



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
CIVIL DIVISION

MISC. CIVIL APPLICATION NO. 127 OF 2020

SHILTUN KALUMBO BARAZA.....APPLICANT

-VERSUS-

JOSEPH KAMAU KARANJA.....RESPONDENT

RULING

1. Before the Court is the amended motion by **Shiltun Kalumbo Baraza** (hereafter the Applicant) dated 30<sup>th</sup> June 2020, seeking that time to appeal be enlarged and his appeal be admitted out of time. The motion is premised on the provisions of Section 79G of the Civil Procedure Act and on grounds that the appeal raises important issues and there exists sufficient cause to warrant the admission of the appeal out of time.
2. The Applicant swore two affidavits in support of the motion. To the effect that being aggrieved by the judgment and decree delivered on 13<sup>th</sup> December 2019 in **Nairobi Milimani CMCC No. 3171 of 2019** he desires to prefer an appeal. In explaining the delay, the Applicant deposed that he initially filed an application for review of the judgment; that however upon receiving typed proceedings and copy of the judgment and advice by counsel, he realized that his issues could be best be remedied through an appeal; that by this time, the stipulated time within which to appeal had lapsed. He attributed the delay to erroneous advice by his counsel on the appropriate course of action and stated that the said mistake should not be visited on him as an innocent litigant. He attached a copy of the draft memorandum of appeal to his affidavit.
3. The Respondent opposed the motion by way of grounds of opposition dated 22<sup>nd</sup> March 2021 which state that application lacks merit, is premature, incompetent, speculative and amounts to an abuse of the process of the court. Further that the Applicant has not explained the inordinate delay in filing the appeal, and therefore has not demonstrated good and/or sufficient cause; and that the Applicant stands to suffer no prejudice as the appeal does not have any chances of success.
4. On 10<sup>th</sup> February 2021, the court issued directions that the motion be canvassed by way of written submissions and oral highlighting. The parties duly complied with filing of submissions but elected not to highlight them.
5. The Applicant reiterated his affidavit material and submitted relying on the decision in **Belinda Murai & Others v Amos Wainaina (1978) KLR 278** that there was, no delay in presenting the instant motion and urged the court to do justice by enabling the Applicant to ventilate his appeal. Counsel argued that the appeal raises serious issues for consideration and that no hardship would be visited on the Respondent if the motion is allowed. Counsel cited the cases of **JM (suing as next friend of KN a minor) v Nicholas Nyaga [2019] eKLR** and **Jonathan Nyumu Kavita v Mercy Wayua Kiilu [2020] eKLR**.
6. On the part of the Respondent, it was submitted that the Applicant had not invoked the provisions of Section 95 of the Civil Procedure Act and Order 50 Rules 5 of the Civil Procedure Rules. Relying on **Karny Zahrya & Another v Shalom Levi [2018] eKLR** counsel submitted the Applicant had not any cogent and satisfactory reasons for failing to file the appeal within time and that by dint of Order 43 Rule 1 (2) & (3) the Applicant needed, but did not seek leave of the court to appeal hence his motion was incurably defective as stated in **Serephen Nyasani Menge v Risphah Onsase [2018] eKLR**. Finally, it was submitted the motion was an abuse of the court process and should be dismissed, as litigation ought not be conducted on a trial-and-error basis.
7. The court has considered the application in light of the parties' respective material and submissions. The Applicant is seeking enlargement of time to file appeal as provided for in Section 79G of the Civil Procedure Act. The section 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.”**

8. The successful applicant approaching the Court under this section must demonstrate “**good and sufficient cause**” for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari material with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”**

9. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.

10. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

**“(T)he underlying principles a court should consider in exercise of such discretion include;**

**1. 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;**

**2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**

**3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;**

**4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**

**5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**

**6. Whether the application has been brought without undue delay.**

**7. ....”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR**.

11. Having considered the material before it, the Court is persuaded that this motion turns on an issue not addressed by the parties, but which is pertinent. The Applicant asserts in his affidavits and submissions that following the trial court’s judgment of 13<sup>th</sup> December 2019, he was aggrieved that his claim for damages in respect of lost earning capacity had been disallowed and subsequently filed an application for review dated 17<sup>th</sup> December 2019.

12. What the Applicant avoids to mention expressly is that the said review motion was heard and dismissed by the lower court and that his initial application to this Court came after the said dismissal order. This history is clear from a cumulative reading of the Applicant’s affidavits and submissions by both parties. The draft memorandum of appeal annexed to the affidavit supporting the amended motion relates not to the review ruling but to the judgment of 13<sup>th</sup> December 2019. The question to be determined, is whether a party can seek both the remedy of review and appeal in respect of the same decision.

13. In my reading, the provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules do not admit the exercise of the remedies of appeal and review either simultaneously or sequentially in respect of the same decision. Indeed Rule 2 of Order 45 confirms this intent in Rule 1. Section 80 of the Civil Procedure Act provides as follows:

**“Any person who considers himself aggrieved—**

**a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.**

14. The wording in the above section is replicated in Order 45 Rule 1 of the Civil Procedure Rules which is in terms that:

**“Any person considering himself aggrieved—**

**a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or,**

**b. by a decree or order from which no appeal is hereby allowed....”.**

15. The Court of Appeal in **Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR** addressing itself on these provisions observed that:

**“It has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal.”** (Emphasis added)

16. Further, the same Court in **Chairman Board of Governors Highway Secondary School v William Mmosi Moi [2007] eKLR** stated that even where an appeal had been filed before an application for review, once the review application was determined the appeal stood lapsed, as the two remedies cannot be pursued either concurrently or sequentially. Therefore, the two remedies are mutually exclusive. In **Francis Origo & Others V. Jacob Kumali Mungala [2005] eKLR** the said Court held that the option of review was closed to a party who had first filed an appeal in connection with the same decision sought to be reviewed.

17. The Appellant having exhausted the remedy of review in the lower Court, cannot also appeal to this court concerning the same judgment in respect of which review was sought. Given the background to the instant motion, the critical issue here is not merely whether the Applicant has justified the delay in filing an appeal regarding the judgment delivered on 13<sup>th</sup> December 2019, but rather whether he is entitled to seek leave to file an appeal at all. The position of the law is that he cannot appeal against the judgement which was also the subject of the dismissed review application, and it matters not that he was allegedly acting under the erroneous notion that review could address his grievance concerning the said judgment. An appeal could only lie on the ruling concerning the application for review under Order 43 Rule 1 (x) of the Civil Procedure Rules. See **Mary Wambui Njuguna v William Ole Nabala & 9 others [2018] eKLR**.

18. In view of the foregoing, the Court finds that the amended motion dated 30<sup>th</sup> June 2020 is misconceived and without legal foundation. No purpose will be served by delving into the merits thereof. The motion is dismissed with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 15<sup>TH</sup> DAY OF JULY 2021.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Applicant: Mr Mugambi.**

**For the Respondent: Ms Odongo h/b for Mr Macharia**

**C/A: Carol**