



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPLICATION NO. E027 OF 2021

NABEA MBORORHI.....APPLICANT

VERSUS

STANLEY MURIIRA IBIRI.....1ST RESPONDENT

INTEX CONSTRUCTION LTD.....2ND RESPONDENT

RULING

1. Before the Court is an application dated 3th May 2021 seeking leave to appeal against the Judgment delivered on 16th March 2021 by Hon. R. Ongira (SRM) in Tigania CMCC No. 93 of 2014 out of time.

Applicant's Case

2. The Application is supported by the grounds on the face of it and by the supporting affidavit sworn by the Applicant's Advocate on 3rd May 2021. He also filed submissions dated 21st June 2021. The Applicant's intended appeal is on quantum, and he urges that the quantum awarded by the trial Court was inordinately low. He urges that it is in the interests of justice that leave be granted. He urges that he approached the Court hardly 30 days past the statutory limit. In their submissions, they urge that although they did not explain the delay in the application, the certified copy of Judgment and typed proceedings were obtained way past the statutory period had lapsed. They rely on the case of *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited (2020) eKLR*.

Respondent's Case

3. The Respondent opposes the application by grounds of opposition dated 24th May 2021. He also filed submissions dated 14th June 2021. He urges that the delay has not been explained. Relying on the case of *Diplack Kenya Limited vs William Muthama Kitonyi (2018) eKLR*, the Respondent urges that in the absence of a valid excuse for the delay, the application should be dismissed. He further urges that the intended appeal is not arguable considering the injuries sustained by the Applicant; and that the Court's discretion cannot be exercised in favour of the Applicant in the circumstances of this matter.

Determination

4. This Court extensively dealt with the issue of leave to appeal out of time in the case of *Meru Misc Application No. 70 of 2020 Lydia Kiaruthi Kaaria & Ano vs Florence Kinairote M'imanyara*.

5. Extension of time is a matter of discretion. The law gives this Court jurisdiction to extend time upon application, even when the time for doing the act in question has already lapsed. Section 79 G of the Civil Procedure Act, Cap 21 Laws of Kenya provides as follows: -

79G. Time for filing appeals from subordinate courts

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. See also Order 50, Rule 6 of the Civil Procedure Rules, Section 95 of the Civil Procedure Act, Cap 21 Laws of Kenya and Section 59 of the Interpretation and General Provisions Act.

7. This discretion must however be exercised within the reasonable bounds of the law. The principles to be considered in such applications for leave to appeal out of time were well settled by the Court of Appeal in the case of **Omar Shurie Vs Marian Rashe Yafar (Civil Application No. 107 of 2020)**. There are four main issues which the Court is enjoined to consider the following: -

i) the length of the delay

ii) the reason for the delay

iii) the chances of the appeal succeeding if the application is granted

iv) the degree of prejudice to the respondent if the application is granted

8. Concerning the length of the delay, the time period between the last day (i.e thirtieth day) on which the Appeal ought to have been filed and the time of making the instant application was 30 days. This period is relative but does not amount to inordinate delay, but this issue must be considered alongside the other issues as follows.

9. On the reasons for the delay, the Applicant has not given any explanation whatsoever for the delay. Indeed, he ought to have given some form of explanation and it is not enough to urge that there is an arguable appeal. In his grounds of opposition, the Respondent has pointed out this failure for explanation on the part of the Applicant. Although the Applicant made an attempt to sneak in an explanation in his submissions, this Court has held time and again that parties are bound by their pleadings and submissions cannot be a substitute for pleadings.

10. The obligation upon an applicant seeking extension of time is couched in mandatory terms. Such applicant must satisfy the Court that he had good and sufficient reason for not filing the appeal on time. The importance of offering a sufficient explanation for delay was underscored in the Court of Appeal case of **Susan Ogutu Oloo & 2 others v Doris Odindo Omolo [2019] eKLR** where Otieno-Odek JA held as follows: -

‘The instant application is founded on Rule 4 of the Rules of this Court. In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo arap Korir Salat V. IEBC (2014) eKLR Sup. Ct. Application No. 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted.’

11. The above finding was with respect to appeals to the Court of Appeal. This Court however finds that the principles cut across and apply to appeals to the High Court. Ultimately, this Court finds that the Applicant failed to discharge the duty of explaining the reasons for delay, if any.

12. On the chances of the appeal succeeding, the Applicant has failed to annex a draft Memorandum of Appeal. The Court is not able to ascertain the grounds that will be urged in the appeal. He has only averred in his supporting affidavit that the damages awarded of Ksh 180,000/= before liability was inordinately low. The Respondent on the other hand has urged that this was a just award in the circumstances. It is however not for this Court to go into the merits of the claim at this stage.

13. Concerning the prejudice to be suffered by the Respondent if leave is granted, this has not been demonstrated. This Court is however cognizant of the fact that it is the Respondent who was to pay the Applicant the sums awarded. Parties did not address the Court on whether the money has been paid. There however appears to be no real prejudice to be suffered by the Respondent other than him having to go through the trouble of defending the Appeal.

Conclusion

14. Although the Applicant failed to advance any good reasons for the delay in filing his intended appeal, this Court observes that the delay herein is not inordinate. Further, there is no demonstrable prejudice likely to be suffered by the Respondent if leave is granted. The Applicant must however be abhorred for failing to advance any reasons for the delay as was required of him and the Court will therefore order that he pays the costs of the application.

ORDERS

15. Accordingly, for the reasons set out above the court makes the following orders: -

i) The application dated 3rd May 2021 is allowed and leave is hereby granted to the Applicant to file his appeal out of time on condition that he files the Memorandum of Appeal within seven (7) days from the date of this order.

ii) The Applicant shall pay the costs of the application to the Respondent.

Order accordingly.

DATED AND DELIVERED THID 15TH DAY OF JULY 2021

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Vivian Aketch & Co. Advocates for the Applicant

M/S Mithega & Kariuki Advocates for the Respondent