordinately low and also for not having been awarded costs of the suit by the trial court. The 1st Respondent has not shown any prejudice that they stand to suffer if the enlargement of time is granted and/or that it cannot be compensated by an award of costs.

23. For the above reasons, the Application dated 30th September,2020 is allowed in terms of prayer No.1. The **Memorandum of Appeal**

filed on **29th June, 2018** is deemed to be properly on record and the Applicant is granted 30 days to put in their Record of Appeal. Mention on 14th June for directions on the hearing of the Appeal.

24. Costs shall abide by the outcome of the Appeal.

It is hereby so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at MOMBASA this 6th day of May, 2021.

D. O. CHEPKWONY

JUDGE