



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC MISC APPLICATION NO. E005 OF 2020

GEORGE ALFANUS ONYARE.....APPLICANT

VERSUS

BOSIRE JULIUS OTWORI.....1ST RESPONDENT

ALFRED OTWORI.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated 11.12.2020 the Applicant moved this court seeking leave to appeal out of time against the judgment of the Senior Resident Magistrate's Court delivered on 6.3.2020. He also prayed that the annexed Memorandum of Appeal be deemed as duly filed.
2. The application is anchored on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 11th December, 2020 in which he explains why the appeal was not filed in time. Basically he cites the global COVID -19 Pandemic and the resultant scaling down of court operations as the main reason for the delay.
3. The application is opposed by the Respondent who swore a Replying Affidavit in which he emphasized that the appeal has no chance of success as the grounds raised therein are irrelevant.

ISSUES FOR DETERMINATION

4. The singular issue for determination is whether the Applicant ought to be granted leave to appeal out of time.

ANALYSIS AND DETERMINATION

5. 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.

6. In the case of **Mwangi v Kenya Airways Ltd (2018) eKLR** the Court of Appeal held that the following factors should be considered by the court in exercising its discretion to grant leave to appeal out of time:

They include the following:

- i. The period of delay;
- ii. The reason for the delay;
- iii. The arguability of the appeal;
- iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted;

- v. The importance of compliance with time limits to the particular litigation or issue; and
- vi. The effect if any on the administration of justice or public interest if any is involved.

7. In the case of **Daphene Parry vs Murray Alexander Carson (1963) EA 546** the court held 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. 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.”

8. In the instant case the Applicant has explained that the delay in filing the appeal was occasioned by the scaling down of court operations due to the global COVID -19 pandemic. He has annexed a receipt to show that even though he paid for the proceedings in September 2020, he only managed to get them in December 2020. This has been explained by the fact that some staff were working from home and the few who were on duty were overwhelmed with work. These assertions have not been controverted by the Respondent. The court takes judicial notice that the COVID-19 pandemic indeed affected court operations countrywide and the courts were not functioning optimally.

9. With regard to the merits of the appeal, it would be premature for the court to arrive at a decision that the appeal has no merit as this will be determined after considering the submissions of both parties.

10. The Respondent has raised the concern that the Applicant has not demonstrated whether he has deposited the sum of Kshs.30,000 in court as security for costs as directed by the trial court. Even though this is a valid concern, I note that the order is self-executing as failure to deposit the said amount within the stipulated period, would result in the order for stay of execution lapsing automatically and the Respondent would be entitled to apply for execution.

11. The Respondent has not demonstrated what prejudice he would suffer if the Applicant is granted leave to appeal.

12. Having considered the affidavits, rival submissions, the relevant law and authorities, I am of the view that the application is merited and I grant it. The Record of Appeal shall be filed within 21 days from the date of this ruling.

The costs of the application shall be borne by the Applicant.

DATED, SIGNED AND DELIVERED AT KISII THIS 7TH DAY OF DECEMBER, 2021.

J.M ONYANGO

JUDGE