

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. 69 OF 2019

EVERLYNE JENNIFER MWAKA.....APPLICANT

VERSUS

RONALD ANZELIMO KONGOTI.....RESPONDENT

RULING

1. The application for determination is dated 12th June 2019. Principally, it seeks leave to file appeal out of time; and, consequent upon that leave being granted, that there be stay of execution of the default judgment in Mumias SPMCCC No. 9 of 2018. The applicant says that she was unable to file appeal within the time allowed because she was in ill-health, which led to her hospitalization for a long time. She only came to learn of the decisions that she wishes to challenge on appeal upon her discharge from hospital. To support her case, she has attached several documents: the impugned ruling of the trial court, delivered on 8th February 2019; a Motion dated 13th February 2018, filed at the trial court, seeking stay of execution; an authority, ostensibly cited at the trial court; a draft of the memorandum of appeal; and a bundle of medical records from Kenyatta National Hospital, Shammah Physiotherapy, German Medical Center, among others.

2. The respondent replied to the application. He points out that no defence had been filed by 27th April 2017, when he requested for judgment. He avers that the applicant just went to sleep until warrants were issued for her arrest in execution of the decree. When the applicant sought the setting aside of the default judgment, she did not attach a draft judgment, and the court was unable to assess whether there were triable issues, hence the application was dismissed, in the impugned ruling of 8th February 2019. He avers that no good or sufficient reason has been adduced for not filing appeal on time. He states that the foundation of the case was the agreement that some money was to be repaid by her on or before 15th August 2016, but that never happened.

3. Directions were given, for canvassing of the application by way of written submissions. Both sides have filed submissions. I have read them, and noted the arguments made.

4. The applicant's desire to appeal was prompted by the ruling that was delivered on 8th February 2019, dismissing her application for setting aside of default judgement and leave to file a defence. The only issue, therefore, for consideration is whether she is entitled to what she seeks, extension of time to file appeal. For the court to allow that, the applicant will only need to show whether or not there was a good reason for her not filing the appeal on time.

5. Whether I should allow the extension or grant leave to file appeal out of time, or not, is something within my discretion. What I ought to consider, in the circumstances, is the period of delay, the reasons for the delay, the arguability of the appeal, the degree of prejudice to be suffered by the respondent, the importance of compliance with timelines to the particular issue or litigation, among other considerations. See *Efraim Yossef vs. Rosemary W. Kihiu* [2018] eKLR (J. Ngugi J), *Kenya Power & Lighting Company Ltd vs. Rose Anyango & another* [2020] eKLR (Aburili J) and *Thuita Mwangi vs. Kenya Airways Ltd* [2003] eKLR (Omolo, Tunoi & Keiwua JJA).

6. The original records from the trial court have not been availed, and, therefore, I may not have not have a complete picture of what transpired there. The impugned ruling of 8th February 2019 was principally determined around the matter of draft defence. The trial court found itself unable, without the draft defence, to assess whether the applicant had a reasonable defence, which raised triable issues. The lack of draft defence also meant that the court was unable to assess the prejudice that either party stood to suffer, either way. This cause, for extension of time to file appeal out of time, was not presented until 18th June 2019. The ruling of 8th February 2019, was on an application by the applicant, dated 13th February 2018.

7. The applicant pegs her failure to act timeously on her ill-health. She has attached documents to show that she had health problems at around that time. Most of these documents relate to medical care that she got in 2018. There is a discharge summary from Kenyatta National Hospital, which points to a discharge from there on 14th March 2018. There is no evidence of any other hospitalization. The documents dated 2019 are just two. A report of the physiotherapy treatment that she was undergoing. It is dated 27th May 2019. The other is a receipt, issued by Prof. James O. Jowi, dated 10th January 2019, for consultation.

8. Has the delay in filing appeal against the ruling of 8th February 2019 been explained? I have noted that the impugned ruling was on her own application to set aside the default judgment. Significantly, the said application was supported by an affidavit sworn, not by the applicant herself, but by her advocate. The said application of 13th February 2018 was apparently filed in court before the applicant was discharged from Kenyatta National Hospital on 14th March 2018, according to her documents. It would appear that the applicant was suffering from what appears to be a very debilitating condition or illness, during the period when the suit was filed in court, and right up to the time of the impugned ruling, and it would appear that that might have played a role in derailing her from taking action with respect to filing documents in the suit, including filing appeal, within time, from the ruling of 8th February 2019. I am not persuaded that her illness was more of an excuse than a reason for her inability to file her papers on time. I am inclined to exercise discretion in her favour.

9. In view of what I have stated in paragraph 8 here above, I allow the application by the applicant for leave to file appeal out of time. The appeal shall be filed and served on the respondent in the next fourteen (14) days. There shall also be stay of execution of the judgment or decree of the trial court pending appeal, which stay should lapse automatically, in the event of the applicant failing to file appeal within the 14-day timeline. In view of the evidence of ill-health, I shall refrain from asking her to deposit any money as security for costs or due performance. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2ND DAY OF JULY, 2021

W. MUSYOKA

JUDGE